

Evidence, Proof and Judicial Review in EU Competition Law

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*Reviewed by Silvia Bessa Venda**

1. Introduction

In a time when the public enforcement of EU competition law carried out by the European Commission (hereafter, the Commission) has been increasing together with the concerns about the legality of its proceedings and judicial review, a work emerges which, as the reader will realise, addresses the problem with the depth and pragmatism that it claims.

Indeed, in recent years we have witnessed a greater number of proceedings related with Articles 101 and 102 TFEU, together with record-breaking fines. It is clear that detecting and sanctioning undertakings that break antitrust rules is essential to the functioning of the internal market. And there is also substantial literature on the analysis of the substantive provisions referred to above. However, this does not apply to the state of procedure law, especially in what concerns standards of proof and judicial review, as well as the protection of fundamental rights regarding the public enforcement of EU competition law. This is why the aim of this book is to assist readers, especially practitioners, understand these procedural matters which, although not yet studied intensively in literature, are crucial in a process which seeks to determine whether antitrust rules have been infringed.

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To that end, the authors of *Evidence, Proof and Judicial Review in EU Competition Law* take advantage of their practical experience as agents for the Commission in the Court of Justice of the European Union (CJEU) to analyse its case law regarding the issues above.

Lifting the curtain a little, Fernando and Eric argue that the high rate of the Commission's success cases is seen as a problem "in itself" by some practitioners that do not consider the hypothesis that there are few annulments due to the positive work of the Commission.

2. Description

Evidence, Proof and Judicial Review in EU Competition Law is structured in six chapters. Its topics are interconnected, which often compels authors to make references to other chapters or to repeat ideas.

Chapter 1

The book starts with a brief overview of its purpose and structure. The authors describe the topics addressed in each chapter and the methodology applied.

Additionally, they raise the question and give their opinion on whether there is a problem with the fairness of the Commission's procedures to implement competition law and its judicial review. For them, the system works (according to them, mistakes or a different assessment of evidence by the CJEU are marginal) and the origin of the critics lies often in the mere circumstance of the low number of annulments and, consequently, in the high number of the Commission's "wins". The authors consider that no concrete deficiencies in its decision-making are invoked by the critics. On the contrary, they believe that the Commission's conduct has evolved in terms of the selection of priority cases, many of the controversial situations or cases are dropped along the way, the prosecution often differs substantially from the final decision, some objections are dropped, and naturally these cases do not pass to the CJEU. To support this understanding at this stage, they rebut some of the arguments pointed out about win/loss quotas, which in our view do not prove the statements mentioned above.

On the other hand, Fernando and Eric develop a very interesting analysis, based mostly on the CJEU's decision-making practice – the main source of the book, especially the most recent one –, about the thin line between substantive law and the facts that are relevant and must be the object of the proof. As they demonstrate, this is particularly relevant regarding the

decentralisation provided by Regulation 1/2003 due to the “principle of procedural autonomy”, provided that such rules (namely on the standard of proof or obligations to ascertain certain facts) are compatible with the principles of effectiveness and equivalence and with the procedural fundamental rights of EU law.

Finally, the authors define the scopes of both the standard of proof and the standard of judicial review and address the question of the compatibility of the Commission’s powers to investigate and impose fines without the intervention of a “judicial body that has full jurisdiction” with the rights to respect for private life and correspondence and to a fair trial provided by the European Convention on Human Rights (ECHR), observing the differences and similarities in the understandings of the European Court of Human Rights (ECtHