EUROPEAN COMPETITION LAW ANNUAL 2009:

The Evaluation of Evidence and its Judicial Review in Competition Cases

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2009

The Evaluation of Evidence and its Judicial Review in Competition Cases

Edited by

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and

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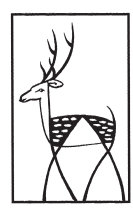

OXFORD AND PORTLAND, OREGON
2011

Hart Publishing,
16C Worcester Place,
Oxford, OX1 2JW
Telephone: +44 (0)1865 517530 Fax: +44 (0) 1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: www.isbs.com

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84946-073-6

Typeset by Hope Services Ltd, Abingdon
Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

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Rules That Govern Rules: Evidence, Proof and Judicial Control in Competition Cases

*Mel Marquis**

This Volume contains a collection of written contributions prepared for the 14th edition of the Annual EU Competition Law and Policy Workshop, held on 19–20 June 2009 at the European University Institute in Florence. It also includes edited transcripts of several rounds of debate held on those dates. The 2009 Workshop was a very special one in the sense that Professor Claus Ehlermann, the intellectual and managerial force behind the Workshop since its inception, decided on that occasion to pass the leadership of the event, effective January 2010, to Philip Lowe, a senior official of the European Commission. The papers and discussions contained in this book are, I think, a fitting tribute to the formidable edifice Claus has built for the benefit of antitrust scholars, practitioners and policy makers around the world.

Background. The EU Competition Law and Policy Workshop is designed to explore topical policy and enforcement issues in the area of competition law and economics. Each year the Workshop brings together a group of top-level EU and international policy makers, judges, legal practitioners, economic experts and scholars to take part in intensive roundtable debates that explore specific competition-related issues in an informal and non-commercial environment. One of our primary objectives is to stimulate critical reflection on the part of both the Workshop participants and the broader public.

The 14th edition of the Workshop[1] was devoted to *Evaluation of Evidence and its Judicial Review in Competition Cases*.[2] The objective was to examine and better understand a number of key procedural issues in antitrust and

* *Part-time Professor of Law,* EUI, Florence; *Professore a contratto,* Università degli studi di Verona. I would like to dedicate this introductory chapter to the loving memory of my mom, Neva Marquis. As a career switchboard operator at Ma Bell, she was an exceptionally appropriate mother for an antitrust lawyer. Then there was the out-of-this-world lasagna, but that would require several additional pages. As always, profound thanks are due to Claus. On specific points I have also benefited from the feedback of Stephanie Reinart and Bruno De Witte, who shall bear none of the blame. Institutional support has been provided, with the utmost grace, by Giorgio Monti.

[1] For information concerning previous editions of the Workshop and the corresponding *European Competition Law Annual* series, see the website of the Workshop: www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/CompetitionWorkshop/Index.aspx.

[2] The subject was partly inspired by Claus' experiences as a Member and ultimately Chairman of the Appellate Body of the World Trade Organization. See Claus-Dieter Ehlermann and Nicolas Lockhart, "Standard of Review in WTO Law", 7 *Journal of International Economic Law* 491 (2004).

merger control cases which might be called evidence rules or, adding an academic flourish, "rules that govern rules": how is the burden of proof in such allocated?[3] What principles govern, or should govern, the sufficiency of the evidence; and if they vary in different contexts (e.g., due to the possibility of heavy sanctions), or if they ought to vary, how so? How should specialized economic evidence and (conflicting) expert testimony be treated, particularly where there are information asymmetries? Should the tradition of "unfettered evaluation of evidence" give way to something more structured? What is the scope and intensity of review that applies, or should apply (with due regard to Article 6(1) ECHR and now Articles 47(2) and 52(3) of the Charter,[4] which now of course binds the EU and its Member States[5]) when the General Court is called on to judge Commission decisions in antitrust and merger control, and when the Court of Justice hears appeals of the General Court's decisions?

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[3] The "burden of proof" (not the ultimate legal burden of "persuasion" but the burden of production, if one may be forgiven for resorting to these conceptual categories) has at least two dimensions. First, who is graced with it, in the first instance, and for the purpose of showing what? Second, and of equal importance, how does the allocation actually function, and how easily is it thrust upon the other party? Such questions may have to be modulated in some systems in which, at least where one of the parties is a public authority, the burden of proof is to some degree a shared task.

[4] Article 6(1) ECHR, first sentence, indicates that a fair trial within the meaning of the Convention must guarantee for defendants a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The rights guaranteed by the Convention constitute general principles of EU law (see Article 6(3) TEU), and will bind the EU directly when it accedes to that instrument (see Article 6(2) TEU and corresponding Protocol 8 as well as, for the "conclusion" procedure (i.e., ratification), Articles 218(6)(a)(ii) and 218(8) TFEU).

Article 47(2) of the Charter (of Fundamental Rights of the European Union, 2010 OJ C83/02) reproduces, almost verbatim, the first sentence of Article 6(1) ECHR: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law." On Article 47 of the Charter, see, e.g., Case C-407/08 P, *Knauf Gips KG v Commission,* judgment of the ECJ of 1 July 2010, not yet reported, paras. 88-92.

Article 52(3) clarifies that the rights contained in the Charter which correspond to those guaranteed by the ECHR are taken to have the same meaning and scope as those of the Convention, without prejudice to greater levels of protection under EU law. The Explanations to the Charter indicate that the meaning and scope of the Convention are also to be determined by reference to the case law of the European Court of Human Rights and of the ECJ. See 2007 OJ C303/17, at page 33 (Explanation to Article 52(3) of the Charter). Also referring to the case law of both courts is the Charter's Preamble.

For further information on the Charter, see the Commission's first annual report: 2010 Report on the Application of the EU Charter of Fundamental Rights, COM(2011) 160 final and the accompanying Staff Working Document, SEC(2011) 396 final. See also the Commission's Strategy for the effective implementation of the Charter, COM(2010) 573 final.

[5] More precisely, by virtue of Article 6(1) TEU, the Charter is binding on the institutions, bodies, offices and agencies of the EU, and on the Member States when they act within the scope of, and particularly when they implement, EU law. The first wave of ECJ jurisprudence directly applying the Charter is already ashore. See, e.g., Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH,* judgment of the ECJ of 22 December 2010, not yet reported, especially paras. 30–35 (concerning the scope of the obligation imposed on Member States to make legal aid available, in order to ensure an adequate access to justice, an inherent element of the right to a fair trial).

And the flipside to the "scope" question: what are the *limits* of judicial review? Should the deference accorded to the Commission depend on whether the issue is complex, and if so, are the justifications for this robust? Or should a rigorous control of complex data appraisal in the competition field be an inherent part of the judicial function. Many of us inside and outside the legal community are keen to know: what is the proper role of an administrative authority, with an increasingly prosecutorial alter ego, in a Union committed to respecting the idea of the rule of law?[6]

Linked to the questions posed above is the matter of institutional design: is the EU's institutional framework – which includes what is sometimes called an "integrated agency model"[7] – above reproach? If not, is the answer incremental refinements? Or is it time for another legal and cultural revolution? A personal view is that, even in these times of worldwide social upheaval, neither the prospects for, nor the wisdom and desirability of *wholesale* regime change emerge clearly enough to present a compelling case. However, the concerns expressed in some of the papers in this Volume need to be taken

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[6] In some of its deeds, the Court of Justice has shown that it does take this idea seriously, even if overall the record may be uneven. For a high point with both important practical implications and rich symbolism, see Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351. There are too many pertinent citations to list here. For an optimistic discussion of what *Kadi* means for European constitutionalism, see N. Türküler Isiksel, "Fundamental Rights in the EU after *Kadi and Al Barakaat*", 16 *European Law Journal* 551 (2010). For further references, see Sara Poli and Maria Tzanou, "The Kadi Rulings: A Survey of the Literature", 28 *Yearbook of European Law* 533 (2009), and the symposium in the same volume of the YEL.

[7] See Michael Trebilcock and Edward Iacobucci, "Designing Competition Law Institutions: Values, Structure and Mandate", 41 *Loyola University Chicago Law Journal* 455 (2010). In the present context, the term "integrated agency" refers euphemistically to an enforcement agency combining investigative, prosecutorial and quasi-adjudicative powers. The traditional official line has been that, as the Commission is not a tribunal, and since aggrieved parties may appeal to an independent tribunal with full jurisdiction over the Commission's decisions, the combination of these functions does not infringe Article 6(1) ECHR. The effectiveness of judicial control in this context is an important theme of this book. To cite just one of many examples, see Fernando Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases", pages 319 et seq., at pp. 396–405.

Many Workshop participants recognized that the General Court is generally quite thorough in its review of most kinds of Commission decisions (though there seems to be much unfinished, or unstarted business, in relation to Article 102 TFEU; see *infra* fn. 14). However, some would argue that by the time the General Court reviews the case, some prejudice, not easily rectified by a court reviewing a decision, has already been sustained during the administrative phase. Furthermore, some doubts were expressed by several participants about whether the "margin of appreciation" doctrine (going back to *Consten and Grundig v Commission*) is necessary and appropriate. In this regard, it seems relevant that the General Court – although not self-consciously a specialist institution like the CAT in the UK (or like the specialized chambers of the OLG Düsseldorf, or other specialty courts in other Member States) – routinely handles complex competition law cases and has substantial cumulative experience in this field. Not all the judges of the General Court are competition law experts but neither do they conform entirely to the notion of "generalist" judges.

seriously, and creative-but-realistic solutions should be given due consideration.[8] In the nature of things, and in the absence of Treaty reform, one may expect to see an awkward truce between consolidation, accretion and experimentation, or between the uneventful and the unexpected.

Then there is the perennial question underlying the Workshop: can greater insights be had when such questions are seen from a variety of perspectives, including not only those of jurists and economists practised in the arts of EU competition law but also of those conversant with national systems in Europe and elsewhere? Quintessentially rhetorical, this question.

The Workshop in Florence was not the first foray into a deeper examination of such issues.[9] In general, however, issues of evidence, proof and the standard of judicial review have for decades been exemplars of benign neglect. Putting questions of expert evidence aside, such matters may have been underresearched by competition specialists not only in Europe but in the US as well.[10] With regard to the competition law of the European Community/

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[8] For a recent and in-depth discussion of institutional reform, See Massimo Merola and Denis Waelbroeck, eds., *Towards an Optimal Enforcement of Competition Rules in Europe: Time for a Review of Regulation 1/2003?,* Bruylant, 2010.

[9] Relatively early English-language discussions of relevance include K.P.E. Lasok, "Judicial Review of Issues of Fact in Competition Cases", 4 *European Competition Law Review* 85 (1983); Julian Joshua, "Proof in Contested EEC Competition Cases: a Comparison with the Rules of Evidence in Common Law", 12 *European Law Review* 315 (1987); Nicholas Green, "Evidence and proof in E.C. Competition cases", in Piet Slot and Alison McDonnell, eds., *Procedure and Enforcement in E.C. and U.S. Competition Law,* Sweet & Maxwell, 1993, pp. 127 et seq.; OECD, *Policy Roundtable: Judicial Enforcement of Competition Law* (1996); Virpi Tiili and Jan Vanhamme, "The 'power of appraisal' (*pouvoir d'appréciation*) of the Commission of the European Communities *vis-à-vis* the powers of judicial review of the Communities' Court of Justice and Court of First Instance", 22 *Fordham International Law Journal* 885 (1999); and various editions of *EC Antitrust Procedure,* written by Christopher Kerse (and in recent years co-written with Nicholas Khan; 6th edition forthcoming), which includes various sections devoted to judicial review (see chapter 8). For other recent works, see Paul Craig, *EU Administrative Law,* OUP, 2006, chapter 12; Richard Gordon, *EC Law in Judicial Review,* OUP, 2007, chapter 13. For a general reference on the jurisdiction of the EU Courts and on various points of procedure, see recently Melchior Wathelet and Jonathan Wildemeersch, *Contentieux européen,* Larcier, 2010.

Debates concerning the internal procedures of the Commission, also relevant to this book, go back to the preliminary discussions leading up to the adoption of Regulation 17 of 6 February 1962. By the 1970s, it was possible to construct wide-ranging overviews of the administrative practice. Some points of contention that were relevant in that early period continue to reverberate today. *Cf.,* e.g., Ivo Van Bael, "E.E.C. Antitrust Enforcement and Adjudication as seen by Defence Counsel", 7 *Swiss Review of International Antitrust Law* 1 (1979). For a modern and extensive account of proceedings before the Commission (and with a brief section on judicial review), see Van Bael & Bellis, *Competition Law of the European Community,* 5th edition, Kluwer Law International, 2010, chapter 10.

[10] See Michael Boudin, "Evidence and the Formulation of U.S. Antitrust Law", this Volume, at page 665. Boudin's paper is a reminder of how facts, assumptions, subjectivity and socially constructed modes of perception can all be important inputs as judges "manufacture" or build on existing structures of competition law, and it therefore underlines the importance of reflecting on whether the processing of those inputs is subject to adequate control mechanisms.

European Union,[11] one might tentatively point to certain factors which may have caused a slow but now steady growth of interest. Of great importance, surely, was the establishment of the Court of First Instance, which took up its duties in 1990 and by 1991, beginning with the *Polyproplene* case, was busily toiling away as the fact-intensive specialist institution it was intended to be.[12] Another factor may have been the general turn toward getting the theory of harm right in antitrust cases, which presupposes reliance on economically plausible and empirically sustainable reasoning. Judgments of the EU Courts, such as those in *Delimitis, Woodpulp, European Night Services* and *(02) Germany v Commission* might be cited as examples where notable emphasis was placed on: understanding the nature of competition (structural characteristics, upstream/downstream conditions, entry possibilities and counter-strategies as well as firm incentives and behaviour) in specific markets; the need to formulate appropriate counterfactual stories; and, in some circumstances, the need for unambiguous proof.[13] Growing attentiveness to issues of proof and evidence may also have dovetailed, in the 1990s, with the greater emphasis in the policy discourse on an economically sound antitrust system, with its advocates and critics both outside and inside DG IV. But the watershed events must have been, first, the 2002 judgments of the Court of First Instance which overturned some key merger decisions, and not long thereafter the judgments of the Court

[11] The Workshop was held at a time in which the fabled European Community still existed. Many of the papers contain references to the "Community", to the "Community Courts", and to Treaty Article numbers introduced by the Treaty of Amsterdam, especially Articles 81 and 82 EC. In other papers, many of which were completed following the entry into force of the Treaty of Lisbon in December 2009, the new numbers – Articles 101 and 102 TFEU – are used. As is well known, the Treaty of Lisbon did not result in any significant changes to those two provisions. Considering these differences in the numbers and terminology to be of minor importance, and unlikely to trip up most readers, the editors have not bothered to harmonize the various chapters in this respect. For purposes of competition law, the General Court remains, for the time being, a court of first instance.

[12] See Council Decision of 24 October 1988 establishing a Court of First Instance of the EC, 1988 OJ L319/1 (corr. 1989 OJ L241/4) (noting, in its Preamble, that the CFI would hear "actions requiring close examination of complex facts [to] improve the judicial protection of individual interests", and that it would "maintain the quality and effectiveness of judicial review in the Community legal order"). David Edward has pointed out, however, that "the desire to improve judicial protection was not accompanied by any change in, or clarification of, the nature of the new Court's jurisdiction. This remained limited, as before, to review of legality according to the criteria of judicial review laid down in Article 173 (now Art. 230) [and now Art. 263]. Specifically, it was not made clear how the 'close examination of complex facts' was to be conducted or how far it was to go." Edward, "Quality Control of Competition Decisions", in Mielle Bulterman et al., eds., *Views of European Law from the Mountain, Liber Amicorum for Piet Jan Slot,* Wolters Kluwer, 2009, chapter 11, at page 146.

For an early assessment of the CFI's operations, see, e.g., Marc van der Woude, "The Court of First Instance: The First Three Years", 16 *Fordham International Law Journal* 412 (1993); for reflections on evidence issues that arose immediately in the CFI's early jurisprudence, see Koen Lenaerts, "Some Thoughts on Evidence and Procedure in European Community Competition law", 30 *Fordham International Law Journal* 1463 (2007).

[13] Recounting the evolution of the case law from the 1960s to the 1990s, see, *ex multis,* Giuliano Amato, *Antitrust and the Bounds of Power,* Hart Publishing, 1997.

of Justice in *Tetra Laval* and *Sony BMG.*[14] These judgments quickly raised the profile of questions such as what standard of proof applies in competition cases and with what rigor the enforcer's decisions will be controlled. More generally, the value of exploring these issues relates to the ancient insight[15] that principles of procedure cannot or should not be regarded as neatly dissociable from substance, as one often bears decisively on the other.[16]

The gaze of specialists is thus cast increasingly on this area of research, and following the years of neglect these issues are now swelling into a significant corpus of literature that may consolidate what is clear, illuminate what isn't, and suggest options for raising the bar to the next level.[17]

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[14] It is not without significance that no judgment mentioned in this paragraph concerned allegations under Article 102 TFEU. *Cf.* Damien Geradin and Nicolas Petit, "Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment", Tilec Discussion Paper DP 2011-008, final page, final sentence: "Abuse of dominance needs an *Airtours*." Other relevant authorities, besides *Airtours,* might include *General Dynamics* (1974, per Stewart, J.) or *Société Technique Minière* (1966), or – despite the underlying factual differences compared to the latter case – the Opinion of Advocate General Roemer in *Consten & Grundig* (1966).

The judgment in *Oscar Bronner* may be described as being sensitive to the complex balance that must be struck in regulating dominant firms under antitrust law, and thus contrasts sharply with more formalistic judgments. However, as a preliminary reference case the Court did not have the occasion to review an administrative decision; and it did not go quite as far as *Delimitis* did in providing detailed instructions to the referring court with regard to what kinds of evidentiary inquiries it had to undertake before the dispositive legal conclusions could be drawn.

[15] See Christopher Bellamy, "Some Reflections on Procedure in Competition Cases", in Mark Hoskins and William Robinson, eds., *A True European: Essays for Judge David Edward,* Hart Publishing, 2003, chapter 14, at p. 187 (summoning the ghosts of H.S. Maine and F.W. Maitland).

[16] One may think of the definition of an "agreement", for example. If that concept is stretched wide, this has implications for the burden of proof and the standard of proof, as a defendant would have to prove the non-existence of tacit acquiescence even upon quite a flimsy production of evidence by the enforcer. See Case T-208/01, *Volkswagen AG v Commission* [2003] ECR II-5141, para. 19, *upheld on appeal:* Case C-74/04 P, [2006] ECR I-6585, para. 38. For discussion, see Luis Souto Soubrier, "The Concept of an Agreement and Beyond", in Giuliano Amato and Claus-Dieter Ehlermann, eds., *EC Competition Law: A Critical Assessment,* Hart Publishing, 2007, chapter 3.

From the reverse angle (i.e., the impact of procedure on substance), it seems obvious that the standard of review applied in reviewing the decision of a public authority can be altogether decisive for substantive outcomes and the content of substantive rules. If a question of interpretation or analysis eludes judicial control, control of substance devolves upon the public authority. See, e.g., Heike Schweitzer, "The European Competition Law Enforcement System and the Evolution of Judicial Review", this Volume, pp. 79 et seq., at p. 116 (discussing the impact of § 71(5) GWB on judicial review of Bundeskartellamt decisions in Germany). The matter of judicial control is clearly a matter of common interest since applications of the law that escape such control may engender a body of law that grows in shadows and quietly exerts significant practical influence as market participants adapt their behaviour taking the shadow law into account. This issue was sometimes absent from the Workshop discussion in 2009, but it was a recurring theme in 2008, particularly as it related to decisions taken by the Commission under Article 9 of Regulation 1/2003.

[17] In this regard, several papers written by Michael Collins, David Bailey and Bo Vesterdorf, some focusing on antitrust cases but most dealing with judicial review in merger cases, were influential; also relevant was the Fordham conference in the fall of 2005, where

Structure of the Workshop. In the present Volume, the debates held at the 2008 Workshop are broken down into an introduction, followed by four main sessions, or "Panels". The following broad topics were covered:

(1) *The European Commission: Standard of Proof, Burden of Proof and Evaluation of Evidence in Antitrust and Merger Cases;*
(2) *The European Courts: Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases;*
(3) *National Competition Authorities: Standard of Proof, Burden of Proof and Evaluation of Evidence in Antitrust and Merger Cases;* and

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part III of the proceedings focused on the standard of proof and the standard of judicial review in EU competition cases (see chapters 5, 6 and 8 of Barry Hawk's yearbook, Juris Publishing, 2006). A major work, published in March of 2008 by LGDJ and written by Anne-Lise Sibony, is entitled *Le juge et le raisonnement économique en droit de la concurrence.* The 2009 Workshop itself is another illustration of the growing interest in this area of research. On 7–8 October 2010, many of the same themes were also discussed at the Sixth Annual Conference of the Global Competition Centre, organized by Jacques Derenne and Massimo Merola.

Citations to the many papers that have emerged since *Tetra Laval* was decided are sprinkled throughout this book, and most are collected in the "References" section (pages 751–759). Recent works, not necessarily with an exclusive focus on competition matters, also include Nigel Parr and Euan Burrows, "Burdens and Standards of Proof in European Community Competition Law", in Wayne Dale Collins, ed., *Issues in Competition Law and Policy,* Vol. 1, ABA, 2008, chapter 6; K.P.E. Lasok, "The Nature of Judicial Control" (2009), a contribution to the 20-year anniversary of the CFI; Arjen Meij, "Scope of Judicial Review and Sanctions in competition cases", in Mielle Bulterman et al., eds., *Views of European Law from the Mountain,*cited above note 12, chapter 14; David Edward, "Quality Control", cited above note 12; Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, eds., *National Courts and the Standard of Review in Competition Law and Economic Regulation,* Europa Law Publishing, 2009; Viven Rose, "Margins of Appreciation: Changing Contours in Community and Domestic Case Law", 5 *Competition Policy International* 3 (2009); Diane Wood, "Square Pegs in Round Holes: The Interaction between Judges and Economic Evidence", 5 *Competition Policy International* 51 (2009); Ginevra Bruzzone and Aurora Saija, "Non varcare quella soglia? Limiti al controllo del giudice sulle decisioni antitrust nell'era della modernizzazione e dell'approccio economico", 12 *Mercato Concorrenza Regole* 7 (2010); Alexander Fritzsche, "Discretion, Scope of Judicial Review and Institutional Balance in European Law", 47 *Common Market Law Review* 361 (2010); Ioannis Lianos, "'Judging' Economists: Economic Expertise in Competition Law Litigation", in Kokkoris and Lianos, eds., *The Reform of EC Competition Law,* Kluwer Law International, 2010, chapter 10; Wouter Wils, "The Increased Level of EU Antitrust Fines, Judicial Review, and the European Conventions on Human Rights, 33 *World Competition* 5 (2010); Damien Gerard, "EU cartel law and the shaking foundations of judicial review", http://ssrn.com/abstract=1675451; Vincent Power, "The Relative Merits of Courts and Agencies in Competition Law – Institutional Design: Administrative Models; Judical Models; and Mixed Models", 6 *European Competition Journal* 91 (2010); Jean-Yves Art and Pablo Ibañez Colomo, "Judicial Review in Article 102 TFEU", in Federico Etro and Ioannis Kokkoris, eds., *Competition Law and the Enforcement of Article 102,* OUP, 2010, chapter 6; David Bailey, "Presumptions in EU Competition Law", 31 *European Competition Law Review* 362 (2010); Geradin and Petit, "Judicial Review", cited above note 14; Michael Harker, Sebastian Peyer and Kathryn Wright, "Judicial Scrutiny of Merger Decisions in the EU, UK and Germany", 60 *International and Comparative Law Quarterly* 93 (2011). I will have missed many others, particularly those published in other languages.

(4) *National Courts in Major Jurisdictions: Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases.*

In the remainder of this chapter, an overview is provided of the main points discussed, first in the written contributions and then in the course of the related roundtable debates. It would be a mistake to regard the overview as an adequate substitute for the contents of the book. As in past editions, individual oral presentations are not summarized in this chapter; the accounts of the oral proceedings only report on some (not all) of the significant issues arising in the debates that followed. However, both the presentations and the roundtables are reproduced verbatim and contained herein (see Panels I to IV).

Bruno Lasserre and Heike Schweitzer were asked to set the tone for the event with overviews of judicial review at the European level and how it relates to older traditions at the national level. It is no coincidence that Lasserre and Schweitzer received their core legal training in, respectively, France and Germany. The links between French administrative legal procedures and many of the conventions adopted at an early stage in Luxembourg are well known.[18] A German perspective also seemed appropriate in light of the central role played by German concepts of competition law and policy in the design of Europe's enforcement apparatus, even if the German enforcement model in some significant ways deviates from a conventional administrative law model.[19] Without asking these commentators to leave aside current issues, the main objective of the two introductory contributions by Lasserre and Schweitzer was to begin the project with a sense of where judicial review in Europe came from and how it has evolved, so as to enable discussion of where it is and where it might be. But each of these commentators did more than this. Schweitzer examined some key national traditions (including Germany but also France and the UK – see below), while both authors provided their perspectives on the current state of judicial review as practiced by the European courts.

Bruno Lasserre's paper is called "The European Competition System in Context: Matching Old Constitutional Principles and New Policy Challenges". It is divided into two main sections. The first contains a discussion of how Europe's judicial review system is conceived, how it operates, and how it has changed in recent years; the second main section seeks to place judicial review

[18] For a succinct account with reference to competition law, see Hubert Legal, "Standards of Proof and Standards of Judicial Review in EU Competition Law", in Barry Hawk, ed., *International Antitrust Law and Policy: Fordham Corporate Law 2005,* Juris Publishing, 2006, chapter 5.

[19] On the hybridized nature of enforcement at the European level, and its links with French and German law, see also David Gerber, "Two Models of Competition Law", in Hanns Ullrich, ed., *Comparative Competition Law: Approaching an International System of Antitrust Law,* Nomos, 1998.

under EU law within the context of the multilevel system of antitrust enforcement that has emerged and become institutionalized in the last ten years or so. This system may be described as *sui generis* in the sense that it combines federal enforcement and judicial structures with the "central nervous system" of EU law, the preliminary reference procedure.[20]

The first main section of Lasserre's paper reviews the fundamentally administrative law framework that developed under the "Community" law system, according to which the Court of Justice controls the "legality" of Commission infringement decisions (*contrôle de légalité*). Though Lasserre does not mention it explicitly, this review of legality follows from Article 263 TFEU (ex-Article 230 EC), which sets forth specific grounds of review.[21] Yet while these grounds of review are limited, it is clear that one of the responsibilities of the reviewing court (which today is the General Court, and obviously not, in the first instance, the ECJ) is to ensure that the Commission gets the facts and the law right.[22] Thus, Lasserre points out that the *general rule* is that when the General Court considers the legality of a Commission decision, it carries out a "full review": the facts must be correct, they must be appraised correctly (as to their relevance and probative weight), and the correct legal conclusions must be drawn. The imprimatur of administrative law resides not in allowing a wide margin of discretion to the authority but rather in the principle that, if the authority has committed errors of fact or law which "vitiate" its decision, the court refrains from replacing the content of that decision with its own preferred findings and conclusions.[23] The relationship between the authority and the judge reflects the idea of an inter-institutional balance, which in this case (in contrast, say, to the EU's executive authority, where there are complex intersections) might be called a separation of powers.[24] However, there does not seem to be any universal consensus as to exactly what implications flow from the notion of inter-institutional balance, at least not as it pertains to judicial control.

As Lasserre points out, the general rule just described is subject to two exceptions. First, if the Commission engages in certain kinds of analysis designated as a "complex economic assessment" or a "complex technical assessment", the General Court will only interfere if the Commission has

[20] Lasserre points out that the preliminary reference procedure may lead to delays, and may be due for a re-think. Better coordination would be desirable, he says, between the ECJ and national courts, and between the national courts and national enforcers. He intimates that some amendments to the Treaty may be required, but in this regard no details are given. For a country-by-country study of the preliminary reference procedure in the context of competition cases, see Barry Rodger, ed., *Article 234 and Competition Law. An Analysis,* Kluwer Law International, 2008.

[21] See, e.g., Lasok, "The Nature of Judicial Control", cited above note 17.

[22] The other well-known grounds for review under Article 263 TFEU are lack of competence, infringement of an essential procedural rule, and misuse of powers.

[23] See e.g., the Opinion of the Advocate General of 17 September 2009 and the judgment of the ECJ of 29 June 2010 in Case C-441/07 P, *Commission v Alrosa Company Ltd,* not yet reported.

[24] In addition to Lasserre's paper, see Legal, cited above note 18. See also notes 87-90 below, and accompanying text.

committed a manifest error of appraisal, although, as Lasserre and others point out, *Tetra Laval* (which has also had an impact in infringement cases[25]) has ratcheted up the rigor with which limited review is applied. As will be seen, however, the expression "complex economic assessment" is misleading because neither the difficulty of such an examination nor the fact that it is "economic" is a reliable indicator of when the doctrine applies.[26] The second exception, which relates to infringement decisions in which the Commission imposes fines, operates in the opposite sense in that, here, the juridiction of the General Court to intervene is "unlimited". With the level of fines reaching new heights in the last decade, the importance of unrestricted judicial control of fines has drawn significant attention among commentators.[27] The notion of "unlimited" jurisdiction (*compétence de pleine juridiction*), which implies that, in contrast to the usual control of legality, the General Court may substitute its own views for that of the Commission so far as fines are concerned, is established by Article 261 TFEU (ex-Article 229 EC) and activated by Article 31 of Regulation 1/2003. In principle there is an appealing logic to the idea of meticulous judicial review in cases where fines are imposed. On the other hand, some of the Workshop participants wondered whether a decision to block a merger, for example, might in some cases be just as intrusive and drastic, if not more so, than the assessment of a fine.[28] If so, then the doctrine of unlimited review should perhaps be extended to merger control, although one has to recognize that the *Tetra Laval* standard already seems rigorous. On the antitrust side, since a large part of the Commission's enforcement practice relates to infringements to which fines attach, this exception to the general principle of "objective legality control" already has some breadth.

The second major section of Lasserre's paper shifts gears and discusses Europe's post-modernization, multilevel system of competition law enforcement and judicial control. This section touches on several themes, but among these is the important connection between the way in which "multilevel competition governance" operates and the degree of legitimacy (and, one might add, the store of political capital) it has. Legitimacy, according to Lasserre, is

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[25] See the Opinion of Advocate General Kokott, cited above note 23, at footnote 45 "This case-law, first developed in connection with merger control [see *Tetra Laval,* para. 39; *Sony BMG,* para. 145], now has importance far beyond that area of law and can apply whenever Commission decisions are to be reviewed for manifest errors of assessment [with references to Case C-525/04 P, *Spain v Lenzing,* para. 57; Case C-405/07 P, *Netherlands v Commission,* para. 55; and Joined Cases T-44/02 OP etc., *Dresdner Bank v Commission,* para. 67]."

[26] See below notes 54–57 and accompanying text. As Lasserre points out, quite of bit of competition law analysis is complex, economic and fact-intensive. If the expression were taken literally, this exceptional deferential standard (manifest error of appraisal) would no longer be exceptional.

[27] It was also an important theme of the preceding Workshop. See Ehlermann and Marquis, eds., *European Competition Annual 2008: Antitrust Settlements under EC Competition Law,* Hart Publishing, 2010.

[28] This raises complex issues of comparison which are fascinating but which in any case are obviated by the way the law is presently structured.

one of the system's "pillars", together with economic expertise and "policy". The latter is described not in terms of the policy's content but in terms of the array of instruments used in its implementation. But coming again to the matter of legitimacy, the key components are said to be reason-giving (which supports judicial review and the rule of law),[29] transparent guidance and predictability (achieved in part through the use of guidelines that serve as a form of institutional self-discipline and as a tool for self-assessment by economic operators), and procedural due process. The latter element, in particular, was an important point of discussion at the Workshop, with the then-Director General at DG Competition announcing that he intended to launch a thorough review of internal procedures and process, another development that reflects the modern era of European enforcement, in which perhaps the primary role of the Commission on the antitrust side of the house is to bust, punish and deter cartels.[30] The due process debate also recalls what appear to be unfulfilled wishes, on the part of some, to see a replication of systems in which a wall of impartiality separates investigative services from the administrative decision-maker. While perhaps conceding that such a system is not perfect (and what system is), Lasserre considers the French experience, "on balance", to be a positive one. This debate, however, remains largely speculative.[31]

In addition to transparency, predictability and fair procedures, one might think of other elements that presently or potentially add to the system's legitimacy, such as good outcomes for consumers, good prioritization of cases and projects, robust organizational and financial independence, targeted and conscientious advocacy, diligent "self-study" and self-improvement (for example, through systematic policy "R&D"), engagement with academic institutions, engagement with peer institutions in international arenas, and many others.[32] All of these may be seen as elements which complement a rigorous and effective system of judicial control. But is the European system rigorous and effective? Lasserre suggests that the pediment above his pillars is incomplete.

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[29] See Article 296 TFEU (ex-Article 253 EC), which provides, in pertinent part: "Legal acts shall state the reasons on which they are based".

[30] Although this calls to mind the current tendency to describe the Commission as primarily a "prosecutor" (as opposed to its traditional role as an administrative authority), Lowe points out in his paper that this perception may be skewed insofar as it fails to reflect the many complaints which the Commission rejects (even if it is true that prosecutors select cases too).

[31] For recent discussion, see Christopher Bellamy, "An EU Competition Court: The Continuing Debate", in Kokkoris and Lianos, eds., cited above note 17, chapter 3.

[32] Given its relatively technocratic nature it is not surprising that most of the items just described in the main text are forms of "output" legitimacy. It may be wise to promote, within limits, "input" legitimacy, for example through greater efforts to involve consumer interest groups in policy fora. (Admittedly, the Workshop itself has not been a leader in promoting such participation.) At the legislative level, the European Parliament's claim for greater input legitimacy seems to be having an impact on the envisaged legal base and legislative procedure to be used in devising mechanisms to promote private, compensatory antitrust litigation.

One part of it, the "enforcement leg", is performing well. But as suggested above, the framework in which national courts carry out their tasks under EU law is still under construction.

Heike Schweitzer's contribution, "The European Competition Law Enforcement System and the Evolution of Judicial Review", provides an ambitious critique of several themes connected to European judicial review on the basis of a careful comparative analysis. The paper traverses a lot of ground and cannot be adequately summarized in just a few paragraphs. But it represents a quest for coherence with regard to various aspects of judicial control over the Commission's antitrust and merger decisions, such as, for example, intensity of review and judicial deference, and the standard of proof to be applied in a given case. The paper rigorously pursues a question that lay at the heart of the Workshop, a question conceived by Claus Ehlermann: how can these various aspects be systematized, if at all, in particular given the distinct nature of antitrust proceedings, on the one hand, and merger control on the other.

In studying this question, Schweitzer takes as a starting point the transformation of the European system of enforcement from one of notifications and exclusive rights over the exemption for restrictive agreements to a quasi-prosecutorial model. The current model is characterized by the possibility of severe financial penalties (on the order of a felony) and a directly applicable *exception légale*. This transformation has put great power in the Commission's hands but it also calls, in Schweitzer's view, for stricter controls. The underlying approach is driven by a strong *rule of law* orientation in which competition law is tightly wound up with the protection of individual rights, including the procedural rights guaranteed by Article 6 of the European Convention on Human Rights.[33] As Schweitzer says: "The EU law of judicial review in competition cases is thus in urgent need of a new, coherent conceptual basis. Such a conceptual basis must take developments in human rights law into account, and it must acknowledge the general shift in the field of judicial review – a shift from a 'mere' objective legality control to a dual-goal system in which objective legality control and individual rights protection are equally relevant."[34]

Schweitzer's comparative analysis is contained in Part III of her paper. Her selected national reference points are the German, UK and French competi-

[33] Article 6(1) ECHR provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article 6(2) provides for the presumption of innocence in criminal cases. Article 6(3) provides for the right to be informed promptly of the nature and cause of criminal accusations, and further provides that the accused must have the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". See also note 4 above.

[34] Schweitzer, this Volume, page 108. For a description of legality control, see, e.g., Bruno Lasserre's contribution, described above; and Lasok, "The Nature of Judicial Control", cited above note 17.

tion law regimes, with respect to which she describes both the institutional apparatus and the theory and practice of judicial review.[35] This survey of national systems is illuminating on several levels, but among these is the observation that judicial review in the selected Member States is generally carried out quite assiduously – often *de novo* with regard to infringement decisions apt to trigger fines, while even in relation to merger control the scrutiny of facts and law is more exacting than, say, a mere administrative law standard. This may suggest that, at the national level, the principle of a separation of powers need not preclude high- or at least medium-intensity judicial control of the regulator in antitrust cases. One wonders whether the CFI, as it was then called, was as rigorous as it might have been in a certain high-profile judgment in September of 2007. Placing undue emphasis on one case is dangerous; however, if mistakes were made, the risk of errant path dependence requires strict attention.

In Part IV of her paper, Schweitzer lays out some final reflections and a number of "options for reform". I leave these for the reader's own delectation and proceed, now, with the more structured part of the program.

1. Session One: *The European Commission: Standard of Proof, Burden of Proof and Evaluation of Evidence in Antitrust and Merger Cases*

A. *Written contributions* (Hellström, Lowe, Ortiz Blanco, Venit)

Following the introductory papers of Lasserre and Schweitzer, the next two papers were written by officials of DG Competition, one bringing the perspective of a litigator and the other the perspective of a chief administrator and policy maker. **Per Hellström's** contribution, entitled "A Uniform Standard of Proof in EU Competition Proceedings", addresses a number of issues concerning the standard of proof to be met by the Commission in infringement and merger control cases, including the question: is the "standard of proof" a

[35] For Germany and the UK, see also the contributions of, respectively, Jochen Burrichter and Kelyn Bacon, pp. 683 et seq. and 671 et seq. With regard to judicial review in France, an English-language discussion is provided in Nicolas Petit and Louise Rabeux, "Judicial Review in French Competition Law and Economic Regulation: A Post *Commission v. Tetra Laval* Assessment", in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen, eds., *National Courts and the Standard of Review in Competition Law and Economic Regulation,* Europa Law Publishing, 2009, chapter 7.

category error that has no proper place in litigation before the EU Courts?[36] And if not, how is the concept to be best understood in this context? A logical starting point is the definition of "standard of proof", which means, as Hellström points out, a criterion by which a judge may determine whether a fact or proposition has been substantiated sufficiently by its proponent that it may be recognized as formally established before the court. In short, the standard of proof relates to the sufficiency of the evidence. If the General Court hears an appeal against a decision of the Commission, for example on the ground that the Commission misapplied (and thus "infringed") Article 101 TFEU, a central issue will be whether in its decision the Commission, in condemning the applicant, managed to prove its allegations "to the requisite legal standard". Although one may find this formulation vacuous, the same might be said of the "standard of proof" itself. What seems to make common law jurists uncomfortable is that the ECJ and the General Court generally (though not always) avoid familiar expressions such as "preponderance of evidence", "balance of probabilities" and "beyond reasonable doubt". The need to decode the concept of "proof to the requisite standard" leaves many lawyers feeling that precision or objectivity has been sacrificed in order to retain flexibility. At the least, some ambiguity persists in competition cases with respect to the sufficiency of the evidence.[37] Jurists trained in civil law countries, perhaps more skeptical about assumptions of objectivity in a fundamentally human exercise, may be less troubled.

Rightly or wrongly, the organizers of the Workshop took the view that some value may be had in discussing the standard of proof that applied in EU competition cases. As Hellström notes, it was hoped that further clarity might be achieved with regard to what the standard is, in practice at least, in various kinds of cases. Could a distinction be discerned between cases where fines may be imposed and other cases? Does it matter whether a case is brought under Articles 101/102 or under the Merger Regulation? Does it matter whether the contention to be established relates to future events or to past conduct? Hellström (citing Reeves and Dodoo[38]) begins with the observation that, in principle, the standard of proof appears to be the same regardless of the type of case; hence, the title of his paper. On the other hand, it may be a mistake to lump infringement cases and merger cases together in a single category. Where the Commission seeks to establish an infringement, and where theo-

[36] While Hellström gives some attention to this question and reaches a cautious conclusion, the issue becomes a principal theme for Eric Gippini-Fournier in "The Elusive Standard of Proof in Competition Cases", this Volume, pp. 295 et seq. The subject is also addressed in other submissions, for example that of Heike Schweitzer ("The European Competition Law Enforcement System and the Evolution of Judicial Review", pp. 79 et seq.).

[37] The need for more clarity in this regard is underlined in the paper submitted by Judge Ó Caoimh, this Volume, pp. 271 et seq.

[38] Tony Reeves and Ninette Dodoo, "Standard of Proof and Standard of Judicial Review in European Competition Merger Law", 29 *Fordham International Law Journal* 1034 (2006).

retically a fine could thus always be imposed (since Article 23 of Regulation 1/2003 does not itself limit fines to serious infringements), there is a presumption of innocence[39] which flows from the general principles of EU law and from, more specifically, the Convention and the Charter.[40] This is not the case, of course, in the domain of merger control, where the ECJ was seduced by a "symmetrical" standard of legality according to which, if a proposed merger raises "serious doubts" and if the Commission therefore carries out an in-depth investigation of its likely consequences but then decides to clear the merger unconditionally, the Commission must prove affirmatively that the transaction will *not* significantly impede effective competition.[41]

As concerns the stringency of the "uniform" standard of proof, Hellström concludes that it lies between the classic civil litigation standard (balance of probabilities) and the criminal law standard (beyond reasonable doubt).[42] This indeterminate, unnamed standard is itself influenced by factors such as what is the fact or proposition to be proved, for what purpose, and by whom and for whom? It can be influenced, in other words, by elements such as procedural posture and the standard of judicial control. With respect to some propositions, for example, as discussed repeatedly in the papers and in the present chapter, the Commission may enjoy a zone of limited discretion. A final observation made by Hellström, and echoed by several participants at the Workshop, relates to the question of what the proponent of a given piece of evidence seeks to prove. Does it go down easy? Perhaps it is the kind of argument submitted to a court that activates one's built-in spam filter.

Philip Lowe, who at the time of the Workshop was serving for a seventh year as Director General of DG Competition, provided his views on a number of related matters in his paper, "Taking Sound Decisions on the Basis of Available Evidence". Like Hellström, Lowe addresses certain issues arising in the context of litigation before the EU Courts, including the burden of proof and the standard of proof, but he begins by stepping back and considering the role of the Commission as a public authority and an enforcer, and the legal framework within which it carries out its pre-litigation procedures. The themes of the paper include the need for the Commission to provide a stable environment of competition policy, to enforce the law and to do so while respecting the rights of undertakings and the need to process cases with a minimum of delay. The paper thus gives a sense of what the Commission tries to achieve and the institutional constraints that bind it.

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[39] See, e.g., Case C-199/92 P, *Hüls v Commission* [1999] ECR I-4287, paras. 149–150.

[40] That presumption is only "disapplied" (resulting in a shift of the burden of producing exculpatory evidence) in very particular factual circumstances. Such exceptional situations are discussed by, among others, Philip Lowe in his contribution.

[41] This approach seems out of tune with other areas of EU competition law, where the modern tendency follows classical liberalism: that which is not prohibited is generally allowed. There are several other arguments against a symmetrical standard, but they have been unavailing and for the time being the debate seems frozen.

[42] This conclusion may be compared with the findings in the paper of Judge Ó Caoimh.

With regard to the issue of the burden of proof, Lowe describes what seems to be, particularly in light of Article 2 of Regulation 1/2003, a widely accepted view: the Commission generally bears the burden of establishing an infringement (or, in a Phase II case under the Merger Regulation, of showing that a merger will or will not be likely to significantly impede effective competition). It is a truism to say that if the Commission does not come forward with evidence sufficient to establish a *prima facie* case against the undertaking or undertakings concerned, there is no case. During the administrative procedure, if the Commission discharges that burden, and if the defendant then seeks to avoid the conclusion that it has breached the competition rules, it has no choice but to come forward with evidence, in response to the Statement of Objections, that either rebuts the Commission's case (e.g., by showing, in an Article 101 case, that in fact there was no agreement or concerted practice, or perhaps that the Commission's finding of an effect on trade between Member States was in error) or demonstrates that despite what appears to be an anticompetitive agreement or practice, there is some cognizable justification, for example on the basis of objective necessity or countervailing pro-competitive benefits. Then there is the matter – essentially unaddressed by Article 2 of Regulation 1/2003 – of the burden of proof once an adverse decision is appealed to the General Court. Possibly with the aim to stir comment, Lowe suggests that in this setting it is "in principle" for the applicant to show that the Commission's conclusions are defective. This seems partly right and perhaps partly wrong. It is certainly true that no applicant can launch an action for annulment under Article 263 TFEU and then, upon arrival in Luxembourg, simply rest his case and leave it for the Commission to substantiate all material allegations in the Statement of Objections. The applicant must at least come forward, to begin with in its written submissions, with colorable arguments (on the facts, on the substantive law, or on the procedural aspects of the case) sufficient to give the General Court a basis – consistent with the permissible "grounds of review" – on which to control the legality of the Commission's decision (or, in an Article 261 TFEU case, the theoretically *de novo* assessment of the fine). On the other hand, it is recalled from the discussion above that, although the standard of review applied by the General Court in cases that do not involve fines is not a *de novo* or "full merits" review, the control of legality implies that in reviewing the facts and law asserted in the Commission's decision, the General Court carries out a full or "comprehensive" review except as concerns: matters where the Commission enjoys a margin of appreciation; and matters limited to (a somewhat ill-defined concept of) policy choices. Furthermore, in cases that do involve fines – quite a significant proportion of all cases heard by the General Court – the principle of "unlimited jurisdiction" arguably implies, if it is taken seriously, a *de novo* review of the Commission's factual and legal findings, including its appraisal of the facts.[43] In such cases it seems difficult to avoid the

[43] See below notes 91–93.

implication that the burden of persuasion is borne unalterably by the Commission, even when it is the respondent on appeal. Admittedly, however, the force of this argument may be diluted by the simple fact that the applicant submits his contentions to the General Court and the Commission then attempts to counter those contentions with its own.

Coming to the standard of proof, which as noted above was the principal subject of Hellström's paper, Lowe offers several remarks which will not be replicated here. However, it is not difficult to detect, in these remarks, an attempt to debunk claims to the effect that the Commission should be held, in this era of heavy sanctions in infringement cases, to a criminal standard of proof. It seems clear from the discussions of the Workshop that these claims in favor of a criminal standard do not reflect either the practice or the clear implications of fundamental rights criteria as interpreted in Luxembourg and Strasbourg. On the other hand, Lowe highlighted a *de facto* evolution in the degree of scrutiny to which the Commission may be subject as a consequence of the turn toward an effects-based approach to competition law enforcement. This seems like a reasonable conclusion, at least in theory, since an effects-based approach implies, among other things: closer attention to forensic science; somewhat more narrow prohibitions; and broader scope for efficiency arguments (or, to put it differently, broader scope to contest evidence of ambiguous competitive effects). The argument will be stronger in the coming years if we begin to see partial and total annulments of decisions taken under Article 102. As regards the quality of the evidence that the Commission requires of *itself* when it adopts an infringement or merger decision, which undoubtedly has an impact on whether the standard of proof imposed implicitly by the General Court is met, Lowe indicates that the evidence must be, as *Tetra Laval* (for example) suggests, sufficiently precise, consistent and convincing (which does not necessarily imply the "clear and convincing" standard known in common law countries). The remainder of Lowe's paper is devoted above all to a review of the many internal and external checks and balances (including, for example, a kind of "enforcement impact assessment") that constrain the Commission when a case proceeds all the way to the point of an adverse merger decision or an infringement decision.[44] This, too, was a reaction to the common charge that Europe's competition law system is an inquisitorial one, in the pejorative sense. A series of final remarks come back to the general message of the paper, which is that the Commission is perpetually obliged to make tradeoffs between the ideal of perfect information and a variety of other considerations such as time, the need for repose, resource constraints, the rights of defense and so on.

Luis Ortiz Blanco's contribution is called "Standards of Proof and Personal Conviction in EU Antitrust and Merger Control Procedures". The paper

[44] The Commission has rather more flexibility in cases that proceed under Article 9 of Regulation 1/2003.

complements several of the others by elaborating on the concept of a standard of proof in EU competition cases, and like Hellström, for example (see above), Ortiz Blanco locates this standard (descriptively and normatively) at an intermediate point between the classic (common law) standards used in criminal law and civil litigation. He embraces the term "firm conviction", stressing the word "firm", and this need for firm conviction would apply, in the first instance, to the Commission itself as the initial decision-maker. Quite possibly, in using the term "firm conviction" he is also implicitly nodding at the civil law notion of *intime conviction*. However, Ortiz Blanco makes a determined effort (with the aid of imaginative graphics) to systematize the idea of "firm conviction" by suggesting how it might vary in different kinds of cases, and how the Commission tends to build a case with the aim of meeting the standard.

Ortiz Blanco's approach takes him first of all to merger control, where he detects gradations of rigor in the standard of proof ranging essentially from a standard for single dominance cases to other unilateral effects cases and coordinated effects cases. He then points out that such gradations are a reflection of the common sense notion that simpler facts and a simpler theory of harm generally tend to be accepted more readily as established in the eyes of a decision-maker than more complex facts and more complex theories of harm.[45] It is at this point that Ortiz Blanco recalls a memorable heuristic used about a decade ago by Lord Hoffmann, to the effect that the asserted sighting of an Alsatian strolling through Regent's park is less likely to require extraordinarily persuasive evidence than the sighting of a lioness. The lioness in Regent's Park was irresistible to the participants at the Workshop, and she reared her head on several occasions. Ortiz Blanco applies the idea to the structuring of the proof required to demonstrate certain ("simple") concerted practices in the past or an anticipated post-merger scenario of collective dominance. Here again, one might be struck by the sometimes thin line between substantive liability criteria and the standard relating to the sufficiency of the evidence, but this is one of the implications of the *lion in the park* line of reasoning.

With regard to cases under Articles 101 and 102 TFEU, perhaps unexpectedly, Ortiz Blanco seems to discard the concept of a structured standard of proof and reverts to his general formula of "firm conviction", at least where the case law does not suggest more specific criteria. He then links the stringency of that formula to the deterrent effect of sanctions, which may be achieved, he suggests, through means other than imposing high fines. In a

[45] This is a rough translation of Occam's (Ockham's) Razor. However, one must be cautious with this principle, since obviously a complex explanation that is correct is no less valid for its complexity while, conversely, the simplicity of a fallacy does not transform it into a valid claim. Particularly with reference to the scientific method, Occam's Razor is often described as a preference for hypotheses which, compared with other hypotheses that are equally robust in other respects, depend on fewer assumptions.

more systematic way, he discusses how the process of *evidence construction* occurs when the Commission conducts an antitrust investigation. One of his aims here is to propose a series of guidelines that may be used for the assessment of the credibility of certain types of evidence, from the documents prepared by a defendant internally and contemporaneously with the material fact or transaction to evidence traditionally regarded as less trustworthy, such as hearsay evidence. Some lawyers, influenced no doubt by their training in national traditions, would like to see more formal principles emerging to discriminate among these types of evidence, but there is an entrenched tradition of "unfettered evaluation" (and hence little scope to challenge properly collected evidence as inadmissible on credibility grounds) of evidence in Luxembourg.[46]

Having discussed the credibility of certain evidence and certain mechanisms for obtaining such evidence, Ortiz Blanco sets forth what he calls the "evidence matrix", which refers to the complex layers of evidence the enforcer (or plaintiff) manages to collect during the course of its investigation. Like Philip Lowe in his paper, Ortiz Blanco underlines the fact that no case is ever built on the basis of perfect information. The question is whether, despite its gaps, the threads hold together and instill in the judge sufficient "conviction". As the author points out, certain shortcuts, including for example the concept of a "single and continuous infringement", have developed because some small leaps of faith are generally unavoidable as a practical matter when the available information is incomplete. The evidence matrix thus in a sense may reach critical mass and may activate principles and presumptions that offer the Commission some assistance. If those shortcuts are interpreted too broadly this may create some tension with constraints imposed by fundamental rights.

Finally, Ortiz Blanco notes that when economic argumentation is submitted to courts in competition cases, it may be too easy to accept that argumentation, uncritically, as "evidence". As he points out, it is helpful to regard such argumentation in a manner analogous to legal argumentation. This allows for the proponent to assert that the arguments are robust and for the opposing party to indict the theory or data submitted, while avoiding the mistake of equating the arguments with facts.[47]

Jim Venit submitted a paper entitled "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".[48] Venit's paper might be described in two ways. First, it is

[46] See, e.g., Lenaerts, cited above note 12, with references.

[47] On this theme, see further Justin Coombs and Jorge Padilla, "The Use of Economic Evidence before the Courts of the European Union", this Volume, pages 473 et seq.

[48] Venit thus does not focus directly on merger proceedings in this paper, apart from some comparative observations (especially as regards the relative similarity between merger issues and abuse of dominance issues, which he says underlines the dubiousness of imposing severe penalties in abuse cases). However, he returns to the subject of merger control,

a useful primer, with both broad coverage and depth, to the wide range of issues relating to the Commission's powers of investigation and inspection and the procedural rights of defendant undertakings in antitrust procedures. Second, it is a sustained, multi-angle indictment and exposé of a naked emperor, the naked one in this case being EU antitrust enforcement, fundamentally defective for its lack of devices, such as those typical of adversarial systems, which could ensure quality control in the evidence used against defendants. Like a number of other papers in this Volume (e.g., those of Schweitzer and Castillo de la Torre), the scope and detail contained in this one preclude an adequate synthesis here; only a brief, indicative outline will be presented.

As suggested above, the paper sets out to demonstrate the many subtle or less subtle ways in which the administrative (or quasi-penal) enforcement procedures before the Commission under Articles 101 and 102 systematically place defendants at a disadvantage. Many of these are connected to the Commission's double-hatted role of prosecutor and "judge", and the absence of opportunities during the proceedings to test the evidence that has been gathered and used to prosecute the defendant, for example by way of interlocutory appeals (which are currently possible only in very limited situations) or cross-examination (which never really occurs at oral hearings). According to Venit, the structural defects of the enforcement system are compounded by certain kinds of prosecutorial bias.[49] These are human elements – such as the tendency to look for and find evidence supporting (and not contradicting) one's own beliefs – and as such seem nearly inescapable. They might be mitigated, however, through: (i) the use of neutral, rigorous and external arbitrators (judges applying strict scrutiny) – which ideally can have not only *ex post* corrective effects but also *ex ante* effects on an enforcer acting in the arbitrator's shadow; and (ii) the introduction of more adversarial elements to help

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and in particular the standard of review applied to the Commission's merger decisions by the EU Courts, in a new essay, "The Scope of Judicial Review of Commission Merger Decisions", in Lowe and Marquis, eds., *European Competition Law Annual 2010: Merger Control in European and Global Perspective,* forthcoming, Hart Publishing.

[49] The many guises of agency bias have long been discussed in the US. See, e.g., William Warfield Ross, "Should Prosecutors Write Agency Decisions? The Role of Agency Counsel in Decision-Making", 22 *Administrative Law Review* 579 (1970); John Kingdon, "The 'Big Antitrust Case': Thoughts on Procedural Reform", 37 *Washington and Lee Law Review* 25 (1980); Malcolm Coate and Andrew Kleit, "Does It Matter that the Prosecutor is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission, 19 *Managerial and Decision Economics* 1 (1998); Rachel Barkow, "Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law", 61 *Stanford Law Review* 869 (2009). With regard to the European Commission, bias is discussed in Wouter Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", 27 *World Competition* 201, 212–218 (2004), with references. Recently, see also Bo Vesterdorf, "Due Process Before the Commission of the European Union? Some Reflections Upon Reading the Commission Draft Paper on Best Practices in Antitrust Proceedings", *CPI Antitrust Journal,* April 2010, No. 1, pp. 2–6.

ensure more objective results at the end of the investigation. More radical solutions, such as the creation of an independent competition court, are not really on the table, and Venit leaves such ideas to be discussed in more theoretical debates.

In brief, the structure of the paper is as follows. Part I reviews the combined nature of the Commission's role (investigator, prosecutor and adjudicator), emphasizing the inquisitorial style of enforcement proceedings and the relative lack of external control prior to the adoption of an infringement decision. Part II highlights various kinds of biases that can subvert the truth-seeking function of law enforcement, particularly where procedures are asymmetric and inquisitorial, with few adversarial correctives. Such biases, familiar to psychologists, include confirmation bias, hindsight bias and enforcement bias. Part III presents an extensive review of the gathering of evidence by the Commission, its use against defendants in the Statement of Objections, and the subsequent debate between the Commission and the undertakings concerned about the validity of the allegations. Venit divides enforcement procedures into two basic phases, the preliminary inquiry phase (which may include dawn raids, requests for information, etc., up to the adoption of the SO) and the post-SO phase (access to the Commission's file, written reply by the defendant and the oral hearing, up to the adoption of a decision or the closing of the file). Following a description of these two phases of the proceedings, Venit highlights the shortcomings of each in some detail. Part IV recalls three antitrust and merger cases (*Italian Flat Glass, Airtours* and *Tetra Laval*) in which the Commission has been reprimanded by the EU Courts for mishandling or distortion of evidence.[50] The purpose here is to demonstrate that the claims of bias and a tilted playing field are not merely speculative. Part V of the paper discusses "possible constraints on the quality of evidence and the Commission's exercise of its enforcement powers". The key word here is "possible", as Venit clearly does not consider most of these constraints (peer review panels, internal ethical codes, exceptional liability in damages for "sufficiently serious" breaches by the Commission) to be adequate, in practice, to ensure effective quality control.

The interdependent deficiencies in the system lead Venit to Part VI, in which he discusses the appropriate standard of judicial review and the appropriate standard of proof. In light of his critique it is no surprise to find that Venit recommends the most rigorous review possible of the Commission's collection, selection, presentation and interpretation of evidence, with an eye not just to what appears in a decision but what does not. According to Venit, the one-sidedness of the enforcement system, not to mention the "criminal" nature of penalties imposed under Articles 101 and 102, militate in favor of the strictest scrutiny. The EU Courts should therefore subject the Commission's

[50] On *Italian Flat Glass,* see also David Edward, "Quality Control of Competition Decisions", cited above note 12.

findings to rigorous testing, and there is little room or justification for any zone of deference. With respect to the standard of proof, for the reasons already suggested, and invoking Article 6(2) ECHR as well, Venit supports the adoption of a criminal standard of proof (beyond reasonable doubt), or at least some relative approximation of it (such as the "clear and convincing" standard). Taken as a whole, however, the paper suggests that a high standard of proof and a strict standard of judicial control are second-best solutions, and that a profound re-think of the structure of enforcement procedures, with a view, for example, to promoting greater opportunities for impartial arbitration and interlocutory appeals, is needed.

B. *Discussion*

The roundtable discussion corresponding to Session One was combined with that of Session Two, and thus they are summarized together below.[51]

2. Session Two: *The European Courts: Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases*

A. *Written contributions* (Forwood, Wahl, Ó Caoimh, Gippini-Fournier, Castillo de la Torre, Forrester, Ratliff, Coombs & Padilla)

The title of **Judge Forwood's** contribution is "The Commission's 'More Economic Approach' – Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review". In this paper Forwood considers how the ECJ's classic approach to the standard of review should be understood in light of the evolution in Europe toward more explicit and specific use of economics.[52] Does more economics imply

[51] See pages lv et seq.

[52] As Judge Forwood reminds us, the ECJ understood the importance of sound economic logic at a very early stage. One might add that mainstream industrial organization in those days was perhaps more intuitive than it is today, and may have seemed, as it were, less of a threat to legal reasoning, with its affinity for clear rules and bright lines. Arguably there

more "complex economic assessments", and thus a lighter judicial touch? A second issue Forwood addresses is one of the guiding research questions underlying the 2009 Workshop: does (should) the standard of review vary according to whether the Commission's decision is "purely regulatory" or "quasi-penal"?

On the first question, which relates to the nature and functioning of a "marginal review" doctrine,[53] Forwood recalls that limited review is the exception, and that in most cases the EU Courts have conducted a "comprehensive review" of the Commission's decisions under the competition rules. This higher degree of scrutiny has often been applied, he points out, in cases where the relevant economic analysis has been fairly sophisticated. The implication of Forwood's evaluation seems to be that one cannot predict, on the basis of the difficulty of the analysis alone, or on the basis of a need for a fact-intensive inquiry alone, that the court will limit itself to marginal review. The very term "complex economic assessment" may therefore be misleading: the word "complex" may refer, as Forwood suggests, to whether a reasonable antitrust enforcer could draw a range of (roughly) equally plausible conclusions as to the boundaries of what is permitted by the law.[54] Examples would include, say, a four-year versus a five-year non-compete obligation, or the minimum number of sales to be aggregated in the context of an information exchange among competitors.[55] Arguably, in such circumstances one might regard a substitution by the court of its own preferences in place of those of the administrative authority as unnecessary (and potentially harmful) micromanagement in the absence of a manifest error of appraisal.

The conceptual problem might then be how best to distinguish the latter kinds of issues from other line-drawing matters such as where lay the legal boundaries of a market.[56] Judge Forwood does not propose more specific criteria in this regard, but he does point out that the instances in which the ECJ

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was significant harmony between structuralist approaches in economics (disseminated, for example, by Corwin Edwards) and the way competition law was understood among at least some jurists in the 1960s. However, since the 1980s, the cognitive distance between IO specialists and non-specialist jurists has widened. This may lead one to wonder whether authoritative pronouncements by the ECJ of the 1960s must in a sense be ratified by today's Court if they are to retain their full value.

[53] Where marginal review is applied, the court verifies that the procedural rules have been respected, that the facts have been stated accurately, and that there has been no manifest error of appraisal or misuse of powers on the part for the administrative authority.

[54] See also, e.g., the Opinion of Advocate General Kokott in *Alrosa*, cited above note 23, at para. 84 ("If the factual and evidential position reasonably allows different assessments, there can be no legal objection if the Commission adopts one of them, even it if is not the one which the Court considers to be preferable.").

[55] Forwood suggests that matters such as these might be "essentially discretionary".

[56] Practically since the beginning of the ECJ's jurisprudence under Article 102 TFEU, the Court has been willing to subject the Commission's findings on market definition to close scrutiny. However, there may be occasions where the courts bind themselves to limited review for "complex appraisal" reasons. See Case T-201/04, *Microsoft v Commission,* para. 482.

has spoken of complex economic assessments have often (though not always[57]) been in connection with applications for an exemption under the old Article 81(3) EC (now Article 101(3) TFEU). It is doubtful that one could construct a robust doctrine of strict correspondence between exemption review under Article 101(3) and judicial minimalism; however, one might consider exemptions to be a sphere in which the enforcer functions as a regulator and defines the scope of permissible conduct.[58] Institutionally, a court may be less equipped to play that role, whereas it is emphatically within a court's responsibilities to determine whether the elements of an infringement have been sufficiently established to justify a finding that the law has been breached,[59] and still more fundamentally, it is ultimately for courts to elucidate what those elements are.[60] Still, the question of which matters require "regulatory" expertise would inevitably call for some line-drawing. Putting this point about exemptions to one side, the more important observation Forwood makes is that marginal review is and perhaps should be an exceptional category, and strictly construed. This suggests a more full-blooded review in case of doubt.

The second question, as noted above, concerns the dichotomy between "purely regulatory" decisions (such as a finding of infringement with no fine but a cease and desist order or affirmative behavioral remedies) and "quasi-penal" decisions (i.e., an infringement decision with substantial fines). Here Forwood offers two legal reasons why such a distinction may be valid. On the one hand there is the "unlimited" jurisdiction of the EU Courts to review Commission infringement decisions under Article 261 TFEU and Article 31 of Regulation 1/2003. It therefore seems that there is no room for marginal review in "quasi-penal" cases; the doctrine of complex assessments could only be applied, if at all, in what Forwood calls "purely regulatory" matters. On the other hand, the key provisions of the ECHR[61] arguably appear to preclude unduly broad discretion on the part of an enforcer, that is, decision-making freedom outside the scope of review, if quasi-criminal sanctions are imposed.

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[57] See, e.g., Case C-260/07, *Pedro IV Servicios SL v Total España SA* [2009] ECR I-2437, para. 36 (block exemption can relieve an operator of having to carry out a "complex economic and legal assessment" in order to establish whether an agreement falls within Article 101(1) TFEU).

[58] There may also be some cases in which an exemption is evaluated through the lens of non-competition objectives. In those circumstances one might be inclined to follow the institutional logic described in the main text.

[59] This still leaves room for the court to give some leeway to the administrative authority on the basis of perceived expertise. See, e.g., Case C-202/07 P, *Commission v France Télécom* [2009] ECR I-2369, paras. 69 et seq.

[60] Of course, statutes lay down prohibitions, but statutes tend to be incomplete contracts in need of further articulation. The point that it is ultimately for courts to define the scope of prohibitions accords with Judge Wahl's observation that decisions in which the Commission bases its conclusions on its own views as to the scope of the competition rules are subject to comprehensive review.

[61] For the text of some of the relevant provisions of the Convention (and of the Charter), see above note 4.

As Forwood points out, these issues (e.g., what is undue and what is not?) remain subject to further evolution and clarification.

Judge Wahl's paper is called, succinctly, "Standard of Review – Comprehensive or Limited?" Whereas Judge Forwood's paper recalls some of the seminal jurisprudence in this area, Judge Wahl surveys some of the more recent developments including, among others, the *Tetra Laval* judgment, whose significance goes beyond the merger context in which that case was decided. A related subject covered in the paper is the *de facto* relationship between the standard of scrutiny applied by an appellate body and the sufficiency of the evidence that the enforcer must put forward to sustain its case. As a starting point, the essay compares the "comprehensive" and the "limited" standards of review. A first difference is that the "manifest error" standard by implication allows for harmless error, even if the EU Courts have not (yet) clearly articulated such a doctrine. The second difference concerns the sufficiency of the evidence, i.e., the standard of proof, in particular as regards the correspondence between the facts and the conclusions drawn from them. According to Wahl, it is where policy choices are to be made,[62] or where a complex economic (or technical) appraisal is to be performed, that suggest a less stringent standard of a plausible link, whereas in other cases the enforcer might have to adduce more robust evidence to overcome the intuitive presumption that unexpected events (such as the breach of a legal prohibition) do not normally occur.

With respect to *Tetra Laval,* Wahl notes that in that judgment the ECJ tightened up its limited review standard to a certain extent, at least for some kinds of cases. What remains to be seen, as the case law develops, is how much of the old limited review standard will be cannibalized, so to speak, by the more rigorous *Tetra Laval* standard. But the point made by Wahl as concerns *Tetra Laval* is that there is some internal dissonance within the judgment. On the basis of his assumption that a higher standard of review implies, *de facto,* a higher standard of proof, Wahl questions the affirmation of the ECJ in *Tetra Laval* that the CFI in that case had not applied a more stringent standard of proof. In an attempt to reconcile the latter statement with a more intense standard of review, Wahl concludes that although the formal standard of proof remains unchanged, the *Tetra Laval* standard nevertheless seems to have implications for the quality of the evidence required to convince the General Court of the accuracy of the Commission's conclusions. On the other hand, while the standard of review may have been reinforced by *Tetra Laval,* and while the term "limited review" appears to that extent increasingly inadequate, it is equally clear that the *Tetra Laval* standard does not imply the

[62] Wahl seems to attach a broad meaning to the concept of policy choices, so that they relate not only to horizontal policy (pursued independently of idiosyncratic facts in given cases) and enforcement priorities but also to policy expressed through discretionary, "regulatory" choices in particular cases. This appears to correspond to Judge Forwood's reference to discretionary assessments as to whether, for example, a duration of a certain number of years is acceptable for a non-compete obligation.

same degree of scrutiny seen where the "comprehensive review" standard applies.

Judge Ó Caoimh's contribution bears the title: "Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases: Perspective of the Court of Justice of the European Union". This paper complements those of Judge Forwood and Judge Wahl, and it covers: appeals of judgments of the General Court to the ECJ; preliminary references from the courts of EU Member States; and appeals of the Commission's merger control decisions. On the first subject – appeals from the General Court – Ó Caoimh highlights a number of judgments which, on the whole, establish the General Court as the pre-eminent authority with respect to ascertaining the facts of a case under Articles 101 and 102 and "assessing" or "appraising" those facts, that is, determining their probative value. An important example of such assessment or appraisal is the extent to which the General Court finds the Commission's presentation of the factual matrix of a case to be plausible. Ó Caoimh's general point here is understandable, since it is axiomatic that the ECJ's appellate jurisdiction does not extend to pure questions of fact.[63] In that regard it is generally only where there are allegations that the clear sense of the evidence has been distorted by the General Court that an appealable question of law arises. One might (although Ó Caoimh does not) call this, informally, a mixed question of law and fact, the legal aspect of the matter being whether such a distortion occurred. The General Court may also commit an appealable error of law if, in assessing the evidence, it infringes the general principles of EU law, or if it misapplies the rules regarding the taking of evidence. Moreover, and more importantly from a practical perspective, while it is for the General Court to determine the weight and credibility of the evidence before it, the legal *characterization* of facts (e.g., did such-and-such behavior amount to a concerted practice?), and of course legal conclusions in a broader sense (e.g., does some exemption or defense apply?), are likewise points of law and may be appealed. Though the paper does not say so explicitly, an important point underlying these doctrines of admissibility concerns the workload of the ECJ. To some extent the "points of law" doctrine and related filters function as a means to preserve the *raison d'être* of the General Court, which relieves the ECJ, at least in theory, of having to sift through the full range of complex factual issues that arise in litigation of EU law. Such concerns, of course, are common to practically all appellate systems; on the other hand, not all systems are characterized by features such as, for example, the lack of a *certiorari*-type discretion to hear cases.

Other issues discussed in the first part of Ó Caoimh's paper include the lack of clarity with respect to the standard of proof in cases under Articles 101 and

[63] See Article 256 TFEU (ex-Article 225 EC), which refers to appeals on "points of law only".

102, which may be explained in part by the subjectivity of the ECJ's approach (discussed in several of the papers in this Volume and in the combined round-table following Panels I and II – see below), and what might be called the EU's doctrine of "judicial notice" concerning well-known facts that need not be substantiated with specific evidence.

The second part of Ó Caoimh's paper provides a significant discussion of how the ECJ handles issues of judicial review in the context of preliminary references under Article 267 TFEU (ex-Article 234 EC). Here the starting point should be the essential nature of the exercise. When a national court refers a question to the ECJ to help it resolve a case at national level that raises issues of EU law, the responsibility and the exclusive prerogative of the ECJ is to deliver an authoritative interpretation of (primary or secondary) EU law. In principle, all fact-finding is for the national court, as is – again, in principle – the application of the law, as interpreted by the ECJ, to the facts of the pending case.[64] From this starting point, Ó Caoimh turns not to the national courts themselves but to the traditional sovereign power of the Member States to lay down rules of civil and criminal procedure.[65] That power may be regarded as fundamental or constitutional, but it is nevertheless subject to the principles of EU law, such as primacy, equivalence and effectiveness.[66] The point that Ó Caoimh makes here is that those limits placed on the procedural autonomy of the Member States may come into play if Member States adopt or maintain

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[64] It is well known that, on occasion, the ECJ goes rather far and leaves little room for doubt as to what the outcome should be in the national proceedings, thereby effectively relieving the national court of any autonomous application of the law to the facts before it.

[65] The nature and the intensity – and even the existence – of national procedural autonomy are controversial. In the literature such autonomy has even been referred to as a "conjecture". For further discussion, see, among others, Constantinos Kakouris, "Do the Member States Possess Judicial Procedural 'Autonomy'?", 34 *Common Market Law Review* 1389 (1997); Koen Lenaerts, "Interlocking Legal Orders in the European Union and Comparative Law", 52 *International and Comparative Law Quarterly* 873 (2003); Assimakis Komninos, *EC Private Antitrust Enforcement,* Hart Publishing, 2008, esp. pp. 147–149; Charlotte Leskinen, "The Competence of the European Union to Adopt Measures Harmonizing the Procedural Rules Governing EC Antitrust Damages Actions", Working Paper WPLS08-01 (2008); Veljko Milutinović, *The 'Right to Damages' under EU Competition Law,* Kluwer Law International, 2010, esp. pp. 306–313; Michal Bobek, "Why There is no Principle of 'Procedural Autonomy' of the Member States", in Bruno de Witte and Hans Micklitz, eds., *The European Court of Justice and the Autonomy of the Member States,* forthcoming, Intersentia. For another recent discussion from Luxembourg, see the Opinion of Advocate General Mazák of 7 December 2010 in Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. Zoo, now Netia SA w Warszawie,* not yet decided.

[66] Despite the obvious importance of procedural rules that shape both civil and criminal law at the national law level, it is interesting to see that procedural law was not *as such* regarded as being so close to national identity as to fall within the German Federal Constitutional Court's catalogue of fields (social policy, fiscal policy, education, family law, etc.) subject to its exceptional "identity review". However, fundamental rights did fall within that catalogue, and by implication this would extend to at least some procedural rules with constitutional parameters. This is especially true in the context of criminal law, since "criminal justice" itself was included in the catalogue. See Case 2 BvE 2/08 etc., *Gauweiler v Treaty of Lisbon,* judgment of the FCC of 30 June 2009, paras. 249–260.

rules that either make civil recovery of damages in antitrust cases unreasonably difficult (e.g., by limiting recovery to where infringements are shown beyond reasonable doubt) or lead to an intolerable degree of diverse treatment in different Member States. As an illustration of how the principle of (qualified) procedural autonomy can raise the question of whether a given evidentiary rule (in this case, a presumption) falls within the scope of that principle or whether it is, to the contrary, linked intrinsically to the substance of EU law (and must therefore be governed by "universal" principles throughout the EU), Ó Caoimh discusses the *T-Mobile Netherlands* judgment.[67]

Coming to the third part of the paper, concerning challenges to the Commission's merger control decisions, the situation with respect to the standard of proof to which the Commission is held is somewhat clearer than it is in the context of infringement cases. In particular, when the Commission receives notification of a merger, it is in principle required to vet the transaction on the basis of what its investigation reveals to be the most likely economic outcome. Ó Caoimh interprets this requirement as being equivalent to a "balance of probabilities" standard of proof. Furthermore and famously, the Commission is required to meet the same standard regardless of whether it chooses to prohibit a concentration or to clear it; the fact that European society is structured on the principle of an open market economy, with some hints here and there of a right to free economic initiative even under EU law principles[68] (and not just national law), does not imply any *presumption* that mergers and acquisitions within the scope of the Merger Regulation are compatible with the internal market.

Ó Caoimh's finding that the standard of proof in merger control is relatively clear brings him back, at the end of his paper, to the unsatisfactory state of affairs with regard to the standard of proof in cases under Articles 101 and 102 TFEU. The need for clarity in this regard is underlined, he says, by the considerable diversity in a post-modernization, post-enlargement and radically multilingual environment, and by the significant potential for inconsistent procedures (and hence outcomes) that go with it. The debate on the standard of proof in such cases continued during the roundtable following Panels I and II (see below).

Eric Gippini-Fournier coyly entitled his paper "The Elusive Standard of Proof in EU Competition Cases". In this intriguing contribution he does not claim to capture this elusive notion; instead he suggests that, at least in the context of proceedings before the EU Courts, an abstract standard of proof is neither possible to pin down nor worth the effort of doing so even if one *could* be pinned down. As outlined here, the paper aims to achieve two interrelated objectives.

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[67] Case C-8/08, *T-Mobile Netherlands and others* [2009] ECR I-4529.

[68] This is reflected, for example, in Articles 15, 16 and 17 of the Charter of Fundamental Rights of the European Union, 2010 OJ C83/389.

First, it seeks to pierce the veil of the "standard of proof" concept so deeply ingrained in the thinking of jurists trained in common law systems, in particular by reviewing the Continental concept of *intime conviction*. According to the latter concept, the sufficiency of the evidence is perceived as being determined by whatever quantum and quality of proof is necessary to convince a judge, without respect to any *ex ante* abstract (and sometimes probabilistic) formulae, such as "the balance of probabilities" or "beyond reasonable doubt". The exposition of the principle of *intime conviction*, which as Gippini-Fournier points out is found in a (large) majority of the legal systems of the Member States, is plainly a critique of attempts that have been made by common law-oriented commentators to superimpose the "standard of proof" framework on the EU jurisprudence. The argument is that the "standard of proof" jargon may indeed be used occasionally by the EU Courts, but it is a second-order concept that may potentially obscure more important indicators (see below) of whether and how the Courts accept allegations and other evidence as being proven. It is, furthermore, chimerical in the sense that *ex ante* certainty of what standard of proof will prevail in a case will in fact shed little light, without additional information, on the degree of receptivity or skepticism with respect to a given proposition or piece of evidence.

Legal specialists trained in common law jurisdictions encountering such notions for the first time may be taken aback at what may appear, at least at first glance, to be an impermissibly subjective standard that could potentially threaten the uniform application of the competition rules. Indeed, such misgivings seem to be expressed by Judge Ó Caoimh in his paper,[69] which as noted above refers to the need for clear standards in order to ensure that the judges of 27 Member States – despite the (controversial) principle that rules on the standard of proof fall within the sphere of national procedural autonomy[70] – can orient on or perhaps be inspired by common criteria. Why does the concept of *intime conviction* make common law jurists uneasy? It would seem that the gist of that concept, namely, *A point or fact is proven in law when the judge is persuaded that it has been,* has an uncomfortable tautological ring to it. On the other hand, one might suggest that its imperviousness to refutation also indicates that *intime conviction* and the concept of a standard of proof are not mutually exclusive. As already mentioned, Gippini-Fournier in fact acknowledges that there are at least some traces, in some judgments, of a com-

[69] See pages 273, 277–278 and 283.

[70] On the notion of national procedural autonomy, see the literature cited above note 65. It seems likely that the proposition according to which procedural rules, including rules on the standard of proof (if any), remain a matter of national choice (subject to the principles of equivalence and effectiveness), a proposition which is asserted expressly in Recital 5 of Regulation 1/2003, explains the absence of any mention by Gippini-Fournier of any possible relationship between the standard of proof in proceedings before the EU Courts and the standard that may apply before national courts. He may not be alarmed by the possibility of fragmentation in the numerous jurisdictions in the EU, perhaps because fragmentation has not led to breakdowns within Continental systems and perhaps partly also because he would deny that the adoption of a standard of proof provides any guarantee against it.

mon law-style standard of proof, even if he does not find them helpful. If the two traditions are not mutually exclusive, then the challenge presented by the paper for advocates of a standard of proof is to demonstrate how the common law categories provide added value, if they do. Gippini-Fournier rejects the intuitive proposition that standards of proof serve the goal of legal certainty. Considering the strong indications that the EU Courts have not really taken to heart the concept of the standard of proof, those practitioners that advocate its use may have to redouble their efforts to show its utility or at least to show how it can interact and hybridize with the principle of *intime conviction* to provide more structure in litigation before the Courts and more precision in understanding the rigor with which the Courts will treat the evidence submitted to them. At any rate, it is worth noting that few participants at the Workshop seemed willing to relinquish altogether the concept of a standard of proof. To the contrary, many written and oral observations seemed to take the existence of a standard of proof as given, even if it remained shrouded in some uncertainty.

The second objective of Gippini-Fournier's paper follows from the recommendation to leave behind the standard of proof concept and to focus on the subtle characteristics of each case in order to have a sense of when facts or propositions will be deemed established to the requisite legal standard. Citing Anne-Lise Sibony, David Bailey and Bo Vesterdorf, the author reviews a number of variables which may enhance or reduce the propensity of the EU Courts to accept the evidence submitted by the parties in a given case. Some of these are familiar and straightforward, such as the proposition that a claim which depends on complex or convoluted reasoning may call for more solid proof than a more simply constructed claim; or the role that sanctions play, since more compelling or unequivocal evidence may be required if the establishment of a fact implies significant penalties. To these factors Gippini-Fournier adds three other considerations.[71] First, he says that it is often difficult to prove that a defendant has engaged in anticompetitive conduct within his control, but then once it has been established to the court's satisfaction that the allegation is true, it is much easier to show that the misconduct actually or potentially leads to negative consequences (e.g., higher relative prices). Those consequences, he explains, and the causal link between them and the wrongdoing are not necessarily within the control of the defendant (since, for example, a price-fixing agreement can theoretically be defeated in terms of its effects if customers react by boycotting the relevant product). This distinction between the uphill battle of demonstrating that the defendant acted in a certain way and the lazy promenade of proving anticompetitive consequences reflects the fact that the EU Courts have not embraced, with open arms, the turn to a thoroughgoing effects-based approach to competition law. The

[71] As he notes, these additional considerations are to a certain extent related to, or overlap with, the variables discussed by the cited commentators.

second relevant factor in a case-by-case inquiry into the fate of evidence submitted to the Courts is one already touched on in this introduction, namely the judge's perception of "economic normality". An anticompetitive conglomerate merger, Gippini-Fournier suggests, may be as likely as a lioness trotting through Regent's Park, whereas an anticompetitive horizontal merger is a far less exotic creature. Other interesting examples of the normal and the abnormal are given as well. Finally, the ease or difficulty of proof may be influenced by "risks of getting it wrong". Examples of such risks might include the following: if a false allegation is accepted as established by the court, will it imply condemnation and significant fines? If conduct with ambiguous effects on competition is condemned, will this inhibit desirable conduct? Of course, if getting it wrong is risky this can also influence the degree of rigor embedded in the substantive liability test, but as Gippini-Fournier suggests (again, by reference to examples) it can also affect how the Courts view the evidence.

A few intrepid souls might embark on the cross-country *piste* marked out by **Fernando Castillo de la Torre** in his paper, "Evidence, Proof and Judicial Review in Cartel Cases". The paper is a defense of the EU's cartel enforcement system, increasingly criticized on the basis of dramatic, occasionally billion-euro penalties, or on the ground that the Commission is a "*Moloch* of power". To critics of the system Castillo de la Torre says, for various reasons explained in the paper: "*No exageremos*". The paper is also a vehicle for discussing the evaluation of evidence by the EU Courts, and the difficulty of finding an adequate way to conceptualize it in the context of a supranational court possessed of such an unusual variety of mental formation and legal tradition.

Castillo de la Torre's *opus* is divided into 17 sections, just one short of Homer's tales of the bearded sage from near Cephalonia.[72] I can try to help by enumerating the various sections:

1. Introduction
2. What needs to be proven?
3. Burden or *burdens* of proof
4. The impact of the Court's attitude to the process of presenting evidence
5. Standard of proof
6. Categories of evidence
7. Admissibility of the evidence
8. A holistic view of the evidence
9. In particular, on the duration of cartels
10. Factors determining the value of the evidence (the general criteria; contemporaneous documents; information drafted *ex post;* the attitude of the undertaking during the proceedings)

[72] Castillo de la Torre also includes far more footnotes in his work than the sightless poet did in his (a crushing comparison of 389 to 0).

11. Fines
12. The use of economic analysis
13. Judicial review: the standards
14. Should judicial review be limited to elements available to the Commission at the time it takes its decision?
15. Where is the problem with judicial review?
16. Is the system compatible with Article 6 of the ECHR?
17. Conclusions

I will not have the courage to provide a discussion or even adequate summary of the paper; I will merely highlight a few points. One of the numerous interesting remarks made by Castillo de la Torre relates to the question of whether a restriction of competition is one "by object" really turns, as is often supposed, on whether negative market effects are sufficiently likely to warrant a presumption of illegality.[73] The suggestion here is that at least the impact on final consumers was held not to be decisive by the ECJ in *GlaxoSmithKline*.[74] I am not altogether sure that it follows from the ECJ's judgment in the latter case (paragraphs 62–64, and likewise paragraphs 36–39 of *T-Mobile Netherlands*) that the concept of a restriction by object must be construed as independent of any presumption of consumer harm, even if I must acknowledge that *a prima vista* the Court's statements may give that impression. I submit that the Court's formulations are ambiguous, and may even be read as *implying* a presumption of (long-term) consumer harm that results from a reduction of competitive pressures – a presumption that becomes, in some circumstances, irrebuttable. I would interpret the judgment in *GlaxoSmithKline* (i.e., the part of the judgment concerning the restriction of competition by object) as meaning that the question of whether there is net consumer harm in a *particular case* must give way to the greater good derived from the Court's "competition as such" ethic; this latter (ordo-inflected) notion is used – when market integration appears to be threatened – as a means of ensuring the long-term protection of consumers, competitive pressure, and, with these, the *Grundnorm* of the European project.

Therefore, when it is explained that "the examination of an agreement's legal and economic context in cases which are normally characterized as comprising restrictions by object is designed to see whether or not there is still competition which may be restricted", it seems to me that this does not convey the full picture. The "legal and economic context" doctrine is flexible enough to serve a variety of purposes, including the one to which the author refers, but to my mind the essential purpose of the doctrine, as established in *STM*

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[73] See pages 321–322.

[74] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P, *GlaxoSmithKline Services v Commission* [2009] ECR I-9291 (dismissing appeals against the CFI's judgment but finding that the CFI had made errors of law, specifically in relation to application of Article 101(1).

and *Consten and Grundig,* is to establish, for the EU Courts and the national courts, a functional methodology of analysis. Courts may stop short of extended, costly analysis (the "Full Monty"), and they may summarily condemn a limited category of agreements deemed inimical to competition or to market integration. But they are enjoined, even when proceeding with this very truncated analysis, to consider an agreement or concerted practice in light of real circumstances and realistic assumptions. This may consist, for example, of an evaluation of how a particular contested contract or provision interacts with the broader landscape, which may include other relevant agreements, laws, regulations or other circumstances which have a bearing on the real competitive significance of the agreement.

However, the definition of a restriction by object is not the focus of Castillo de la Torre's paper; a more central aim of the study is to reaffirm the importance of a conceptual distinction between legal standards, on the one hand, and requirements of proof on the other. These are too often conflated, the author suggests. Regarding burdens of proof – the evidential and the legal burden beloved by common lawyers, or the objective and subjective burden in continental systems, the author cautions against too much faith in theory. His impression is of something messier and pragmatic.[75] On the relevant standard of proof, for purposes of establishing the accuracy of facts, Castillo de la Torre observes a bit of common law imperialism. It is indeed easy to slip into the common law categories and to assume that they provide the appropriate apparatus in litigation before the EU Courts – when something subtler might be a better tailored solution for Europe. The author then briefly touches on some of the civil law traditions that seem relevant to the ECJ's jurisprudence and functioning. Like some of the other Workshop participants, for example (such as Forrester, Gippini-Fournier and others), Castillo de la Torre describes the Continental reliance on a judge's *intime conviction*.

Another interesting discourse in the paper concerns how economic analysis is used in litigation in Luxembourg. Sometimes, the appropriate word is not "use" but "abuse". The point made by Castillo de la Torre seems to boil down to a question of credibility: in the face of overwhelming evidence of a cartel, one is well advised not to point to economic evidence suggesting that all is well in the relevant market. Furthermore, the submission of economic analysis at the limits of credibility reflects poorly on clients and their legal advisors. This underscores a need for client education, and the need for litigators to resist the temptation to throw up 20 different arguments in the hopes that number 16 will stick.

Castillo de la Torre unsurprisingly rejects the proposition that the malfunctioning of the EU's system of enforcement is confirmed by the fact that the

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[75] See page 334: "[T]he match is played as if both players were serving at the same time [. . .]" (citing Anne-Lise Sibony and Eric Barbier de la Serre, "Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective", 43 *Revue trimestrielle de droit européen* 205, 218 (2007)).

Commission "always wins".[76] As he points out, litigation only reveals part of the overall enforcement picture, since the Commission, in its search for truth (if you will), may winnow down investigations during the administrative procedure, even if it only rarely gets credit for doing so. The problem here is that, while disinterested parties might be willing to believe that the Commission follows the instructions of its *superego,* one would still feel more secure if verification of its good behaviour came from an independent source. Easier said than done, certainly. It should also be recalled that the paper speaks only of cartel cases, apart from some pointed criticism of the CFI for its (lack of) examination of evidence in *GlaxoSmithKline*.[77] What one may make of the Commission's track record before the Courts in Article 102 cases is another matter. Given the recent (far from radical) shift in enforcement policy,[78] it is too soon to say whether the future will amount to a re-enactment of the past – though misgivings will be forgiven.

On the other hand, one can only agree with the author that the Commission's internal debates must remain confidential[79] – in contrast with what I hope (the "springing eternal" kind of hope) will develop one day into dissenting *judges'* opinions at the Court of Justice.[80]

In a penultimate section, fittingly, the theme of the "human rights" of companies is addressed.[81] When this subject is discussed, there may be a noisy elephant taking up most of the room: a company is not a human being, and it is only by an awkward analogy that the two may be compared. However, it would also probably be misleading to draw sharp distinctions between natural and legal persons because, even among natural persons, not all rights apply in a uniform manner. Equal treatment must be respected, but the way in which

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[76] I am borrowing, clearly, from the dissent of Justice Potter in *United States v. Von's Grocery Store,* 384 U.S. 270, 301 (1966) (referring to the infamous state of affairs in the 1960s under Section 7 of the Clayton Act).

[77] For Castillo de la Torre, the CFI's judgment is "an example of judges giving up their duty to make a determination on the facts". On the specific issue of the application of Article 101(3) to Glaxo's dual pricing scheme (as opposed to how Article 101(1) was applied), the Court of Justice was more sympathetic to the CFI's approach. See *GlaxoSmithKline,* cited above note 74.

[78] For a wide range of debate on the proper application of Article 102 TFEU, see Ehlermann and Marquis, eds., *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC,* Hart Publishing, 2008. There is a heaving mass of other recent literature. To cite a bare minimum of many thoughtful contributions, see Giorgio Monti, "Article 82 EC: What Future for the Effects-Based Approach?", 1 *Journal of European Competition Law and Practice* 2 (2010); Lorenzo Pace, ed., *European Competition Law: The Impact of the Commission's Guidance on Article 102,* Edward Elgar, 2011.

[79] It seems very difficult, and it is probably pointless, to compare the Commission with the FTC, where the dissenting opinions of Commissioners may be made public. These are two substantially different institutions.

[80] Only Valentine Korah seems to agree with me about this. See Korah, "Tetra Pak II: Lack of reasoning in Court's judgment, 18 *European Competition Law Review* 98 (1997).

[81] For a broader study of such issues without the specific focus on competition law, see Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection,* OUP, 2006.

respect for fundamental rights is enforced often and quite naturally depends on contextual factors, such as for example whether a given set of facts concerns protected or unprotected speech. As human rights law has some degree of built-in flexibility, it is not surprising that there is a kind of variable geometry that leaves room for the protection of legal persons. For its part, the Court of Justice has long recognized that legal persons enjoy the protection of fundamental rights, such as the right to privacy, which are an integral part of the general principles of "Union" law.[82] As Andreangeli has explained, for example, the European Court of Human Rights has accepted that corporate bodies may claim the protection of a variety of rights under the Convention, largely on the ground that such entities are an outlet for free association, and that they are a form of "private life" within the meaning of Article 8 ECHR, a conception which also seems consistent with notions of economic liberty and "free initiative".[83] With respect to economic liberty, one may assume that when legal persons are adversely affected by the acts of public authorities, the property rights of natural persons are implicated, directly or indirectly. There is therefore a need to balance rights such as these, and the importance of respect for due process, against society's interest in truth, punishment and deterrence.

However, Castillo de la Torre's point is another one, namely that those who decry the present administrative and appellate apparatus in the context of EU antitrust enforcement as violating the Convention[84] (and now also the Charter) sometimes gloss over the fact that in this area the European Court of Human Rights does not seem to insist – not always, anyway – on "rights overkill".

Ian Forrester produced another in a long series of eloquent reflections, this one with the expansive title: "A Bush in Need of Pruning: The Luxuriant Growth of *Light Judicial Review*". This paper should be read together with a companion piece published in the *European Law Review*.[85] Whereas the latter article features an elaborate critique of antitrust investigations by the European Commission, where procedural protections for undertakings are in Forrester's view inadequate and at odds with minimum fundamental rights criteria, in his "Bush in Need of Pruning" paper he examines the distinct issue of judicial deference to the "prosecutor". The paper is subtle, as Forrester recognizes that "light judicial review" is sometimes applied with remarkable rigor. However, he shows how light review has become a "creeping" concept and even a

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[82] See, e.g., Case 136/79, *National Panasonic (UK) Limited v Commission* [1980] ECR 2033, paras. 17–19.

[83] For a discussion of the entitlement of legal persons to fundamental rights protection, see, e.g., Arianna Andreangeli, *EU Competition Enforcement and Human Rights,* Edward Elgar, 2008, at pp. 15 et seq., with references to literature and to certain judgments of the ECtHR, such as *Niemitz* and *Société Colas Est*.

[84] One of the central provisions in the competition law context – Article 6 ECHR – is quoted above at note 33. (For further notes on the Convention, see above note 4.)

[85] Forrester, "Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures", 34 *European Law Review* 817 (2009).

mantra (with mechanical repetition in the judgments), and the paper underlines the risk that the exception of light review, if it stretched its bushy branches any further, could indeed displace the general rule whereby the European Courts "roll up their sleeves" and subject infringement decisions to searching, independent inquiry. It seems clear that, in Forrester's estimation, this inversion has already occurred.[86]

The paper is rich in scope, detail and personal insights from a wealth of litigation experience. No attempt will be made here to cover all of it. One may find in it stimulating discussions of, for example, national approaches to the sufficiency of evidence (including, in particular, *intime conviction* and equivalent notions), or the weight assigned to various types of evidence in the jurisprudence of the European Courts. Skipping over details and summing up simplistically, the paper sets forth a number of reasons why the European Courts can and should reverse the trend toward light touch review, which first appeared in the 1960s when the Commission used exemption decisions as a kind of regulatory "rulemaking" instrument, and which later spread outward so that it is triggered not only when the Commission makes complex economic assessments but also when it conducts complex *technical* assessments ("technical" being, potentially, quite an elastic word). Such doctrines thus extend past contexts, such as rulemaking or pure policy, where administrative discretion might be legitimate, to the specific determinations of a "prosecutor" whose findings determine the guilt or innocence of a particular undertaking. Moreover, as Forrester points out, the Commission's findings can have important legal consequences in subsequent national proceedings due to the primacy of EU law.

Reading this contribution, one recalls the way in which light judicial review by the European Courts is sometimes conceptualized, namely that it reflects the logic of constitutionalism, with the judiciary respecting the Executive's sphere of authority and expertise.[87] However, Forrester challenges this understanding, and emphasizes the need for vigilance by an independent arbiter. Part of the background to this need for control is, once again, the possibility that severe penalties will be imposed. The point is an important one; it is a reminder that constitutionalism does not end with the "horizontal" notion of

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[86] The general claim that judicial review by the European Courts is in need of fortification may also be seen as linked to Forrester's contention that Article 9 decisions under Regulation 1/2003 tend to result in the circumvention of judicial review. See Forrester, "Creating New Rules? Or Closing Easy Cases? Policy Consequences for Public Enforcement of Settlements under Article 9 of Regulation 1/2003, in Ehlermann and Marquis, eds., *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law,* Hart Publishing, 2010, at pp. 637 et seq.

[87] See above note 24 and accompanying text. The term "Executive" is used loosely here, and may tend to obscure the Commission's other roles, including, for example, its limited normative powers). On the other hand, the Commission is explicitly given a function of (*inter alia*) "execution". See Article 17(1) TEU.

the separation of powers[88] but also includes the "vertical" institution of fundamental rights protection. One cannot lightly trade off the individual right of effective legal protection in the name of inter-institutional courtesy. In the admittedly different context of the UN-mandated freezing of assets due to suspected links with terrorist activities, the ECJ implicitly rejected the proposition that its jurisdiction was bounded, under the circumstances, by a "political question" doctrine.[89] The strong affirmation of its authority and its duty to control the "political branch" reflects a thicker sense of constitutionalism that goes beyond mere horizontal balance and mutual respect among the institutions.[90]

A central legal argument in the paper concerns the scope of judicial review resulting from Articles 229 and 230 EC – which now take the form of Articles 261 and 263 TFEU. Forrester's claim is essentially that, contrary to common assumption, Article 229 EC gave the EU Courts unlimited jurisdiction as regards not just the amount of fines but also the material content of any decision by which fines were imposed. There is a strong textual argument, under Article 31 of Regulation 1/2003,[91] which supports Forrester's position on this point.[92] On the other hand, perhaps a skeptic would raise the question of whether in Article 31 of the Regulation the legislator in fact went beyond what

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[88] The term "separation of powers" is problematic in the context of the EU's institutional structure, not least because of the significant overlap in responsibilities and roles in certain areas of policy and lawmaking. As is well known, the ECJ has used the more subtle expression "inter-institutional balance", according to which each institution exercises its competences in a manner that is respectful of its sister institutions. This concept was primarily developed in the context of conflicts between the political institutions (see, e.g., Case 70/88, *Parliament v Council* [1990] ECR I-2041) and must therefore be transposed by implication for the purpose of addressing latent tensions between the political institutions and the "judicial branch". Further, according to Article 13(2) TEU, each institution must act, with regard to the others, in accordance with the principle of sincere cooperation. In that regard, see, e.g., Case 204/86, *Greece v Council* [1988] ECR 5323; Case C-65-93, *Parliament v Council* [1995] ECR I-660.

[89] Judicial abstention was recommended by the Commission in the oral hearing in *Kadi* on the basis of such a doctrine, and the suggestion was roundly repelled by Advocate General Maduro in paras. 33 et seq. of his Opinion of 16 January 2008. The ECJ followed the Advocate General on practically all material points. On the political question doctrine, see, *inter alia, Baker v. Carr,* 369 U.S. 186 (1962). In Continental traditions, somewhat similar discourses arise in relation to *actes de gouvernement*.

[90] Furthermore, as several Workshop participants pointed out (see, e.g., the paper of Heike Schweitzer), in some national legal orders judicial review of competition authorities encompasses "full merits review", i.e., a *de novo* standard, at least in certain kinds of cases. On this basis too, one may question whether, at the level of the EU, a "margin of appreciation" doctrine necessarily follows from the principle of separation of powers (or variants of it).

[91] In the context of merger control, see Article 16 of Regulation 139/2004.

[92] Forrester adds an argument based on a slight change of punctuation (i.e., a semi-colon exchanged for a full stop) when Regulation 1/2003 replaced Regulation 17/62. The implication would be that, prior to May of 2004 (the era of the semi-colon), the EU Courts had unlimited jurisdiction only with respect to the amount of a given fine. I am less inclined to think that the change of punctuation should be accorded much significance, and would conclude that the broader notion of unlimited jurisdiction applied even under Article 17 of Regulation 17/62. However, the matter would be only of historical interest, if any.

it was authorized to do by Article 229 EC. That provision simply provided that the Council had the power to adopt regulations granting the Court of Justice "unlimited jurisdiction in regard to the penalties provided for in such regulations".[93] Does this basic jurisdictional norm really allow the legislator to give the Court of Justice unlimited jurisdiction "to review *decisions whereby* the Commission has fixed a fine or periodic penalty payment" (emphasis added) as opposed to reviewing only the fine or payment as such? Perhaps an affirmative answer requires a teleological reading of Article 261 TFEU. Nevertheless, I am struck by the oddity of the proposition that *pleine juridiction* is strictly limited to the calculation and amount of a fine. Can the calculation of the fine be neatly divorced from the analysis and reasoning that led the finding of infringement, which led to the imposition of the fine?

The paper delivered by **John Ratliff** – entitled "Judicial Review in EC Competition Cases Before the European Courts: Avoiding *double renvoi*" – focuses in particular on judicial review by the General Court in cartel cases. The paper expresses both satisfaction at the General Court's general willingness to engage in close, careful scrutiny of the Commission's work and discontent in relation to particular areas where a greater degree of rigor is desired. There are some interstitial zones, Ratliff suggests, in which the enforcer and the supervisor each expect the other to exercise responsibility in ensuring adequate protection for undertakings, leading to a situation in which neither does so. This could be avoided, in Ratliff's view, if certain doctrines of procedure, evidence and vicarious liability, all of which tend to enhance the Commission's prosecutorial powers, were reconsidered.

The paper discusses the two principal modes of review by the General Court in cartel cases, i.e., the fairly strict review under Article 263 TFEU (ex-Article 230 EC) and the "unlimited jurisdiction" review under Article 261 TFEU (ex-Article 229 EC). With regard to review under Article 263, Ratliff praises the General Court's meticulous control of the Commission's decisions but points out that certain doctrinal devices may make the Commission's tasks too easy, for example because they result in a shift of the (evidential) burden of proof once the Commission has come forward with evidence of doubtful strength. It is implied that the General Court may be too quick to accept circumstantial and indirect evidence of collusion. There is also a hint of regret that evidence is rarely excluded on admissibility grounds, in contrast to customary procedure in common law jurisdictions.[94] However, Ratliff acknowl-

[93] Article 261 TFEU is no different ("with regard to" instead of "in regard to"), except for the important (but here irrelevant) addition of the European Parliament as co-legislator with the Council.

[94] Ratliff refers here to the well-established notion of "unfettered evaluation" of evidence by the EU Courts, which has been discussed by, among others, Bo Vesterdorf and Koen Lenaerts. Of course, one significant factor that distinguishes EU Court proceedings from legal action before common law courts is the impossibility in Luxembourg of a jury trial. The use of juries has undoubtedly contributed to the elaboration of complex admissibility rules for evidence before common law courts.

edges that not all evidence is given full weight but rather stands or falls on its credibility, consistency and relevance. Another point of concern relates to the "margin of appreciation" doctrine in cases involving complex economic or technical assessments. Ratliff notes with approval that this doctrine is subject to the pointed language used by the ECJ in *Tetra Laval,* and he argues that the Commission should be expected to defend its own (potentially self-serving) economic reasoning. Calling on the European Courts to press the Commission for adequate explanations, Ratliff plainly does not accept that a "manifest error" standard has any place in a conscientious review of complex economic assessments carried out by the enforcer. Such a permissive standard leads, in Ratliff's view, to the kind of paradoxical gap mentioned above.

With regard to the General Court's "unlimited" jurisdiction under Article 261 TFEU, Ratliff reviews several cases in which fines imposed by the Commission were subsequently reduced by the General Court. However, it is argued that the Commission still may be given too much discretion in certain instances. For example, Ratliff notes that the Commission is not held to a meaningful criterion of equal treatment in the sense of consistent fining practices across different cases. Also criticized, on proportionality grounds, is the quasi-automatic assessment of large fines against parent companies and corporate groups for the wrongs of subsidiaries. It is suggested that such discretion in favor of the Commission is hard to reconcile with the notion of unlimited jurisdiction. Here, then, is another gap.

Justin Coombs and co-author **Jorge Padilla** provided an essay on "The Use of Economic Evidence before the Courts of the European Union". Despite this title, the authors point out that the principles discussed in the paper can be applied in various contexts, including litigation before national courts, administrative procedures before national competition authorities and, presumably, proceedings under criminal law where relevant. The paper thus partly reflects a global discussion on the submission and treatment of economic evidence, especially by competition authorities, made prominent, for example, by DG Competition's Best Practices of early 2010,[95] a document currently under review. The purpose of Coombs and Padilla's contribution is to provide means by which economic evidence might be evaluated by decision-makers with little formal training in economics; if decision-makers have the means to harness such evidence, they will be less inclined to ignore it or fail to appreciate its significance in a given case. The authors are particularly concerned by scenarios in which a judge, given asymmetric information and faced with expert economic opinions that appear to be diametrically opposed, may be tempted to treat those opinions as canceling each other out, or that they

[95] See, e.g., Damien Neven and Miguel de la Mano, "Economics at DG Competition, 2009–2010", 37 *Review of Industrial Organization* 309, 330–332 (2010) (summarizing submissions received during the public consultation). The 2010 version of the Best Practices (likely to be revised in 2011) is available at: http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf.

will otherwise be discounted. As the authors point out, the complexity of economic evidence arises in many types of civil, criminal and administrative cases, and competition law is therefore not unique in this respect. On the other hand, the ubiquity of economics in this field of law underlines the need to get the economics right, and the need to give economic evidence a commensurate degree of serious attention and understanding.

With regard to the use of economists as expert witnesses, Coombs and Padilla observe that in some legal systems, rules of evidence have emerged to cope with the problem of the reliability of expert evidence in a situation of asymmetric information. Most prominently there are the generic principles announced by the US Supreme Court in *Daubert*.[96] Stated briefly, those principles consist of verifiability, "market testing" in peer-reviewed journals, tolerable margin of error, and acceptance within the relevant scientific community. The upshot of the US jurisprudence is that expert evidence must have indicia of reliability, and it must be relevant to the facts of the case before the trial court. There is some divergence between the approach outlined in *Daubert* and the doctrine of the unfettered evaluation of evidence by the EU Courts, but the US Federal Rules of Evidence are partly driven by the need for sufficiently reliable evidence in a legal system where juries are (very) often the responsible fact-finder, even in complex areas such as environmental litigation, patent disputes, insider trading, antitrust and many others. This is an obvious point to bear in mind when comparing the European and US approaches to evidence.

Coming, then, to the elements which may be used in order to ensure that economic evidence contributes meaningfully in competition law proceedings before decision makers with little formal training in economics, these boil down to the following:

– framing the right questions to be answered;
– using accepted theories and models (or explaining why it makes sense in a given case to adopt other theories or models, or why the state of the art is itself flawed);
– basing the evidence on appropriate assumptions; and
– supporting the conclusions drawn with adequate empirical evidence.

Each of those elements is discussed in further detail in the paper. Together, as the authors suggest, these elements provide a sound means for assessing expert evidence prepared or submitted by economists. But what is a court to do if, having assessed two opposing opinions according to the above criteria, it still finds each to be equally plausible and equally relevant? In a case of ambiguous evidence, the authors would share a lawyer's instincts: one must revert to the principle of the (legal) burden of proof, which remains always, or nearly always, with the enforcer.

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[96] *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993).

To be noted finally with regard to this paper is that the authors in the course of their discussion also touch on an important underlying issue: in the ever-evolving world of competition law, what is the proper role of an economist?[97] Coombs and Padilla do not wade far out into that debate, but discreetly they do leave some light prints on the strand.

B. *Discussion* (roundtables of Session One and Session Two combined)

For the sake of convenience, the first roundtable discussion was postponed and combined with the second. As usual, I refrain from repeating the points made during the presentations themselves and merely attempt to highlight some, and by no means all, of the comments made during the roundtable.[98]

The general theme of Panels I and II was the "Standard of proof, burden of proof and evaluation of evidence in antitrust and merger cases". Panel I focused on these subjects with an emphasis on the Commission's perspective, while Panel II emphasized the perspective of the EU Courts. (Panels III and IV transpose many of the same themes to the context of national proceedings, and should likewise be considered in light of the introductory presentations.) The term "evaluation of evidence" was to be understood broadly and includes the *scope, intensity and limits of review* applied by the Courts to the Commission's findings in competition cases.

As the first Chair of the Workshop, Heike Schweitzer raised several issues to be considered by the group. To begin with, should a more specific standard of proof be articulated by the EU Courts? This question reflected, first, the lingering uncertainty about where the thresholds lay in terms of the sufficiency of evidence, and – by the same token – second, what appear to be divergent views about whether we should be content with an *intime conviction* approach.[99] Schweitzer then asked whether, for purposes of the standard of judicial review, merger cases should be differentiated from cases under Articles 101 and 102, and/or whether cases that involve fines should be distinguished from cases that don't. Of relevance in that regard, as discussed earlier, is the joint reading of Articles 261 and 263 TFEU (formerly, Articles 229 and 230

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[97] One might ask, for example: do lawyers (and politicians and diplomats) have an exclusive right to weigh in on debates about the normative content of competition laws? Such questions, related in some degree to conceptions of a fact/value dichotomy, have been considered in some detail in past editions of the Workshop.

[98] To cite just one example of what I omit here, much discussion was devoted to the treatment of economic evidence by the EU Courts (see especially the presentations of Damien Neven, Simon Bishop and Justin Coombs, and the subsequent remarks of Philip Lowe and Judge Barling). I leave aside that significant issue and others.

[99] See the discussion above at pp. xliii–xliv.

EC).[100] A third question, drawing on Judge Forwood's presentation, related to the admissibility before the General Court of new evidence in favor of the undertakings concerned, that is to say, facts or argumentation not submitted during the administrative procedure and appearing for the first time in an action for annulment. The admissibility of such evidence, either by the undertakings concerned, or by third parties, or by the General Court itself, is partly determined by, and partly determines, the standard of review. To some extent it is a question of judicial economy, but the admissibility of such evidence must also take into account the fundamental presumption of innocence. Certainly, if the evidence is genuinely new, that is, if the failure to present the evidence during the administrative procedure is excusable, then the presumption of innocence militates in favor of its admissibility on appeal. To the extent that the new evidence is fully debated before the General Court, this would arguably imply a *de novo* standard as regards the evidence concerned. The alternative – excluding such evidence – seems unacceptable. However, the question may arise whether the presumption of innocence imposes a positive obligation on the General Court itself to step outside the four corners of the controversy and to consider exculpatory evidence on its own motion. One would think that, even if there are precedents in which the Courts have carried out their own independent analysis or consultations regarding the material facts (most prominently in the *Wood Pulp* case[101]), absent extraordinary circumstances this should be unnecessary. In a fuller and more precise discussion of matters relating to the Courts' own evidence-gathering, Fernando Castillo de la Torre notes in his paper that the ECJ accords broad discretion to the General Court with respect to whether to consider new pieces of evidence.[102]

Another question raised by Schweitzer, following remarks made by Bruno Lasserre and Philip Lowe, was whether the heterogeneity of procedures in the 27 Member States entails a need at European level to establish some harmonizing principles. As an example, Articles 5 and 3 of Regulation 1/2003 not only empower but oblige national authorities to apply Articles 101 and 102 TFEU in certain circumstances. Yet, according to Recital 5 of the Regulation, national rules on the standard of proof are to be preserved, subject to the principles of equivalence and effectiveness of EU law. Is the latter principle of procedural autonomy[103] sustainable in light of the (qualified) obligation to

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[100] See above pp. li–lii.

[101] A more prosaic example of new evidence would be the hearing of witnesses by the Courts during the oral proceedings, which occurs from time to time. See, e.g., Case 141/94, *Thyssen Stahl v Commission* [1999] ECR II-347: Case T-148/94, *Preussen v Commission* [1999] ECR II-613. In other contexts, particularly preliminary reference cases of "constitutional" importance, the ECJ has a taken very active role indeed, sending questionnaires to Member States and the Commission to solicit further legal argumentation, and re-opening the oral procedure. See, e.g., Case C-2/91, *Wolf W. Meng* [1993] ECR I-5751 (Report for the Hearing); Case C-110/05, *Commission v Italy* [2009] ECR I-519.

[102] Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases", this Volume, pp. 319 et seq., at pp. 336–338, with further references.

[103] On the notion of national procedural autonomy, see above note 65.

apply the substantive rules? As Judge Ó Caoimh notes in his paper, the principle of effectiveness operates, in theory, as a backstop against divergent outcomes, but one may doubt whether that principle is sufficient. The "effectiveness" of the principle of effectiveness may be largely dependent on the preliminary reference procedure (a procedure which, despite its successes, may not be entirely adequate[104] to ensure coherent judicial cooperation), but could *ex ante* rules not provide added value without being too heavy-handed? Other issues, in addition to the foregoing questions, were touched on by the participants as the roundtable progressed.

Several participants commented on the standard of proof issue. Doubts remain about what the standard is, and what it should be. If one begins from the premise that the EU Courts currently embrace the Continental concept of *intime conviction* in infringement cases, then it is pertinent to ask whether a sufficient case has been made to abandon that approach and to adopt the habit more familiar to common lawyers of specifying a standard such as the "balance of probabilities".[105] Perhaps a judge in Luxembourg would have reason to be skeptical about this. If the purpose of adopting the common law approach is to achieve greater transparency and certainty,[106] partly due to the need for greater uniformity in a decentralized competition law system (see remarks below on harmonization), then the judge would immediately note that the neat divisions between the standards of "balance of probabilities", "clear and convincing evidence" and "beyond reasonable doubt" are deceptive. Most of the participants that addressed the issue seemed to agree that, in the context of Article 101 and 102 cases, the standard of proof does not reach the level of "beyond reasonable doubt" (and some thought it *should* not, either[107]). Yet they also seemed to agree that a mere preponderance of the evidence ("more likely than not") was insufficient, which would imply some indeterminate in-between standard.[108] From that perspective, the judge might

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[104] See Bruno Lasserre, "The European Competition System in Context", this Volume, pp. 61 et seq.

[105] At least on one reading, the "balance of probabilities" standard, or some variant of it, has already been adopted by the Courts in the context of merger control. See, e.g., Aindrias Ó Caoimh, "Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases: Perspective of the Court of Justice of the European Union", this Volume, pp. 271 et seq., at p. 281.

[106] See, e.g., Paul Craig, *EU Administrative Law,* OUP, 2006, pp. 470–471 ("The Community courts should be as clear as possible as to the standard of proof that is required of the initial decision-maker [. . .] Legal certainty for applicants and the Commission demands this.").

[107] See, e.g., the oral remarks of Jacques Steenbergen at pp. 50–51. Steenbergen points out that, in relation to cartel cases, adopting the criminal standard in an administrative procedure or civil procedure would unwisely risk prejudging criminal prosecutions.

[108] A brave attempt was made by Luis Ortiz Blanco, however, to construct a series of gradations according to the nature of the case. See both his paper ("Standards of Proof and Personal Conviction in EU Antitrust and Merger Control Procedures", this Volume, pp. 175 et seq.) and his oral presentation at pp. 18–20.

wonder whether the abandonment of *intime conviction* would amount to trading one indeterminacy for another.[109]

The concept of the standard of proof may thus be more brittle than it seems, and if it is wise for the EU Courts to tailor evidential requirements in order to ensure an "enquiry meet for the case", then, in the end, what matters is that the evidence must leave *little room for doubt*. In order to keep subjectivity at bay, two factors should weigh heavily in evaluating the sufficiency of the evidence. First, a decision-maker should take into account how susceptible the evidence is to errors, for example due to possible alternative causality in relation to past events, or because an allegation hinges on future events. Second, as Dennis Carlton noted in his remarks, what are the consequences of such an error?[110] Consequences should be considered both as they relate to the undertaking concerned (in light of fundamental rights) and, from a utilitarian perspective, as they relate to broader social costs (which might arise from perverse signals sent to the wider economy and from enforcement and litigation costs). If this consideration of costs seems to be an intimidating exercise, it may be simplified to some extent by adopting a rigorous approach to the sufficiency of the evidence in all types of cases (Article 101 cases, Article 102 cases and merger cases) and by relaxing that approach only in specifically justified scenarios where, for example, proof may be based on rebuttable inferences and triangulation of facts. A drawback might be that *too much* rigor could lead to type II errors, and raise the risk of a "defendant always wins" world; but that does not appear to be an *inevitable* consequence of requiring objectively convincing evidence before a fact or proposition is taken to be established in law.[111]

A related issue that the participants did not discuss was the sufficiency of evidence adduced not by the Commission but by an applicant seeking annulment of an infringement or merger decision. In this regard, a rigorous approach to evidence should not be suspended merely because the proponent of the evidence is the undertaking concerned. However, in infringement cases the Courts are obliged by the principle of the presumption of innocence to

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[109] Common law-trained jurists may feel quite comfortable with the classic standards of proof. However, the picture is not altogether clear. Judge Barling, for example, referred in his oral remarks to dicta in the judgments of the Competition Appeal Tribunal suggesting that while the formal standard was a "balance of probabilities", the standard actually applied approaches a criminal standard. He expressed doubts about whether such dicta were accurate, but their existence serves to illustrate the ambiguities that can arise in relation to where the standard of proof really lies.

[110] Some European lawyers, and others no doubt, would take issue with Carlton's casual remark that type I errors are more damaging than type II errors. The source of this supposition, as will be recalled from old but still relevant debates in the US (where Frank Easterbrook was one of the main protagonists), is the conviction that markets can correct false negatives, whereas this corrective mechanism is not available for false positives.

[111] Ideally, the likelihood of error and the magnitude of consequences should already be taken into account in the design of the substantive rules of liability. It does not follow, though, that well-designed substantive rules ensure that adequate attention will be given to those issues when the sufficiency of the evidence is evaluated.

respect the principle of *in dubio pro reo,* which may influence the way exculpatory evidence, such as efficiency arguments or objective justification arguments, is regarded. A perfectly symmetrical burden of proof would seem incompatible with these principles.

In the context of administrative enforcement, the standard of proof and the standard of judicial review are distinct in the sense that they pertain to different questions (e.g., the question of whether a reviewing court can substitute its own views for that of the administrative authority is independent of the sufficiency of the evidence that must be obtained by the enforcer), but they are also related in important ways. For example, a rigorous standard of proof (if it is to serve any purpose) logically presupposes a willingness of courts to look rather closely at what is contained (and/or not contained) in the decision taken by the administrative authority. As Schweitzer pointed out, the matter of what standards of review should apply in competition cases before the EU Courts is another area of some debate. The issue is tied, naturally, to the concept of a zone of deference in favor of the authority, with its presumed economic expertise and generally larger reservoir of time and human resources compared to the Courts.

Most, though not all, of the participants appeared to agree that it is neither the General Court's style nor its proper role to sit passively by and limit itself to light supervision of the enforcer. Leaving individual cases aside, where the General Court may have been too timid, in general the intensity of its review – even if under Article 263 TFEU its task is to carry out a "control of legality" – was described by one speaker as "very thorough". Moreover, while much discussion related to where distinctions might be drawn in the level of scrutiny (infringement cases versus merger cases, cases that do or do not involve fines, Article 101 cases versus Article 102 cases), there did not seem to be a consensus according to which, for example, judicial deference is more appropriate in relation to a given category of cases.[112] Some of the legal practitioners seemed to support comprehensive judicial review across the board, which does not seem unreasonable in a system with only very limited adversarial elements. An important argument that underscores the value of strict scrutiny would be the persistence of weaknesses in administrative procedures before the Commission which may tilt the playing field too much. Some of these weaknesses can be traced to design features embedded in the structure of enforcement.[113] I will

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[112] For example, see the remarks of Justin Coombs, who pointed out that the arguments in favor of categorizing different kinds of cases are sometimes contradictory. The risk of categorization is to end up with overinclusive and underinclusive approaches to the intensity of review.

[113] *Cf.,* for example, Bo Vesterdorf, "Certain Reflections on Recent Judgments Reviewing Commission Merger Control Decisions", in Mark Hoskins and William Robinson, eds., *A True European. Essays for Judge David Edward,* Hart Publishing, 2003, Chapter 10, at pp. 118 and 143 (enhanced intensity of review in merger cases was in part a response to criticism relating to the Commission's integrated institutional design).

skip over much of that delightful debate, destined to endure, certainly; but two issues related to this discussion of judicial review should be mentioned here.[114]

First, with regard to the issue of the need for a *margin of appreciation,* whereby the Commission is bestowed with presumptive authority in matters of complex economic or technical analysis, what seems striking is that many Workshop participants questioned that doctrine, and one sullen speaker even called it "depressing"; no participant (and at any rate, no one external to the Commission) came forward with any meaningful defense of the doctrine. One speaker noted that he had "no problem" with it, but no one made a specific case for maintaining it.[115] Perhaps the closest thing to a defense of the margin of appreciation doctrine was put forward by Eric Gippini-Fournier. The essence of the argument was that the term "margin of appreciation" is falsely maligned because that doctrine obscures the true picture, wherein the General Court reviews the Commission's decisions with punctilious verve. To the extent that this degree of scrutiny is indeed applied (which may vary in certain cases – I've already alluded to Article 102 cases), this would seem to be a reason not to praise the doctrine but to bury it – or at least to limit its rhetorical use to the specific situations in which the Courts do in fact rely on the objectively superior competence of the enforcer as a matter of institutional choice.

In short, since the idea of a margin of appreciation in matters of complex analysis does not seem to have much descriptive or much normative value, the doctrine should be abandoned. But in doing so, some space for deference should nevertheless be reserved for the Commission in limited situations. This would have nothing to do with whether an economic argument is complex; it would relate instead to scenarios in which it is clear that the EU Courts are poorly placed to intervene. Broad matters of policy, for example, may – within the limits of the law, obviously – be a proper area for a margin of discretion.

The second issue is whether the Treaty must be read as implying a higher standard of judicial review *where fines are concerned* and a more deferential standard where no fines are imposed. Such a difference could be inferred when reading Article 261 TFEU in conjunction with Article 263 TFEU. Not much was said in this regard during the roundtable, and the reader may wish to refer

[114] For a thorough discussion of the thesis that the system of antitrust investigations before the Commission is dysfunctional and ideally would require a profound overhaul, see Jim Venit's paper ("Human All Too Human"), this Volume, pp. 191 et seq. The paper is summarized above. On this debate, see also, in the roundtable following Panels 1 and 2, the oral remarks of Venit and those of Ian Forrester, Mario Siragusa, Philip Lowe and Claus Ehlermann.

[115] As noted more than once already, the doctrine has been presented – not altogether convincingly – as a natural expression of the separation of powers or, more precisely, of inter-institutional balance. See above pp. **XX-XX**. If the doctrine does indeed flow from the "balance" implicit in the Treaties, then obviously the ECJ would not be free to discard it or unduly restrict its scope. However, it is important to recall that there is no question of an inter-institutional balance with respect to fines, as "balance" is excluded by the principle of *pleine juridiction* under Article 261 TFEU (and Article 31 of Regulation 1/2003). *Cf.* the remarks of Claus Ehlermann at p. 60. *Cf.* also Nicholas Forwood, "The Commission's 'More Economic Approach'", this Volume, pp. 255 et seq., at p. 268.

to the discussion of the issue earlier in this chapter.[116] One might query, however, whether that joint reading, and the negative inference to be drawn from the fact that Article 263 does not contain the term "unlimited jurisdiction", might lead to an exaggerated interpretation. In that regard it is recalled, as Bruno Lasserre points out in his paper, that an intense review is in fact consistent with the classic French system of administrative review (i.e., the source of inspiration for the grounds for annulment under Article 263). This suggests that the limitations implied by Article 263 should be understood as relating not to the intensity of review but only the *scope* of review. Once it is determined that the applicant has presented an appeal linked to one of the proper bases of jurisdiction (or another basis drawn from the general principles of EU law), then it has plenary jurisdiction to review the contested decision.

Mario Siragusa and Jochen Burrichter and others addressed the question of the need for *harmonization of procedures* in light of the fragmentation seen in Europe, and provided rather different answers. Siragusa appeared to support a view consistent with suggestions made by Lasserre, Lowe and Judge Ó Caoimh according to which *some* effort will have to be made in the future to ensure the consistent and coherent application of the EU competition rules in the various Member States and across various languages.[117] An example cited by Siragusa was the need for common principles regarding the rules of evidence. This comes back to the notion that divergent procedural rules raise the risk of divergent outcomes, which one would think should be unacceptable in the European legal order, even if perfection will never be attained. In this light, Siragusa suggests that it is time to move beyond the principle of "unfettered evaluation" of evidence by the EU Courts. This seems to cast the ECJ as the key source of harmonized rules, but one suspects that this would take many years and leave a number of gaps. A more straightforward solution, or a solution to pursue in parallel with judge-made principles, would be minimum harmonization at the level of the EU. Recent experience with the stalled efforts to legislate in the area of private damages actions demonstrates the controversial nature of such an initiative, but it is not a question of whether it will occur; it is a question of how invasive the European rules will be, and to what extent they will displace cherished principles of national law.

Burrichter was more skeptical about harmonization. He pointed out, first of all, that the distinct features of some national systems may impede harmonization initiatives, citing the example of Germany where judicial review of administrative fines is based on rules laid down not in administrative law but in the German code of criminal procedure. It should be pointed out, though, that harmonization need not be a blunt instrument. Harmonization measures

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[116] See also, e.g., Arjen Meij, "Scope of Judicial Review and Sanctions in competition cases", cited above note 17.

[117] Siragusa related the need for consistency to the issue of the standard of proof, but he also pointed out that the decentralized application of the EU rules provided yet another reason to doubt the propriety of a "margin of appreciation" doctrine.

are often replete with provisions that allow for some degree of variable geometry. As for the example given, it is common in harmonizing directives to allow Member States to provide for higher levels of protection for individuals if they so choose. This would presumably be the case where challenges brought against administrative fines may claim the full range of protection under the law of criminal procedure.

Burrichter then raised another objection, this one commonly debated in discussions of harmonization. According to this view, harmonization by its very nature restricts or eliminates systems competition, and thus experimentation and innovation in what would otherwise be 27 vibrant laboratories across the EU. In such a system, superior "lab results" inspire other jurisdictions (in particular, their legislatures) to approximate those results spontaneously. This market-based solution can be expected to produce better outcomes than the top-down imposition of harmonized rules. Although this model has strong theoretical appeal, it is not clear that it works well in practice. First of all, spontaneous convergence toward efficient solutions is made difficult by path dependencies, parochialism, and the relatively short time horizons of national lawmaker-politicians. At any rate, such processes take significant amounts of time, which implies a tradeoff that sacrifices more equal treatment in the short term for a possibility that in the long term more enlightened approaches will emerge thanks to experimentation, benchmarking and emulation. Second, one should be careful about assuming that harmonization implies a purely centralized form of rulemaking. It is true that the Commission is a centralized (and centralizing) institution, but overall it may be argued that there is room in the EU's legislative process for significant input from the Member States. As suggested above, it is doubtful that harmonization aimed at developing a nucleus of basic procedural rules would result in a one-size-fits-all model. Some space may be left for experimentation, and harmonization is indeed typically an iterative process that allows for periodic reassessment.

3. Session Three: *National Competition Authorities: Standard of Proof, Burden of Proof and Evaluation of Evidence in Antitrust and Merger Cases*

A. *Written contributions* (Heimler, Kalbfleisch, Steenbergen, Rosch, Allendesalazar & P. Martínez Lage, Siragusa, Rill & Lederman, Carlton)

While most of the discussion about economics at the Workshop centered on its role and the ability of judges to digest it, **Alberto Heimler** introduced a more substantive discussion of economic analysis in his contribution, "The Legal Significance of Economic Evidence in Antitrust Cases: Some Comments Based on the Italian Experience". The purpose of the paper is to demonstrate how economic theory can be used as a benchmark for the critical evaluation of antitrust analysis. Such an exercise can help to pinpoint weaknesses of past decisions with a view toward improving the analysis to be performed in future cases. One theme that seems to guide the paper is that there is still room, under EU law and under the law of the Member States, for more trimming back on *per se* rules of liability. His examples do not include minimum resale price maintenance but certain kinds of horizontal information exchanges and the application by a dominant firm of predatory prices. Another topic addressed in the paper is the role and effectiveness of the "significant impediment of effective competition" test in the field of merger control.

Following an introduction, in the second section of his essay Heimler provides a primer on the economics of horizontal collusive equilibria, and recalls why basic antitrust law distinguishes between cartels and mere conscious parallelism despite their similar inefficient effects. He then discusses the law regarding the direct or indirect exchange by competitors of historical or existing prices (as opposed to horizontal coordination as to future prices).[118] To illustrate the point that not all information exchanges necessarily harm consumers,[119] he discusses an Italian case that arose in the car insurance industry, a scenario with some hub and spoke features.[120] While the Italian Antitrust

[118] With regard to horizontal information exchanges, a good deal of guidance may be found in the Commission's revised Guidelines on Horizontal Cooperation Agreements, 2011 OJ C11/1, paras. 55–110.

[119] The Guidelines (cited previous footnote) explicitly recognize that the exchange of information can be pro-competitive, for example where used for benchmarking. See *ibid.,* para. 57. In more detail, see paras. 95–100.

[120] On this case, and on its links with the *Manfredi* case, see also Michele Carpagnano, "Private Enforcement of Competition Law Arrives in Italy", 3(1) *The Competition Law*

Authority might understandably have been concerned by the extensive degree of horizontal cooperation in this case, Heimler would have required more robust evidence of likely harm. In this regard he underlines the large number of insurance companies in the market and the homogeneity of the products (which may imply a strong temptation to compete on price, all else equal) and he notes that there was apparently no credible system of reprisals if a company adopted an aggressive pricing strategy. Furthermore, it seems that prices on the Italian market, although much higher than in other Member States, varied significantly. Heimler points out that in circumstances such as these (and in particular, where future prices are not discussed), an information exchange can in fact facilitate new entry by reducing information costs. Other cases decided by the European Commission and the Norwegian competition authority are also mentioned as examples where the approach to the evidence could have been more thorough. In particular, Heimler would insist on evidence of price convergence, and he emphasizes the number *five* as being a rule-of-thumb threshold for the number of would-be cartelists, above which a collusive equilibrium becomes difficult to achieve or sustain.

The discussion of predatory pricing is a familiar one that may be summarized briefly here. The premise underlying the paper in this regard is that, if a dominant firm charges prices below its own costs, then regardless of the short-term exclusionary effects on competitors, consumers will likely be happy unless this increase in static happiness is then jeopardized by factors that suggest the firm will be insulated in the longer term against competitive pressure, e.g., because of reputational effects or other barriers to entry or re-entry. The point put forward is that the EU Courts should be more careful in condemning dominant firms for unfairly low prices because not all predatory pricing cases are the same. In some scenarios there may be evidence indicating that the dominant firm will likely fail to offset the short-term sacrifice with sufficient long-term gain. In that respect, Heimler sees discouraging signs in the jurisprudence but also finds rays of hope in the Commission's Guidance Paper on abusive exclusionary conduct by dominant undertakings, and in the national practice in his country.[121]

On the EU's "significant impediment" test in merger control, Heimler reaffirms his long-held doubts about whether it adds any value to the old dominant test,[122] but he adds some further observations. The point of departure is

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Review 47 (2006); Gian Antonio Benacchio and Michele Carpagnano, *L'azione di risarcimento del danno per violazione delle regole comunitarie sulla concorrenza,* Quaderni del Dipartimento No. 67, Università degli studi di Trento, 2007, chapter II.

[121] 2009 OJ C45/7.

[122] On this subject, see also Nick Levy, "The EU's SIEC Test Five Years On: Has it Made a Difference?", 6 *European Competition Journal* 211 (2010). In an extended analysis, Levy points out that, while the SIEC test was initially regarded by some as an open door to more aggressive intervention by the Commission, the trend in merger control has in some ways been toward less intervention (even if other factors besides the introduction of the SIEC test may have contributed to this, including institutional reforms and in general a stron-

that the Court of First Instance introduced what he sees as too rigid of a test in relation to coordinated effects when it decided the *Airtours* case in 2002.[123] The well-known criteria under *Airtours* are: an oligopolistic market structure with transparency sufficient to sustain a common understanding of the terms of coordination and sufficient to allow for multilateral (or, in the case of a duopoly, bilateral) surveillance; cohesion by virtue of credible punishment to deter potential deserters; and sustainability in the sense that outsiders (i.e., current competitors, future competitors and customers) must be unlikely to find ways to frustrate the coordinated behavior.[124] According to Heimler, these criteria are "very difficult, if not impossible to satisfy", and he refers to what he regards as a more flexible approach to coordinated effects in the United States. His point appears to be that, whereas in the United States the Agencies can rely on a coordinated effects theory to challenge the acquisition of a maverick firm, in the EU "the 2004 Merger Regulation does not allow the SIEC test to be used to prohibit a merger giving rise to coordinated effects (e.g., through elimination of a maverick) if it would not create or strengthen a collective dominant position".[125] This conclusion follows, he says, from Recital 25 of the Merger Regulation, which stipulates that, where a merger does not create or reinforce a dominant position (by which, undoubtedly, both unilateral and collective dominance are intended), the notion of a "significant impediment" should only be understood as applying to the anti-competitive effects of a merger "resulting from the non-coordinated behaviour" of non-dominant undertakings. This would appear to stand in the way of a relaxation of the strict *Airtours* criteria so that mergers involving the elimination of a maverick but falling short of those criteria can be addressed more adequately.

Recital 25, which is hardly the epitome of clear drafting, does indeed purport to limit intervention in "no-dominance" cases to scenarios of unilateral effects in non-collusive oligopolies. Perhaps the response to this difficulty is that, although the elimination of a maverick can potentially increase the

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ger commitment to a more effects-based approach with less emphasis on market shares and concentration levels). Levy confirms that the Commission has not so far prohibited a merger in a true gap case. However, the overall picture that emerges is that the SIEC test has had at least some marginal impact. Reviewing a number of horizontal and non-horizontal mergers investigated by the Commission, Levy shows that the SIEC test has figured prominently in some cases and *may* have been decisive in at least two cases (approvals conditioned on remedies in *BASF/CIBA,* a horizontal case, and *E.ON/MOL,* a vertical case), although there is room for doubt since alternative, dominance-based theories might have been plausible. See *ibid,* pp. 237–254. A separate issue to be considered over time is how national tests modeled on the SIEC test are interpreted and applied.

[123] Case T-342/99, *Airtours plc v Commission,* paras. 59–62.

[124] See also Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, paras. 119–126 (essentially endorsing but also refining the *Airtours* criteria and specifying in para. 125 that "it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination").

[125] Heimler, this Volume, page 530.

likelihood or effectiveness of coordinated effects, it can also lead to unilateral effects incompatible with the internal market. One might infer from the Commission's Guidelines on the assessment of horizontal mergers[126] that what matters in unilateral effects cases is the elimination of an important source of competitive pressure, and that the elimination of an aggressive rival with products reasonably substitutable for those of the acquiring firm (or the elimination of an upstart innovator with a product in the pipeline that threatens to render the products of the acquirer uncompetitive or obsolete) in an oligopoly where the products of other rivals are more differentiated may well result in a significant impediment of effective competition, even where coordination between the remaining post-merger oligopoly is unlikely.[127] There does seem to be some evidence in the Commission's decisional practice suggesting that such scenarios are possible;[128] assuming this is correct, one may conclude that Recital 25 is less problematic than it might appear to be. As for the United States, while the Agencies do point to the possible coordinated effects that may arise from the acquisition of a maverick,[129] the new version of their Horizontal Merger Guidelines is clearer than the 1992 (1997) version with regard to the anticompetitive effects of the elimination of a maverick firm. The discussion of mavericks now appears not only in the section on coordinated effects but also in a more general section that appears to have a broader application, and thus does not seem to be limited to coordinated effects scenarios.[130] Admittedly, the use of the word "maverick" in the absence of coordination is quite awkward.

Pieter Kalbfleisch submitted a paper entitled "Standard of Proof, Burden of Proof and Evaluation of Evidence in Antitrust and Merger Cases: A Perspective of the Netherlands Competition Authority". This paper may be taken to illustrate the point that, where a competition enforcement regime is embedded within a country's administrative law system (in this case, the

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[126] 2004 OJ C31/5.

[127] See *ibid.,* paras. 25, 28 and 37–38. The Commission does not explicitly use the term "maverick" in its discussion of "non-coordinated" effects and does so only later, in para. 42, when discussing coordinated effects. This may be explained by the apparent anomaly of using an expression like "maverick" (i.e., a rogue, one who refuses to conform) when competitors in a market are not coordinating their behavior.

[128] See Giorgio Monti, "The New Substantive Test in the EC Merger Regulation – Bridging the Gap between Economics and the Law?", 10 *Cambridge Yearbook of European Legal Studies* 263 (2008), discussing the Commission's decision of 26 April 2006 in Case M.3916, *T-Mobile Austria/tele.ring,* where the focus was plainly on unilateral effects – even if the Commission did add a brief coordinated effects story for good measure. *Cf.* Levy, "The SIEC Test Five Years On", cited above note 122, at pp. 247–248 (discussing same case but noting that in an older case, *France Télécom/Orange,* the Commission had applied a similar analysis under the dominance test).

[129] See DOJ and FTC, Horizontal Merger Guidelines (2010 version), § 7.1 *in fine*. The 2010 Guidelines are available at http://ftc.gov/os/2010/08/100819hmg.pdf.

[130] See *ibid.,* § 2.1.5. Unhelpfully, the 1992 (1997) version did not contain a section comparable to the latter section. In relation to anticompetitive effects, the elimination of mavericks was thus discussed only in § 2.12 of that version, a passage devoted to coordinated effects.

Netherlands), this does not necessarily imply that the administrative authority enjoys wide zones of discretion. Kalbfleisch highlights several cases in which the Dutch courts have placed the decisions of the competition enforcer (the NMa) under a microscope and either annulled them or at least reduced the amount of the fine originally imposed.

The paper begins with a discussion of the rules of evidence in the Dutch competition system, which are comparable to the European system insofar as there are no formal rules as such (unfettered evaluation of evidence) but only the outer boundaries of admissible evidence as determined by the law of fundamental rights (and in particular by the European Convention on Human Rights). Here an interesting case is recounted concerning the use of evidence obtained laterally, and controversially, from the Dutch Public Prosecutor in a separate criminal investigation concerning bribery.

Kalbfleisch also discusses the burden of proof, the standard of proof and the standard of judicial review in competition cases, as interpreted and applied by the Dutch courts. Overall, there is a significant difference of views between the NMa and the courts with respect to the rigor with which the courts should review the NMa's fact-finding and appraisals. Several Dutch cases are summarized, and references are made to *T-Mobile Netherlands,*[131] a well-known concerted practices case that was referred by the Dutch appellate court to the ECJ for clarification on a number of points of law, although in some ways clarification was not the result.[132] Among other interesting issues raised in this case, the questions submitted to the ECJ reflect a degree of reluctance, on the part of the Dutch court, to accept procedural devices adopted by the European Courts which tend to facilitate the task of enforcers seeking to establish liability under the rules on restrictive practices on the basis of indirect evidence. The judgment of the ECJ in that case serves both to answer and to raise questions about the interplay between primacy, national procedural autonomy, and the notion of procedural consequences linked inextricably to substantive concepts.

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[131] Case C8/08, *T-Mobile Netherlands and others v Raad van bestuur van de Nederlandse Mededingsautoriteit* [2009] ECR I-4529.

[132] Consider *ibid.,* paras. 29 and 31 and *cf.* the discussion in Damien Chalmers, Gareth Davies and Giorgio Monti, *European Union Law,* 2nd edition, Cambridge University Press, 2010, pp. 986-987 (citing Odudu, 2008). *Cf.* also the Opinion of Advocate General Trstenjak in Cases C-501/06 P etc., *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, paras. 89–93. As an aside, in relation to the latter discussion, *quaere* whether the notion of an "inchoate offence" fits the concept of restrictions by object. In some jurisdictions the idea of "incipient" violations has emerged, in particular with regard to invitations to collude. However, absent additional facts, a mere unilateral invitation to collude – even if the unambiguous object of the invitation is to appreciably restrict competition – falls outside the scope of Article 101 TFEU. In short, the reason why the notion of an inchoate offence should be handled with care is that unless it is properly qualified it does not describe agreements, practices or decisions whose object is to restrict competition. Since Article 101(1) itself already refers to restrictions by object, one could say that what is inchoate is not the offence but the restriction of competition. In that light, an inchoate *offence* risks being seen as a kind of "incipient incipiency".

To take one point, among others, where the paper raises questions about whether the Dutch courts have interpreted legal principles consistently with the interpretations of the European Courts, there has been a tendency in the Netherlands to interpret the notion of a "restriction by object" in quite narrow terms, so that ironically the NMa is required, according to Kalbfleisch, to travel great lengths down the road to proving anticompetitive effects, at least where the circumstances of the case do not involve flagrant collusion. Perhaps this tendency could be traced to the rather curious language of the ECJ, dating from the 1960s, according to which an agreement must be considered in its proper legal and economic context before it can be regarded as restricting competition "by object". The Dutch experience may suggest that national courts are in need of clearer guidance about how far the "object" inquiry should go. It is questionable whether paragraph 31 of *T-Mobile Netherlands* can be said to provide adequate practical guidance in that regard.[133] However, it does appear to support the claim made in the paper that the enforcer needs more flexibility than it has traditionally been granted.

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[133] Paragraph 31 is quoted in the paper, and it refers to "the potential to have a negative impact on competition". Is the threshold inquiry really so low as that? In paragraph 31, the Court relies on point 46 of the Opinion of Advocate General Kokott, who in turn cites paragraph 21 of the Commission's Guidelines on the application of Article 81(3) EC. It is submitted that paragraph 21 would imply a more careful and correct approach to the concept of a restriction by object than that which appears in paragraph 31 of the ECJ's judgment. As the Commission states, with regard to restrictions by object: "These are restrictions which in light of the objectives pursued by the Community competition rules have *such a high potential of negative effects* on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. *This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects* on the market and to jeopardise the objectives pursued by the Community competition rules." (emphasis added)

One way to read the Court's language in paragraph 31 – the proper way, hopefully – is that it is not as loose as it seems. Since *T-Mobile Netherlands* concerned a concerted practice among competitors, where practical cooperation is knowingly privileged over the risks of competition (*in casu* through a one-off exchange of information on future reductions of remuneration to dealers, i.e., a cost component), one might say that there is already a built-in threat to effective competition, and once the legal and economic context confirms that the concerted practice has the potential to have a negative impact on competition, this is enough to presume illegality. Paragraph 29 may help to reinforce this context-specific reading, since it refers to "certain forms of collusion [which] can be regarded, by their very nature, as being injurious to the proper functioning of normal competition". (Similar statements are found elsewhere in judgments of the Court and in Commission guidelines, most recently the revised Guidelines on Horizontal Cooperation Agreements, 2011 C11/1, paras. 24 and 72.)

On a less congenial reading, paragraph 31 is *not* roped in by paragraph 29, and the "object" test has become a test of potentiality. In that event, it would be worth asking whether this test might creep into other areas outside the context of concerted practices. What about non-compete obligations, which might, when seen in their proper legal and economic context, be capable of restricting competition? There should be no doubt that the Court has no intention to begin treating such obligations as restrictions by object. Still, further specificity from the Court would be helpful in order to protect against unintended and unwanted spillovers. See also Bernd Meyring, Case Note, 1 *Journal of European Competition Law and Practice* 30-32 (2010), at p. 31 (likewise calling for a narrow reading of the relevant passages from the Court's judgment).

Jacques Steenbergen submitted a paper entitled "Rules of Evidence in Competition Cases: An NCA Perspective". In this contribution, Steenbergen begins with general indications concerning the Belgian competition law system, the institutional structure and some procedural aspects. Where an infringement procedure is opened in Belgium, the functions of case instruction and adjudication are divided internally within the national competition authority, which allows for an adversarial-style procedure. It may therefore be said, as Steenbergen does, that the competition authority has a "dual structure".

Among other points addressed, Steenbergen's paper touches on the matter of compulsory *ex officio* application of EU competition law by national judges.[134] This issue was largely neglected at the Workshop, but the Belgian experience is interesting in that, whereas under EU law (as it stands) national judges are generally under no duty to apply *ex proprio motu* the competition rules of the Treaty,[135] in Belgium, competition problems within the scope of Articles 101 and 102 must be raised by a court of its own motion if the parties fail to do so.[136]

Another issue goes beyond questions of procedure and concerns the relationship between an antitrust policy guided by economics and efficiency and, on the other hand, the Treaty-based dichotomy between restrictions by object and restrictions by effect. If one is inclined to think like a hypothetical economist, some small reservoir of *per se* prohibitions makes sense, as any losses sustained due to type I errors will be more than compensated for by the savings in terms of administrative costs and resource allocation. Removing *per se* rules of illegality entirely from the picture, on the logic that some seemingly hard core anticompetitive behavior might benefit consumers, may also be expected to result in far more detrimental behavior, on the whole, than in consumer-friendly practices. In short, an intelligent use of economics in antitrust can in principle be reconciled with the cherished distinction between object and effect. However, at least two potential problems may arise: the first relates to which practices should be tucked into the "object box", and this may be skated over

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[134] For broader discussions outside the specific context of competition law, see recently Yves Houyet, "L'application d'office du droit de l'Union européenne par les juges nationaux", 18 *Journal de Droit Européen* 69 (2010); Philippe Mollard, "Quand le juge national doit-il soulever d'office des questions de droit européen ?", 11 *ERA Forum* 537 (2011); Tadeusz Ereciński, "When must national judges raise European law issues on their own motion ?", 11 *ERA Forum* 525 (2011).

[135] Those rules are, however a matter of public policy. If national law imposes a duty to raise public policy issues ex officio, that duty would extend to issue under Articles 101 and 102. See Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055. For discussion, see Assimakis Komninos, Case Note, 37 *Common Market Law Review* 459 (2000).

[136] Steenbergen also discusses jurisprudence, in his view unsatisfactory, suggesting that under Belgian law the national competition authority is obliged to investigate whether complainants denouncing anticompetitive behavior have left any stones unturned.

here;[137] the second is addressed by Steenbergen, and it may be described as a potential threat posed by the economics-based approach to the integrity of the "restriction by object" concept, due to which the line between object and effect might blur. As is well known, it has always been necessary to consider restrictive agreements in their proper legal and economic context if one seeks to demonstrate a restriction of competition by object. However, the application of this formula has never been crystal clear; could the test be subverted and transformed from a (pseudo-)abstract test to a test where the objective likelihood of harmful effects is derived from something similar to an in-depth market analysis? Steenbergen pleads for caution here, and his case is a poignant one since many national competition authorities in the EU (not to mention cartel victims) face serious resource constraints. One might argue that international cooperation has a role to play here: resource-intensive cases could be referred to better-equipped agencies, or small agencies could be beefed up with seconded experts. This vision of deeper integration might arguably be something to look for over the horizon, but at present it seems like pie in the sky. Even if such arrangements were implemented, for the reasons mentioned above it would not be wise to allow too much market impact analysis to permeate the object box.

Tom Rosch submitted a number of "Observations on Evidentiary Issues in Antitrust Cases", which should be seen as part of a series of speeches exploring the quirky "double helix" of EU and US competition law.[138] These speeches are notable for the impressive effort spent on following developments in Europe and may indicate a willingness to consider whether European doctrinal approaches might inspire certain aspects of antitrust enforcement in the US, particularly within the FTC.

The general message of Rosch's contribution is that, amidst the striking differences in the US and EU competition law landscapes, there are sometimes surprising parallel outcomes and parallel matters of interest. Rosch emphasizes that issues such as the burden of proof, the standard of proof and standard of review – on the public side and, where applicable, on the private side[139] – attract great interest in the US, just as they do in Europe. This is not surprising, as these issues tend to have transversal importance and arise in settings as

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[137] A *locus classicus* for this charming theme is Richard Whish, *Competition Law,* 6th edition, OUP, 2009, pp. 116–122. See also Alison Jones and Brenda Sufrin, *EU Competition Law,* 4th edition, OUP, 2011, pp. 202 and 210–216. Alberto Heimler, in his contribution to this Volume ("The Legal Significance of Economic Evidence in Antitrust Cases", pp. 513 et seq.), points out that horizontal information exchanges can be beneficial, and that a better legal approach would be desirable. Another controversial matter is whether it is appropriate to put measures limiting parallel trade in the object box, but regrettably the debate on that subject has been laid to rest.

[138] To cite only one example, see Rosch, "Convergence and Comity – Still Improbable?", speech, Brussels, 10 June 2010, http://www.ftc.gov/speeches/rosch/100710transatlanticremarks.pdf.

[139] Of course, in private antitrust litigation the standard of review relates only to the degree of deference shown by an appellate court to the findings of a lower court.

diverse as small-claims litigation and disputes between States before tribunals such as the Appellate Body of the WTO.[140]

Rosch's remarks illustrate how certain concepts might mean different things to different people. In particular, Rosch takes "standard of proof" as a reference to the "probative value" of evidence. If I may digress, I'd be disinclined to subscribe to this, as the two concepts are indeed related but independent in the sense that they respond to different questions. To say that evidence is probative generally means that it is relevant for the purpose of establishing (or refuting) some fact or proposition. One may also speak of probative weight: how material, and how credible, and thus how persuasive is the evidence. The standard of proof is a rule of procedural law which prescribes the degree of certainty to which a given issue of law must be resolved (typically a decisive question of substance, such as – has it been proven in law that an infringement was committed?).[141] Suffice it to observe that the fact that evidence is probative is no guarantee that the standard of proof has been satisfied; in a criminal case, for instance, doubts may linger notwithstanding the presentation of probative evidence by the prosecutor.

In the final part of his contribution, Rosch pragmatically combines the matters of the burden of proof, the standard of proof and the standard of review and frames the ultimate question in terms of the "prospects for liability" in certain hypothetical scenarios. Relevant variables would include, among others, whether the case involved a merger or unilateral conduct, whether the party bringing the action is a private claimant or a public authority, whether efficiency justifications are claimed, and whether the behavior at issue might fall within the "inherently suspect" category (which has some resonance in Europe, although some differences remain). Rosch also addresses the relevance of intent evidence, the vivid concept of "bathtub conspiracies",[142] and the role of sophisticated economic evidence. As he has done in other fora, and as he did during his oral remarks,[143] Rosch in his paper decries the exaggerated use of formal economics and pleads for economic arguments to be deconstructed and translated into, well, plain English.

Rafael Allendesalazar and Paloma Martínez-Lage write about some of the difficult choices faced by undertakings that have engaged in borderline licit/illicit conduct in their paper, "Evidence Gathered through Leniency: From the

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[140] On the latter, see, e.g., Claus-Dieter Ehlermann and Nicolas Lockhart, "Standard of Review in WTO Law", cited above note 2; Andrew Guzman, "Determining the Appropriate Standard of Review in WTO Disputes", 42 *Cornell International Law Journal* 45 (2009).

[141] As can be seen throughout this Volume, the notion of an "objective" standard of proof is generally associated with common law traditions and arguably may not accurately describe the decision-making function in the General Court and the Court of Justice.

[142] See, e.g., James Keyte, "*Copperweld Corp. v. Independence Tube Corp.*: Has the Supreme Court Pulled the Plug on the Bathtub Conspiracy", 18 *Loyola of Los Angeles Law Review* 857 (1985).

[143] See page 495.

Prisoner's Dilemma to a Race to the Bottom".[144] Since much could be gained by confessing to having participated in a cartel, and since leniency programs typically require not just an admission of facts but of guilt, the apparent suggestion is that such programs may have a built-in bias that could lead to type 1 errors. Part of the critique concerns the varying definitions of what constitutes a cartel; as a consequence of such variations, eligibility for leniency may turn on whether the agreement or practice in question was vertical or horizontal, and whether the coordinated behavior was observable or concealed.

The title of the third section of the paper captures the essence of the authors' argument: "Leniency applications: prejudging the legal classification of the facts?" As Allendesalazar and Martínez-Lage point out, there may be some tension between a leniency program that insists on a confession of guilt and the right against self-incrimination. The key to resolving this tension is that the right against self-incrimination is a right against being *compelled* to confess,[145] whereas leniency provides incentives but no obligation as such. However, if the pressure on an undertaking to apply for leniency is strong enough – due to the knowledge that others might approach the competition authorities first, coupled with the knowledge that such an application will necessarily implicate the first undertaking in an alleged conspiracy – the distinction between compulsion and incentives may be, *de facto,* less clear.[146] The authors therefore recommend a reform of leniency programs so that the benefits may be claimed by coming forward with valuable evidence but without having to admit culpability.

The fourth section of the paper discusses how leniency affects the burden of proof and the standard of proof in cartel cases – not to undertakings' advantage – and argues furthermore that leniency statements used, without any corroborating evidence, to convict third parties that did not confess may amount to an infringement of Article 6(1) ECHR. The latter point is linked to what the authors portray as an ironic vicious circle: the more that leniency

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[144] For further discussion of leniency programs, see also the contributions and debate in Panel IV in Claus-Dieter Ehlermann and Isabela Atanasiu, eds., *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels,* Hart Publishing, 2007, pp. 489–624.

[145] See, e.g., Wouter Wils, "The Use of Settlements in Public Antitrust Enforcement", in Ehlermann and Marquis, eds., *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law,* Hart Publishing 2009, pp. 42-45, with references. The general literature on the right against self-incrimination is abundant, but see, among others, Angus MacCulloch, "Privilege Against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications", 26 *Legal Studies* 211 (2006), especially pp. 229 et seq.

[146] It is an interesting question (and psychologists might be best placed to answer) whether defection in a one-shot prisoner's dilemma game is voluntary or involuntary. To the extent that the defection may be said to be involuntary – controversial, to be sure – the admissibility of evidence obtained in this manner while a compelled confession is inadmissible can be seen as a policy choice. Having said that, one could add that it may be misleading to frame the matter as a one-shot game. See, e.g., Phillip Zane, "The price fixer's dilemma: applying game theory to the decision of whether to plead guilty to antitrust crimes", 48 *Antitrust Bulletin* 1 (2003).

statements are taken as damning evidence without need for any corroboration, the stronger the incentive to confess, and yet "compelled" or quasi-compelled statements are the least reliable. Another factor that may cast doubt on the credibility of evidence in the particular context of the Commission's leniency program relates to applications by latecomers seeking a reduction in their fines after the first applicant has already gone in. Under those circumstances, the authors suggest, the need to provide evidence of "significant added value" in order to qualify for a fine reduction[147] may put a premium on extravagant hearsay.

It is for the reader to decide whether the arguments set forth are compelling. One cannot seriously deny that there is a sufficiently strong public interest in leniency programs to justify their existence, particularly since the invisibility of cartels makes empirical verification of their theoretical *instability* – in particular by way of a "before and after" analysis – extremely difficult. But the authors may be right to question whether it is also necessary to require undertakings to classify their own behavior as illegal as a condition for leniency, or whether the public interest would be equally served if the business of accusation and characterization were left for the institution charged with enforcing the law.

In a contribution entitled "Antitrust and Merger Cases in Italy: Standard of Proof, Burden of Proof and Evaluation of Evidence", **Mario Siragusa** presents a fairly wide-angle overview of the Italian competition law system. After reviewing the basic elements of the Italian competition rules, which are very similar but not quite identical to the EU rules, Siragusa lays out, almost in matrix form, and focusing on public enforcement, how the burden of proof, standard of proof and evaluation of evidence are understood and applied in Italy across three sets of rules, namely those covering: agreements and concerted practices; abuse of dominance; and merger control. As a whole, Siragusa's paper highlights the general tendency of Italian antitrust to replicate trends emerging at the level of the EU.[148] This picture may be welcome or worrying, according to one's views as to developments in EU competition law, and depending on whether close convergence is regarded as a valuable, cost-reducing mechanism, or as an oppressive clamp on experimentation, competition and innovation.

However, it would be a mistake to assume that differences and unresolved issues on the margins are of no consequence. In his conclusions,[149] Siragusa underlines the rigorous evidentiary demands of the Consiglio di Stato in

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[147] See Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006 OJ C298/17, paras. 23–25. Evidence brings added value if, by its very nature or by virtue of its level of detail, it strengthens the Commission's ability to prove the existence of the alleged cartel.

[148] At times, of course, a national authority might *anticipate* trends at the European level, and this has happened in Italy as well. See Alberto Heimler, this Volume, pp. 513 et seq.

[149] See pp. 598–599.

cartel cases,[150] which may make direct incriminating (preferably "smoking gun") evidence, and consequently the relatively new Italian leniency program,[151] crucial factors in proving collusion; and he leaves question marks over the future development of investigative and analytical techniques in unilateral conduct and merger cases.

Although **Jim Rill** did not attend the 2009 Workshop in person, he and co-author **Jaimee Lederman** very kindly furnished a paper called "Evidence in Judicial Review of U.S. Federal Trade Commission and U.S. Department of Justice Merger Cases". As the title suggests, the paper focuses on merger actions in the US, where, as is well known, the institutional framework contrasts dramatically with most European systems of merger control. In the United States, once case allocation has been sorted out and following a review procedure, the agency responsible for the case (i.e., either the DOJ or the FTC) must go before the US federal courts if it seeks to challenge a merger (normally *ex ante* but sometimes *ex post* to put the genie back in the lamp). However, the relevant procedures differ even as between the DOJ and the FTC, which explains the persistence of some controversy since dividing cases up is sometimes regarded as a fortuitous factor leading to potentially or concretely diverse outcomes.[152] These different procedures are highlighted right away in the paper: whereas the DOJ must prove its case under Section 7 of the Sherman Act on a preponderance of the evidence standard, the FTC, with its unique internal administrative adjudication function,[153] applies only for a preliminary injunction and need only meet a softer standard (compared to both the DOJ and private suitors) in order to – theoretically – stay the merger pending resolution of its internal procedure. However, as the authors point out, the fate of a merger is often decided not after a fully litigated procedure on the merits (with administrative law judges on the inside and federal appellate judges waiting on the outside, not to mention the additional decisional layer of the Commission sitting as appellate tribunal in between) but at the moment the federal judge signs the order granting a preliminary injunction under the more liberal evidentiary standard.[154]

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[150] See pp. 583–584.

[151] The leniency program in Italy was adopted in 2007. For a concise description, see Mario Siragusa and Cesare Rizza, "Italy", in Global Legal Group, *The International Comparative Guide to Cartels & Leniency 2011,* chapter 21, § 4. See also Siragusa and Rizza, "Italy", in Maher Dabbah and Barry Hawk, eds., *Anti-Cartel Enforcement Worldwide,* Vol. II, Cambridge University Press, 2009, pp. 642 et seq., at pp. 662–666.

[152] For recent discussion, see, e.g., D. Daniel Sokol, "Antitrust, Institutions and Merger Control", 17 *George Mason Law Review* 1055, for example at 1077-1079 (2010) (applying a komesarian analysis to assess the complex multilevel enforcement structure in the US).

[153] For details, see Marquis, "La Federal Trade Commission e la Section 5 del Federal Trade Commission Act: aspetti istituzionali e penombre giurisdizionali", 12 *Mercato Concorrenza Regole* 385 (2010).

[154] Within the FTC there is some recognition that the institutional framework poses important challenges. See, e.g., the interview with Commissioner Rosch in 23 *Antitrust* 32 (2009). In further detail, see Rosch, "Reflections on Procedure at the Federal Trade Commission", speech in Hot Springs, Virginia, 25 September 2008, http://www.ftc.gov/

The argument is formulated succinctly by the authors: "[. . .] despite the FTC's stated goals of procedural reform, the resulting changes have done little to streamline the process or reconcile FTC proceedings with treatment in cases brought by the DOJ".[155] The procedural reform, effective 1 May 2009, was aimed at introducing stricter time limits and other more experimental measures, including for example the possibility of litigating both externally before a federal judge in injunction proceedings and internally before the organic (but independent) administrative law judge (ALJ).[156] The critique shared by Rill and Lederman and others, which need not be repeated in detail here,[157] is that the FTC could have traveled a good deal farther down the road, as it was invited to do by the Antitrust Modernization Commission, but didn't. As a consequence, delay – or the expectation of delay – may take the wind out of corporate sails,[158] which would again underscore the potentially arbitrary results of the FTC/DOJ clearance process, or as the authors call it, the case allocation "lottery".

As we have seen, many of the Workshop papers related to institutional issues with reference to specific regimes, and above all the administrative system in the EU. A more abstract (and, unsurprisingly, economics- i.e., scarcity-oriented) discussion of design and construction – and of how design interrelates with the role economics can play – is included in **Dennis Carlton's** contribution, entitled, "How Should Economic Evidence Be Presented and Evaluated?" One of Carlton's starting points is the message sounded by Tom Rosch and others to the effect that sophisticated economic evidence faces the challenge of finite comprehension on the part of decision-makers, including (but not only) juries, judges and judicial clerks. Another premise is that economic analysis requires data and other resources, which is to say that it is costly, and may have to be weighed against other factors to test its utility – not necessarily just its utility in a given case but in light of its possible value taking into account the precedential value, if any, of a decision. The various factors discussed are left for further contemplation and research according to context; no precise recommendations are made for particular jurisdictions.

In the third section of the paper, Carlton pragmatically suggests that the way in which economic evidence should be presented depends on who is the "audience", i.e., who is the decision maker (or chain of decision makers). Here the interrelationship is between the analytical capacities of the decision maker

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speeches/rosch/080925roschreflections.pdf. However, Rill and Lederman are clearly skeptical that the FTC's internal reform efforts have adequately addressed the structural deficiencies criticized in their paper.

[155] Rill and Lederman, this Volume, at p. 602.

[156] See, e.g., Michael Sibarium and Jay Levine, "Practical and Strategic Considerations in Litigating Under the FTC's New Part 3 Rules", 24 *Antitrust* 33 (2009).

[157] See Rill and Lederman, pp. 608–609.

[158] See Sokol, cited above note 152, at p. 1078, footnote 151, listing around 20 abandoned transactions. One should approach the number of abandoned deals with caution, however, since causal factors may be complex and tangled together.

and the design of rules ("structured decision making" and various procedural devices) which ideally correct for or reduce the impact of shortcomings in his or her ability to sift through and evaluate complex data and modeling. Since the presentation of economic evidence depends on the audience, the design of rules (or rules to govern rules) is logically a dynamic enterprise, keeping pace with the evolving capacities of the decision-making chain itself. Carlton cites the example of the progressive adaptation of systems in which *per se* rules begin as the norm and become the exception. The rest of the third section of the paper discusses how expert evidence might be handled in various settings, before agencies or regulatory bodies and before courts, and how court-appointed experts might play a role.[159] On the basis of positive experiences in litigation in New Zealand, Carlton also endorses "hot tub" style confrontation of economic experts testifying in court.[160] It can be assumed that many of the Workshop participants would regard the creative use of hot tubs as a way of enhancing public interest in antitrust issues.

In the fourth section of the paper, Carlton addresses the evaluation of evidence. He suggests that courts routinely tailor their approach to matters of proof according to error costs, and that they (consciously or otherwise) make complex judgments which might not easily be captured by common economics techniques. In this complex assessment of evidence, account is taken of the probability of error and the magnitude of the consequences, not on the basis of a piece-by-piece analysis but by taking the evidence *in the round,* and by perceiving how elements of proof and risks of errors impact on each other. The fifth section of the paper discusses whether and how economic evidence (arbitrated, if need be, by court-appointed or otherwise neutral experts) can be useful. With regard to price fixing, for example, such evidence may help to identify the overcharge to be reclaimed. On the other hand, where the competitive harm is less easily quantifiable, in particular because it does not involve inflated prices but other unobservable effects (such as on innovation), the risk of error may be greater, in which case arguably the evidentiary requirements should be more stringent. The discussion then turns to other kinds of cases, including merger cases, where the merits of merger simulations and the use of "relevant markets" are considered, and cases involving vertical restraints, where the ease with which theories of harm may be cooked up implies a need to insist that such theories be supported by convincing empirical proof.

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[159] For some of the reasons why judges may be reluctant to appoint subject matter experts or special masters in litigation, see Vaughn Walker, this Volume, page 657.

[160] See pp. 616–617. Many commentators have submerged themselves in the subject. See, e.g., Megan Yarnall, "Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?", 88 *Oregon Law Review* 311 (2009); Gary Edmond, "Secrets of the 'Hot Tub': Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia", 27 *Civil Justice Quarterly* 51 (2008); Lisa Wood, "Experts Only: Out of the Hot Tub and into the Joint Conference", 22 *Antitrust* 89 (2007); Lisa Wood, "Experts in the Tub", 22 *Antitrust* 95 (2007).

B. *Discussion*[161]

The roundtable following the Panel III presentations was opened with a series of remarks by Bruno Lasserre, who highlighted an evolution in the (continuous) process of harmonization in the European context of substantive and procedural antitrust rules. First, in terms of the source of this ongoing adjustment and accommodation (sometimes via mandatory harmonization but also taking the form of more spontaneous responses to European and global trends) was often driven in the past by the ECJ as it elaborated replies to preliminary references. Over time, the emphasis seems to have shifted from the Court and case law to the Commission and soft law. Given the content of a good deal of this soft law, Lasserre also notes that the "harmonization" process increasingly concerns analytical methods. However, some aspects of this evolution are also driven by, and to some extent feed back into, the notable degree of institutional cooperation that occurs under the flexible rubric of the ECN. Lasserre illustrates how the network provides opportunities for dynamic knowledge sharing which can bear on not just policy discussions but on particular cases, for example where one national competition authority encounters novel issues or analyzes unfamiliar markets or market features.[162]

Beyond these informal instances of information and knowledge exchange and mutual learning, there is the more problematic matter of discordant procedural rules in some of the Member States,[163] which imply, as other contributions and interventions have suggested, that legal outcomes may be contingent on locality, a state of affairs ultimately unacceptable from the perspective of the uniform application of EU law. According to Lasserre, the obstacles to "true harmonization" are such that the more realistic path forward is to harmonize not the rules of civil or criminal procedure but the instruments of enforcement: leniency (largely achieved), settlement procedure, sanctions and so on.[164]

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[161] Again, only a few selected points are reviewed here.

[162] It has been suggested that the ECN (and other elements of Europe's post-modernization model of enforcement) might be conceived of as a "learning platform". On this theme, see Yane Svetiev, "Beyond Law versus Economics: A learning platform for competition policy", paper presented at the 6th SIDE conference, Bolzano, 11 December 2010 (noting, however, some tensions, such as in relation to democratic accountability).

[163] Suffice it to mention the wide variance in rules on *locus standi* from one Member State to the next, which clearly can have dramatic consequences in litigation.

[164] On the other hand, if it were shown that procedural autonomy and diversity undermine the effectiveness of EU antitrust law (including secondary law), then the national rules in question would have to be disapplied as a matter of EU "constitutional" law regardless of whether positive harmonizing measures have been adopted by the EU institutions. In those circumstances, some degree of *minimum* harmonization may be appropriate in order to avoid or address procedural gaps. The road to minimum harmonization of national procedural rules within specified areas (above all, collective redress) is a difficult one, but the EU forces, skittish as they may be after some stinging political setbacks, are still on the march.

On the more fundamental issue of system design, Lasserre defended the "inquisitorial" system of enforcement against some of the attacks of those who would replace the European administrative system with more adversarial mechanisms. Small victims, he says, cannot afford adversarial litigation. However, it is not obvious that small victims would suffer more if the European enforcement system were more adversarial: the relevant parties to the process of contestation and "truth seeking" advocated by critics are not the antitrust defendant and smaller rivals or customers but the antitrust defendant and the enforcer. In the "adversarial" system of the "future", a small victim will still be able to make low-cost complaints or tip off the enforcer; but if the enforcer pursues the case it will face off against the defendant before an impartial decision-maker. As Philip Lowe later pointed out, the need for such a reform is debatable since, on appeal, this is precisely the scenario even under the present system. Frances Barr made a similar point. The view one takes of this argument will depend on the extent to which the EU Courts are seen as effectively scrutinizing the Commission's procedures and decision-making. In that regard, the Commission's litigation specialists are quick to point to the meticulous and demanding style of the EU Courts when the Commission presents its case. (See the remarks of Eric Gippini-Fournier.) In general, this does indeed seem to be the case, although again the Commission's spectacular success in certain categories of antitrust cases may leave room for doubt.

Damien Neven pointed out that there is some scope for contestation internally even before the Commission takes a decision, not so much in infringement proceedings but in merger control. It was suggested that merger investigations incorporate an adversarial element insofar as the parties have access to the data room and can challenge the data or techniques relied on by the Commission. Simon Bishop was not entirely persuaded about that.

As for antitrust, Philip Lowe referred, as he had already done earlier in the day, to the various checks and balances the Commission had developed internally.[165] He added that investigation procedures and their alleged shortcomings must also be seen in light of the "whole architecture", the suggestion being that the Commission also works hard on the policy side to provide the public with ample self-assessment tools and major safe harbor instruments so that undertakings can mitigate the risk of suspicion in the first place. However, Lowe was candid and agreed that effective due process was an essential condition for sound and credible enforcement. He was ready to accept that further in-house refinements might be necessary, possibly to include additional internal scrutiny between the adoption of a Statement of Objections and the adoption of a formal decision. With regard to pleas made by some (partly inspired by certain national models, such as in France or Belgium, and partly inspired by large fines) for more fundamental structural inoculation whereby the

[165] See also, e.g., Lowe, "Due process in antitrust", speech of 9 December 2009, Brussels, http://ec.europa.eu/competition/speeches/text/sp2009_19_en.pdf.

instruction of a case would be cordoned off from the decision-making phase, Lowe did not see this happening, and a similar line has now been taken by Commissioner Almunia.[166] One might take for granted that heavy demolition and reconfiguration would in any case require further Treaty reform, but a need to amend the Treaty does not seem self-evident unless one also assumes that true impartiality in decision-making is only possible if a body external to the Commission is charged with that task. Is that the case? Less radical propositions could at least be reflected on.[167]

The reader is invited to consider John Fingleton's closing remarks as Chair of the panel.[168] His proposition appears to be that there is a tradeoff – not an absolute one, but at least on the margins – between due process and institutional efficiency and effectiveness. The tradeoff he sees is in a sense true of regulatory law and public law in general, as private interests and the public interests must be finely balanced so that neither is unduly impaired. Fingleton is skeptical, though, about the need for ever-greater procedural protections, and his message is that legally impeccable procedures should not come at the cost of the authorities' duty to ensure that antitrust delivers value for their constituencies. Among other issues, Fingleton raises a point concerning harmonization – not of procedural rules in litigation but rather ever-more uniform expectations of what agencies are required to do, and how much economic rigor they can achieve. As Fingleton points out, the wide range of institutional capacities in different NCAs across the EU implies that not all authorities are equally equipped for idealized welfare-maximizing interventions. The ECN may constitute a partial answer, in that it may reduce information costs and provide some shortcuts (see above the remarks of Bruno Lasserre), but there are limits to what can be achieved through informal cooperation. The point may also be linked with the remark of Jacques Steenbergen, in his oral presentation, according to which *per se* illegality rules can be an important lifeline for small authorities with limited resources. With regard to many aspects of antitrust enforcement by agencies, some variable geometry – managed divergence within a common framework – may be a permanent feature of multilevel, complex governance in the EU.

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[166] See Joaquín Almunia, "Due process and competition enforcement", SPEECH/10/449 of 17 September 2010, Florence. See also Alexander Italianer, "Safeguarding due process in antitrust proceedings, speech of 23 September 2010 at Fordham University Law School.

[167] Lowe is undoubtedly right to think that no multiplication of internal checks could be an adequate substitute for an external control, and that it might lead to lengthier procedures. However, his support for a first-rate system of due process as part of the Commission's investigations seems equally to suggest that even the assurance of an effective external control does not make scrupulous internal procedures any less important. If that is so, then it should not necessarily be assumed that little could be gained by maximizing the rigor of internal procedures or introducing more adversarial elements. The risk of procedures dragging on is arguably a problem that could be preempted by mandatory time frames.

[168] See pp. 510–512.

4. Session Four: *National Courts in Major Jurisdictions: Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases*

A. *Written contributions* (Walker, Boudin, Bacon, Burrichter & Logemann, Kwinter et al., Hawk & Keyte)

Judge Walker's paper is entitled "Evidence in Competition Cases: An American Trial Judge's Perspective". It begins with a quote from *The Antitrust Paradox,* in which Robert Bork announced that only the "single goal" of consumer welfare is "consistent with congressional intent, and, equally important, only that goal permits courts to behave responsibly and to achieve the virtues appropriate to law". Bork's remark is doubly perplexing since it not only projects a distorted version of Sherman Act history but also plays fast and loose with the distinction between consumer welfare and total welfare, leading some to describe Bork's version of consumer welfare as a "canard",[169] or a means of sugar-coating the campaign for an efficiency-based (efficiency in terms of the primacy of output) antitrust policy.[170]

However, Walker takes Bork's consumer welfare prescription at face value, which is just as well since the consumer welfare idea promoted by Bork and others, rhetorically or otherwise, came to revolutionize antitrust thinking in the US and its pervasive influence remains. This orthodoxy in the US is an important premise of the essay. Walker's aim is to reveal the difficulty of operationalizing the consumer welfare standard so that it can be applied meaningfully in the context of litigation. Sometimes, he points out, it can't be.

One reason why implementing a consumer welfare criterion may be difficult lies in the fact, by now widely recognized, that consumers do not always act rationally, or they may be rationally ignorant due to high information costs.

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[169] See Doug Melamed, oral remarks, in Ehlermann and Marquis, eds., *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC,* Hart Publishing, 2008, at p. 31, with citations to Bork and his critics. For recent discussion, see Barak Orbach, "The Antitrust Consumer Welfare Paradox", 7(1) *Journal of Competition Law and Economics* 133 (2011), at pp. 142 et seq.

[170] One may downplay the impact of this wordplay on the ground that, in most cases, practices that are good for total welfare will be good for consumer welfare, and vice versa. However, cases where the distinction between a consumer welfare standard and a total welfare standard matters are not difficult to imagine (and therefore the importance of the distinction should be neither over- nor underestimated). *Cf.* Orbach, cited previous footnote, at pp. 159-164 (recommending, not without good reason, that the term "consumer welfare" be jettisoned and that the debate in the US should focus on maximizing consumer *surplus* or total *surplus,* though neither is problem-free; Europe, of course, is a very different creature).

Another potentially related reason may be the common dilemma of heterogeneous or contradictory interests among consumers: what if some value innovation while others prefer lower prices they can cash in on today? Furthermore, time-inconsistent preferences demonstrate that the contradiction may stem from one and the same consumer. Incidental to the discussion of the bounded rationality of consumers is the point that judges, too, may be boundedly rational. However, judges have training and tools that may assist them in evaluating evidence, and much of the paper is devoted to showing how judges assess the reliability and probative value of the (expert and non-expert) economic evidence laid before them.[171] Several merger cases are discussed in order to show how various pieces of evidence may be given more or less weight, often a reflection of venerable rules of evidence familiar to litigation specialists practicing before US federal courts.[172] From the discussion of the cases one can see certain tactical errors made by proponents of economic evidence that fail to integrate that evidence satisfactorily within their broader theory of the case.

However, the point underlying the essay, and the point on which Walker concludes, is – again – the chimerical nature of the consumer welfare standard, at least in certain kinds of cases where consumer interests are ambiguous. Walker does not take the next step, so to speak, but perhaps the unstated conclusion is: either consumer welfare itself is an ill-conceived objective and should be replaced, or – more likely – the basic principle might be retained, but more clarity is needed with regard to acceptable proxies in those cases where relative changes in consumer welfare cannot unambiguously be identified. Such debates, and the more fundamental question of what the appropriate constellation of goals should be, are the intimate bedfellows of competition specialists in Europe, where one may assume they will remain a permanent feature of the landscape. In the United States the consumer welfare ideal may be more deeply embedded in the psyche, but in that jurisdiction too there seems to be a difference between the rhetoric of consumer welfare and the messier business of resolving complex competition disputes.[173]

Judge Boudin's paper is entitled "Evidence and the Formulation of U.S. Antitrust Law". Judge Boudin begins with the unusually meshed relationship one finds in antitrust between contingent, case-specific facts and the construction of the law. He further notes the analytical dynamism in this field, which is linked to frequent shifts in how commercial behavior and the boundaries of

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[171] See pp. 658–663.

[172] Despite the existence in Europe of a principle of "unfettered evaluation of evidence", the Workshop overall demonstrated a broadly shared feeling for what kinds of evidence may be more credible than others.

[173] For differences in rhetoric and reality on the European side, see Pinar Akman, "'Consumer Welfare' and Article 82 EC: Practice and Rhetoric", 32 *World Competition* 71 (2009).

merits-based competition are understood.[174] These points tend to underscore the importance of the procedural rules that filter and regulate the factual and economic data used as inputs (or "grist") in a court's decisions. In this light, and from a US perspective, Boudin discusses the roles of lay witnesses (regulated), scholarship (unregulated – but sometimes of decisive and long-lasting impact) and expert evidence (semi-regulated, or as Boudin says, "half inside and half outside" the familiar rules of evidence: vetted by the court but exempt from some of the usual strictures).

One of the ironies Judge Boudin seems to be pointing to is that the judicial development of the law may result more than anything from the types of evidence that are only partially regulated, or not regulated at all. One might infer from this that litigation is part of, and indissociable from, a broader process of social construction in which adjudicative facts are continually mixed with the ideas of decision makers, influenced in one way or another by cultural phenomena (including "general rules of experience"), and by autonomous discourses and dialogues that elude the law while shaping it.

Kelyn Bacon delivered a paper that examines "Standards of Proof, Standards of Review and Evaluation of Evidence in UK Antitrust and Merger Cases".[175] As practitioners in the UK know very well, the jurisdiction of the Competition Appeal Tribunal and the High Court to hear competition law cases, including cases brought under various regulatory regimes since regulators often have (concurrent) jurisdiction in the competition field, can be as intricate as three-dimensional chess.[176] Shedding light on some of the nuances, Bacon proceeds

[174] Needless to say, many of the shifts have radiated from economic research, although one may certainly discern a feedback mechanism as ideas encounter the constraints and peculiarities of legal institutions and practice. For discussion, see William Kovacic, "The Influence of Economics in Antitrust Law", 30 *Economic Inquiry* 294 (2002); William Kovacic and Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking", 14 *Journal of Economic Perspectives* 43 (2000). These papers, characterized as part of the "canonical narrative", have been challenged valiantly by Nicola Giocoli in his essay, "Competition versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy", 5 *Journal of Competition Law and Economics* 747 (2009), for example at 755-756. However, the intimation that Chicago school thinking was merely a red herring and had little genuine impact on US courts, the paradigm case being *Sylvania* (see *ibid.,* pp. 757 and 761), can claim little support from the *Sylvania* judgment, which is replete with evidence to the contrary. (One can certainly agree, however, that *Sylvania* is not the embodiment of Chicago's most bullish prescriptions. See Leucht and Marquis, "American influences on ECC competition law, 1952–1990: Two paths, how much dependence?", in Patel and Schweitzer, eds, forthcoming.) Of course, reconstructions can be fascinating and thought provoking, and the work of Rudolph Peritz (which inspired Giocoli's alternative narrative) has been an invaluable contribution to the understanding of US antitrust.

[175] In relation to some of these issues, see also the oral remarks of Judge Barling, at pp. 623-626; and Heike Schweitzer, "The European Competition Law Enforcement System and the Evolution of Judicial Review", this Volume, pp. 119–128.

[176] See Bacon's introduction at pp. 671–672. For the statutory details, see also Dinah Rose and Tom Richards, "Appeal and Review in the Competition Appeal Tribunal and High Court", 15 *Judicial Review* 201 (2010), at §§ 4–26. With regard to the convoluted scenarios that can arise where regulatory decisions are challenged, which may involve parallel proceedings in the CAT and the High Court, see especially §§ 29–35. Appeals against the

to analyze the standard of review that applies, first of all, in civil antitrust cases and cases in which there is "full merits" review; and then in so-called "judicial review" cases and challenges brought against reports and recommendations in relation to notified mergers or market investigations.[177] As suggested by the title of the paper, she also addresses the standard of proof in such cases, and how (expert) evidence is evaluated.

A first point, which also comes across clearly from the Workshop discussions, is that where the CAT hears an appeal challenging an infringement decision of the OFT,[178] a *de novo* standard of review applies, which means that, much as if it were deciding a civil antitrust claim, the CAT considers the case with plenary jurisdiction and may substitute its own views for that of the OFT (or it may remit the matter to the OFT for further proceedings). As Bacon points out, however, the CAT's jurisprudence suggests that in full merits appeals, since the enforcer or regulator has already carried out a documented analysis of the case, the Tribunal could hardly ignore the contested decision if reached on the basis of an appropriate and reliable methodology. This has nothing to do with any legal obligation, institutional courtesy or procedural doctrine of discretion; it follows from the truism that *if* the CAT finds that the methodology underlying the regulator's decision was appropriate, only by some lapse of logic and reason could it then fail to give the decision due weight.[179]

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decisions of the CAT and of the High Court are heard by the Court of Appeal, and further appeals are heard by the House of Lords. See Richard Whish, *Competition Law,* 6th edition, OUP, 2009, at pp. 79–80 and 426–431.

[177] For an overview of market investigation references under Part 4 of the Enterprise Act 2002 (and a review of Part 4 decisions under Section 179 of the Act), see Richard Whish, "Oligopoly Theory and Economic Evidence", in Claus-Dieter Ehlermann and Isabela Atanasiu, eds., *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels,* Hart Publishing, p. 105, at pp. 109–117 (2007); Whish, cited previous footnote, chapter 11.

[178] Since the fall of 2010 it has appeared likely that the OFT, possibly after hiving off many of its consumer protection functions, will merge with the Competition Commission (as part of the "bonfire of the quangos". See, e.g., *Financial Times,* 13 October 2010). See also Philip Collins, "New decade, new Government – Reflections on possible evolution of the UK's competition and consumer regimes", speech, 20 May 2010, http://www.oft.gov.uk/shared_oft/speeches/689752/0610.pdf, at pp. 14–16 (discussing/speculating on the prospects of a single-agency model); and see further the interviews with John Fingleton and Peter Freeman in 14(2) *Global Competition Review* (14 February 2011) and, in the same issue of GCR, "A Tale of Two Enforcers"; and see still further Laura Carstensen, speech of 9 March 2011, http://www.competition-commission.org.uk/our_role/speeches/pdf/LC_Speech_ACCE.pdf.

Aimed in part at cutting costs and accelerating merger reviews and market investigations, such a reform would necessarily entail some adjustments with regard to the jurisdiction of the courts to hear challenges brought against acts adopted by the parties "pre-merger". To see a comparison of what the current system looks like and what the structure might look like if simplified, see the charts at pages 11 and 12 of European Policy Forum, "Streamlining the UK's Competition Authorities", October 2010, http://www.epfltd.org/images/Streamlining%20the%20UK%E2%80%99s%20Competition%20Authorities_11.10.10.pdf.

[179] The fact that the CAT gives "due weight" to challenged decisions led to some speculation in the Workshop that the "full merits" standard might be more gentle than it seems; this was later corrected by Judge Barling. See his oral remarks at page 624.

In contrast to full merits appeals there are confusingly labeled "judicial review" proceedings. As Bacon explains, there is somewhat more room for discretion here, and in principle only unreasonable decisions are overturned. Such discretion may be removed in relation to certain issue-specific matters, in particular if the issue is sufficiently "hard-edged", that is, if it cuts one way or the other, with no middle road. Nominally, merger decisions and market investigation decisions are subject to the "judicial review" standard of judicial review (as it were); but here appearances deceive, and the CAT's level of scrutiny has been compared to the hard-nosed approach of the EU's General Court when it reviews the Commission's merger decisions.[180] In such cases, the *Tetra Laval* standard established by the Court of Justice has been warmly received by the CAT. The intensity of scrutiny in "judicial review" cases may also be linked to the grounds of challenge at issue in a given case. Where the controversy concerns the sufficiency of the evidence, Judge Barling pointed out in his presentation that the CAT may dig deep, and the difference between this form of review and full merits review begins to fade.[181]

With regard to the standard of proof, Bacon explains that in civil cases the OFT must prove infringements against a "balance of probabilities" standard. However, it seems to be recognized by the UK courts that, even in civil proceedings, infringement decisions potentially may impose heavy sanctions and leave lasting stigma. In that light, the jurisprudence of the CAT states that the more serious the allegation, the more cogent must be the evidence marshaled by the enforcer – "strong and compelling" evidence in serious cases – to meet the standard of proof, even if the applicable formal standard does not change. This may appear odd to anyone expecting the standard of proof to operate uniformly from case to case, but it is less surprising if the standard of proof is seen as an organizing principle that mediates between the gravity of consequences and the likelihood of decision error,[182] not to mention the presumption of innocence and its penumbras and emanations in civil or administrative actions. It may therefore be that the difference in the standard of proof in infringement decisions and the criminal standard the OFT must satisfy to prosecute and punish cartels is more conceptual than consequential.

With regard to the evaluation of evidence by UK courts, it follows from the nature of *de novo* review that new factual or economic evidence and testimony may be presented (subject to cross-examination) before the CAT in a full merits appeal for the purpose of challenging the correctness of the decision adopted by the enforcer or regulator. The role of new evidence is much more

[180] The CAT's rigor may be related to the fact that in many (though not all) ways, the CAT was consciously modeled on the Court of First Instance. See Christopher Bellamy, "Some Reflections on Procedure in Competition Cases", in Mark Hoskins and William Robinson, eds., *A True European: Essays for Judge David Edward,* Hart Publishing, 2003, chapter 14.

[181] See his oral remarks at pp. 624–625.

[182] See, e.g., Dennis Carlton, "How Should Economic Evidence Be Presented and Evaluated?", this Volume, pp. 611 et seq.

limited in "judicial review" proceedings, as the central issues pertain more to whether the limits of discretion were exceeded, although witnesses may be heard. Bacon provides a number of observations regarding the use of expert economic evidence, and some of the challenges such evidence may pose, such as for example the fine line between expert analysis and advocacy. Institutionally, a potential concern arises from the fact that in some cases the CAT and the High Court may be considering similar issues, but the capacity of the judges to absorb and process complex economic evidence may vary.[183] However, as Bacon suggests, issues of skill level in economics can be managed and overcome.

Jochen Burrichter and co-author **Hans Logemann** provided a paper entitled "Evaluation of Evidence in National Courts: Reflections from the German Perspective". As the authors explain, from a procedural point of view there are three principal types of antitrust proceedings in the German legal system.[184] The first involves administrative cases which are "quasi-criminal" in nature because they relate to serious infringements and because fines are imposed. Cases of hard core collusion or flagrant abuse of dominance fall within this category, which is governed by Sections 81 et seq. of the GWB. Second, there are more "regulatory" administrative proceedings concerning, in particular, merger decisions or antitrust cases where the competition authority issues a cease-and-desist order but no fines, or where it accepts commitments. (See Sections 32 et seq. and 54 et seq. GWB.) Finally, there are civil actions, i.e., private damages and/or contract claims. (See Section 33 GWB.)

For each of these categories of antitrust proceedings, the authors discuss a variety of issues: who has jurisdiction to try the case, who is responsible for fact-finding, how is the burden of proof allocated, what is the role of the presumption of innocence, and so on. Many notable points emerge. For example, where administrative fines are imposed, it is the German rules of criminal procedure that govern key aspects of the case, regardless of the fact that the dispute originates in an administrative investigation. (See Article 46 OWiG.) One sees the significant implications that follow from a case's "quasi-criminal" character. They are manifest, for example, in the fact-finding obligations imposed on the court itself, and the prominent role of the presumption of innocence. Interestingly, where fines are not imposed, and the case is merely "administrative", the presumption of innocence does not apply, as if this principle were like a switch that is either on or off. Another remarkable feature in quasi-criminal cases is that the rule contained in Article 2 of Regulation 1/2003, according to which the burden of establishing that the conditions of

[183] Panels deciding cases at the CAT consist of a jurist – drawn from pool of Chairmen unless it is the President of the CAT – but the other members of the panels may be lay judges with expertise in economics, accounting and/or business, and even political science.

[184] A complementary analysis is provided by Heike Schweitzer in "The European Competition Law Enforcement System and the Evolution of Judicial Review", this Volume, pp. 79 et seq., at pp. 110–118.

Article 101(3) are satisfied rests with the party seeking to invoke the exemption, does not apply – a surprising result from the perspective of EU law.[185]

Concerning civil actions, one notes that even though the procedural system was significantly modified in 2005, some classic elements of Continental-style private litigation remain, including in particular a reluctant posture with

[185] In December of 2002, the German Government made a declaration (constituting part of the Council's minutes) to the effect that, in its view, the legal base underpinning Regulation 1/2003 – then Article 83 EC, now Article 103 TFEU – was insufficient to affect national rules of criminal procedure. The Statement provides:

> "With a view to supplementing in particular recital 5 of [Regulation 1/2003], the Government of the Federal Republic of Germany confirms its view that [Article 83 EC / Article 103 TFEU] is not a sufficient legal basis for introducing or amending criminal law or criminal procedural law provisions. This applies in particular to fundamental procedural safeguards in criminal proceedings such as the presumption of innocence on the part of the defendant. The Government of the Federal Republic of Germany would point out that these procedural safeguards also apply to criminal-law-related proceedings such as monetary fine proceedings and enjoy constitutional status. It accordingly assumes that the present Regulation, and in particular Article 2 thereof, cannot amend or adversely affect such criminal law or criminal procedural law provisions applicable to criminal proceedings or criminal-law-related proceedings and legal principles of the Member States." Document 15435/02 ADD 1 RC 22, at p. 8.

In this Statement, the German Government first of all asserts that Article 103 TFEU (even if it explicitly empowers the Council to regulate the "detailed rules for the application of Article 101(3)") cannot be so broad as to authorize the EU to adopt measures that effectively amend national criminal procedural law. The subsequent case law of the ECJ tends to contradict that view, but I will bracket that lengthy discussion and simply conclude that it is not *ultra vires* for the EU to encroach upon national criminal rules of procedure so long as the EU action is designed to ensure the effectiveness of EU law. On the scope of Article 103 TFEU, See Charlotte Leskinen, "The Competence of the European Union to Adopt Measures Harmonizing the Procedural Rules Governing EC Antitrust Damages Actions", cited above note 65, at pp. 17–18.

More interesting than the competence question is the German Government's claim that, where there has been a quasi-criminal administrative offense (*Ordnungswidrigkeiten*), the presumption of innocence must, in effect, take precedence over Article 2 of the Regulation, a result which the Government seems to regard as inevitable as a matter of German constitutional law. This turns the principle of primacy on its head, and cannot be legally correct from the perspective of EU law. Even if Recital 5 itself were interpreted as purporting to allow for a derogation from Article 2 (which would be a fanciful interpretation of the Recital), it is fairly clear under EU law that Recitals cannot provide for derogations from unambiguous (operative) provisions of EU legislation. See Tadas Klimas and Jūrate Vaičiukaitė, "The Law of Recitals in European Community Legislation", *ILSA Journal of International and Comparative Law* 1 (2008), at pp. 13, 16, 23–26 (discussing the *Belgian bull semen* case) and 32. Furthermore, it is abundantly clear from well-established principles of the primacy of "Community" law that secondary legislation adopted by the EU institutions takes precedence over even cherished principles of national constitutional law, let alone the unilateral political declaration of a government, unless those principles coincide with general principles of Community law. (Citations here would be redundant.) The presumption of innocence, of course, forms part of the general principles; idiosyncratic conceptions of that principle do not. Particular national conceptions aside, it is clear from many systems of criminal law that imposing the burden not just of production but of persuasion on defendants may in some circumstances be permitted. Even where the penalty might be said to have a quasi-criminal character, it may be doubted that the presumption of innocence is compromised if – once an appreciable restriction of competition has been established to the requisite legal standard – defendants must then bear that burden of persuasion under Article 101(3).

regard to discovery. Burrichter and Logemann then highlight a number of procedural mechanisms that serve to compensate for what appears at first glance to be a very steep uphill climb for plaintiffs. A balance is certainly needed, since indiscriminate discovery rules are clearly wasteful and lead to perverse outcomes; however, if discovery orders are strictly limited to documents identified with specificity, it is not clear that a good balance has been struck. Fortunately, it appears that some supplementary mechanisms are available which give courts some flexibility in evaluating evidentiary needs in light of the circumstances of a given case.

Turning to the matter of a standard of proof, Germany may in general be said to follow the tradition of *intime conviction* (a robust standard). In the German context this means an individualized and subjective assessment of all the evidence by the judge, to the exclusion, in antitrust cases, of probabilistic formulae[186] and with a remarkably demanding liability threshold – reflecting the presumption of innocence – in "quasi-criminal" cases.[187] However, the presumption of innocence does not preclude judges from relying on reasonable inferences in the light of, among other things, *general rules of experience*.[188]

[186] Merger cases are different. See page 690 ("high degree of probability").

[187] Whereas "beyond reasonable doubt" suggests some semblance of an objective standard (and traditionally, US judges could enter judgments "notwithstanding the verdict" if no reasonable jury could have reached a certain result), the German standard appears to call for an acquittal in cases leaving the "slightest personal doubt" (see page 689). Further checking would be required to determine whether the difference is merely semantic.

[188] In the German tradition and elsewhere, the Weberian concept of "general rules of experience" (*Erfahrungsregeln*) permits a form of probabilistic reasoning with respect to causality which can sometimes compensate for information gaps in particular circumstances. See, e.g., Hannu Tapani Klami et al., "Evidence and Legal Reasoning: On the Intertwinement of the Probable and the Reasonable", 10 *Law and Philosophy* 73 (1991). More specifically, as Fritz Ringer explains: "To substantiate individual causal claims at all, Weber pointed out, both 'causes' and 'effects' must be described at a level of generality that will permit them to be related to 'rules of experience' (*Erfahrungsregeln*). In Weber's account, such rules resemble imperfect empirical generalizations; they are incompletely universal and less rigorously delimited than full-fledged scientific laws. Often expressed in the language of common sense, they are subject to modification by various 'outside' influences. Even so, Weber considered them forms of nomological knowledge, and he thus really excluded the illusion of a radically 'idiographic' historiography." Ringer, "Max Weber on Causal Analysis, Interpretation, and Comparison", 41 *History and Theory* 163, 167 (2002). Rules of experience may (or may not) be corroborated by more specific elements of proof, which may have to be convincing to a greater or lesser degree depending on what consequences are at stake. See Giovanni Sartor, "Legal Validity as Doxastic Obligation: From Definition to Normativity", 19 *Law and Philosophy* 585, 595 (2000).

It has been pointed out that the courts in Luxembourg, relying on their notions of common sense, sometimes engage in "rules of experience"-type reasoning. See Eric Barbier de la Serre and Anne-Lise Sibony, "Expert Evidence Before the EC Courts", 45 *Common Market Law Review* 941, 961 (2008). What is not clear to me is the extent to which the rules of experience are amenable to control on the basis of objective standards. In the context of judicial reasoning in the US, an analogous question is raised by Michael Boudin, "Evidence and the Formulation of U.S. Antitrust Law", this Volume, pp. 665 et seq.

For more on Weber's use of the concept of general rules of experience, see Philippe Fritsche, "La Zwischenbetrachtung: Un espace théorique intermédiaire" , *Archives des sciences sociales des religions,* No. 61(1), pp. 35 et seq. (1986); Guenther Roth, "History and Sociology in the Work of Max Weber", 27 *British Journal of Sociology* 306 (1976).

The standard of proof in civil litigation, as described by the authors, is revealing in that, from a German perspective, *intime conviction* (or "*free* conviction") seems to be equated with a standard of "beyond reasonable doubt".[189] In the context of civil proceedings, the authors also discuss judicial methods used for the calculation of damages.

Section IV of the paper covers German rules on the admissibility of certain kinds of evidence. Here the rules appear to be determined largely by whether testimony may expose witnesses to the imposition of financial penalties; the right of such a witness to say nothing self-incriminating distinguishes him from legal persons, which under German law cannot claim the same dignity-based privilege. Specific German rules on legal professional privilege are also discussed, as are certain criminal procedure-type rules governing the lawful collection of evidence.

Section V briefly discusses access by private plaintiffs to evidence obtained by the Bundeskartellamt under the German leniency program, while the final section of the paper turns to the standard of review applied by German courts in antitrust and merger cases. With regard to judicial review, also discussed in some detail in the contribution of Heike Schweitzer, intense scrutiny will prevail in cases where fines or other administrative sanctions are imposed. This is more than a control of legality; the court is also free to evaluate the "expediency" of the contested infringement decision, meaning that the court need not hesitate to examine the validity of underlying policy choices (*opportunité*). There is no "margin of discretion" so far as concerns the Bundeskartellamt.[190] In administrative proceedings with no "quasi-criminal" element, such as in merger cases, the review is limited to a legality control; with regard to a contested decision, *ça passe ou ça casse*.

Rob Kwinter and co-authors **Cal Goldman, Navin Joneja** and **Chad Leddy** submitted an initial overview of some of the Canadian legislative reforms that entered into force in 2009.[191] Two principal developments are considered: new procedural rules in merger control and more rigorous substantive rules for horizontal agreements.[192] It is apparent that the reforms were designed to achieve a closer rapprochement with the US model in these two fields, although overall the Canadian system has retained its distinct character, with substan-

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[189] See page 691.

[190] The term "margin of discretion" here refers to policy choices and is not equivalent to the "margin of appreciation", which relates more to the actual analysis performed by the agency. On this distinction, see Joachim Bornkamm, "Court Appeals in Competition Law", speech, St. Gallen, 23 May 2008, in Carl Baudenbacher, ed., *Current Developments in European and International Competition Law: 2008, XVth St. Gallen International Competition Law Forum,* Helbing and Lichtenhahn Verlag, 2009, pp. 375 et seq., at 376–377.

[191] See also Calvin Goldman and Navin Joneja "The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner", 41 *Loyola University Chicago Law Journal* 535, 555–560 (2010); and see the reactions of various commentators in "Update: Canada", *Competition Policy International,* August 2010, Volume 8, number 2.

[192] The legislative reforms also had an impact on unilateral conduct cases. See page 704, footnote 8.

tive and procedural rules, not to mention a somewhat simpler enforcement structure, which set Canada apart from the US.

What has not changed is the common law-style approach to the standard of proof: beyond reasonable doubt in criminal cartel cases; and a balance of probabilities in civil cases. However, in contrast to the US system, in Canada the jurisdiction of the courts is divided according to whether or not the case is criminal. If it is, it will be prosecuted by the Attorney General and heard by the Superior Courts of the Provinces. Civil cases – which may be brought by the Canadian Competition Bureau or, in some circumstances, by private plaintiffs[193] – are heard by the Competition Tribunal.[194] The remainder of the paper reports on key elements of the reforms. Among other things, it provides recommendations for the gathering of evidence, for the use experts, and for getting the deal through as smoothly as possible in Canadian merger control.

Barry Hawk submitted a paper, co-written with **James Keyte,** entitled: "Separating the Wheat from the Chaff: How U.S. Courts Analyze Antitrust Evidence". The paper presents a broad panorama of antitrust litigation in the United States. As a framework, the authors set forth an elaborate typology of the sundry claims an antitrust plaintiff (including the FTC or DOJ) can bring before the U.S. courts. The most important of these, of course, are Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The purpose of the paper is to highlight the main evidentiary "battlegrounds" which determine the outcome of (partially or fully) litigated cases. Throughout the paper the authors also provide a sense of the role of economic evidence (i.e., theory and empirics, the latter consisting of quantitative and qualitative data), and of U.S. courts' receptivity to such evidence.

The paper consists of five parts. The first reviews U.S. federal motion practice in order to provide an introduction to the two principal forms of dispositive motions, that is, Rule 12(b)(6) motions to dismiss (now more important than ever in the light of *Twombly*[195]) and motions for summary judgment in the absence of genuine issues of material fact; and the relatively less important motion for judgment *non obstante veredicto*, i.e., judgment notwithstanding a jury's verdict. The first part also contains a review of the *per se* illegality and rule of reason standards, and the less well known "quick look" standard. The second part of the paper covers Section 1 cases, and distinguishes between those cases in which the existence of a collusive horizontal agreement is in

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[193] See Goldman, Kwinter, Joneja and Litsa Kriaris, "Cartel Settlements in Criminal and Civil Proceedings: A Canadian Perspective", in Ehlermann and Marquis, eds., *European Competition Annual 2008: Antitrust Settlements under EC Competition Law,* Hart Publishing, 2010, pp. 359 et seq., at pp. 366–370.

[194] For information on the Competition Tribunal, see its website, http://www.ct-tc.gc.ca/Home.asp.

[195] For discussion going beyond *Twombly's* impact on antitrust cases, see Arthur Miller, "From *Conley* to *Twombly* to *Iqbal:* A Double Play on the Federal Rules of Civil Procedure", 60 *Duke Law Journal* 1 (2010). For the implications in the competition law sphere, see, e.g., Richard Epstein, "Of Pleading and Discovery: Reflections on *Twombly* and *Iqbal* with Special Reference to Antitrust", [2011] *University of Illinois Law Review* 187.

dispute and, on the other hand, cases that turn on actual or likely effects on competition and consumers. The competitive effects cases are divided into horizontal cases such as those relating to joint ventures and vertical cases. Both of these areas have undergone significant changes in recent decades. Since collaborations between competitors are not generally *per se* cases, the structure of the evidentiary analysis may be influenced by whether a court treats the matter as a full rule of reason case or whether it applies a "quick look" analysis. In general, however, in the absence of sham arrangements courts have not been quick to condemn horizontal cooperation. With regard to vertical agreements, the authors note the Supreme Court's controversial *volte-face* in *Leegin*.

B. *Discussion*

In the roundtable following Panel IV,[196] Philip Lowe offered a series of practical observations, touching on, e.g., the *margin of appreciation* concept, and then he raised a point about cooperation between national courts and competition authorities, including the Commission. Particularly in light of a (probable? inevitable?) future turn toward Union-level action on (de-americanized) "collective redress", the development of synergistic relationships between courts and agencies is a subject ripe for deeper reflection, and could perhaps be a point of emphasis for Workshops to come. For his part, Lowe seemed to signal that the Commission was ready to participate in national litigation more actively than in the past – either as *amicus curiae* or in "some other capacity". The latter expression might mean the provision of opinions and information, or possibly (though it is unlikely that Lowe was referring to this) more systematic allocation of EU funds to support the training of judges. The prospects of more extensive cooperation between the Commission and national courts in the application of Articles 101 and 102 should also be considered in tandem with similar initiatives in the area of state aid, even if substance, procedures and competences are all quite different in the latter field of EU law.

The comments of Judge Forwood also related, implicitly, to cooperation between the EU courts and the Commission. Forwood remarked on the potential usefulness of enforcement guidelines, and in particular the

[196] Once again, I leave aside not only the main presentations but also other issues of significance, even if they merit attention and further discussion. For instance, in the remarks of Philip Lowe and of Judge Forwood, the specter of the "competitive process" was raised; or, as another example, the presentation of Lorenzo Coppi (pages 642–644) prompted an interesting discussion of the role of expert (economic) evidence in proceedings before courts and, in particular, before the EU Courts. On the latter theme, which was also discussed in the other panels and in many of the papers (e.g., that of Judge Walker), see the remarks of Judge Forwood and Judge Walker, and consider also the caveats of Jochen Burrichter.

Commission's Fining Guidelines, as an aid for the Courts – which are spared from having unilaterally to construct their own approach to fines from the ground up.[197] Not only does this seem efficient, it is also advantageous from the perspective of transparency, since a gradual bricklaying job may leave doubts as to the ultimate structure of the edifice. Another way of looking at this, arguably, is that it shows how guidelines might be used strategically by the Commission to set the agenda and frame present or future judicial thinking.[198] Certainly, the EU Courts are free to strike out passages or sections of guidelines if they are so inclined, or to declare the guidelines irredeemably defective. But the Courts have not done anything so dramatic. To the extent that the Courts ratify the Commission's policy prescriptions, the line between hard law and soft law tends to fade, and the Commission's *de facto* legislative competences grow. As far as the Fining Guidelines are concerned, one may assume at least for the sake of argument that the Commission has got the risk/reward/punishment calibrations right so far as concerns corporate fines – with all their limitations[199] – despite occasional howls of protest. Even so, one could imagine an important gain in legitimacy if the calculation of fines were articulated in a Council Regulation adopted pursuant to Article 103(2)(a) TFEU. Amendments would obviously require a more cumbersome procedure, but significant rights are at stake.

Another issue that may be considered here is the "ontological" question of whether, when a court applies competition law, the central premise must be that questions of anticompetitive, neutral or benign conduct are all susceptible of "one right answer", as opposed to a range of possible correct answers.[200] One might be tempted to approach this proposition rather skeptically, if one is inclined to regard the law as one great socially constructed fiction. From one

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[197] Of course, the basic provisions governing the imposition by the Commission of fines and penalty payments are set forth in Article 23 of Regulation 1/2003.

[198] A lingering question that looms large is the impact the Commission's Guidance Paper on exclusionary abuses will or will not have on the EU Courts. See, e.g., Pinar Akman, book review, 36 *European Law Review* 148 (2011). More generally, and for a range of views on the Guidance Paper, see also Lorenzo Pace, ed., *The Impact of the Commission's Guidance on Article 102,* cited above note 78.

[199] Corporate fines and an effective leniency program are necessary but insufficient conditions for optimal deterrence against hard core cartel behavior. The use of individual "smart" sanctions (both prison sentences and disqualification orders or "debarment") to penalize corporate employees and officers will in time be perceived as increasingly imperative if effective deterrence is to be assured. Calling on the US DOJ to follow the lead of the OFT (and the US SEC and the OFT) in seeking director disqualification orders, see Douglas Ginsburg and Joshua Wright, "Antitrust Sanctions", 6(2) *Competition Policy International* 3 (Autumn 2010). The EU will likely be cautious about the prospect of adopting legislation in the area of individual sanctions for cartel behavior, at least until a critical mass is reached at the Member State level. When that trend percolates upward, a debate will rage over competences, but a plausible case can be and presumably will be made in favor of the EU's capacity to act. Developing a consensus will be no easy task.

[200] See in particular the remarks of Judge Bornkamm and John Ratliff at pages 632–633, and later the point was addressed by several others, including, e.g., Frances Barr and Judge Barling. See also Joachim Bornkamm, speech, St. Gallen, cited above note 190.

perspective it could be argued that the institutions that apply competition law, not to mention competition law itself, depend on a whole series of assumptions that have little to do with an objective, impervious truth. If the law itself and the institutions applying it are contingent, it may seem contradictory to speak of a court arriving at the one right answer. But that far-fetched line of argument is not very satisfying, and accords poorly indeed with the rule of law. Judge Bornkamm's position seems far more attractive, even if, as he acknowledges, decisions in real cases sometimes cannot escape a degree of arbitrariness, which reflects the more epistemological issues of the imperfection of information and the limits of human knowledge.

What is riding on the "one right answer" issue? In a world in which there are many right answers, there is ample room for administrative discretion. In a world where different answers cannot claim equal measures of truth, there is a more pressing need for assiduous scrutiny of administrative decisions. Judge Barling, drawing on the wisdom of the 18th Century,[201] suggested that the principle of *proportionality* may be used as a compass that guides a court to the right answer. The principle of proportionality sits awkwardly beside the "one right answer" concept, since it locates the outer boundaries of reasonableness, and does not in all cases identify the *most* reasonable solution. Judge Barling's remarks may illustrate that if a question does not admit of a uniquely correct response, then one might still preserve the "one right answer" principle by reframing the question: does the restraint go beyond what was necessary to ensure the commercial logic of the transaction? But that is a way of sidestepping the matter. No satisfying solution can be offered here, as the conclusion that seems to present itself is that a principle of one right answer may be desirable even if, as other desirable legal principles sometimes are, it is based on a fiction.

Finally, at page 650, Ian Forrester and Judge Bornkamm offered some fond and moving words of thanks and farewell to the helmsman, my distinguished collaborator, Claus Ehlermann. With consummate style and dignity, Claus then gave his last sendoff to the group. I certainly hope that future Workshops will meet the high standards Claus has set for us, and that they will continue to enrich our collective knowledge and stimulate critical reflections about competition law in Europe and worldwide.

[201] See *Mitchell v Reynolds,* (1711) 1 P.Wms. 181.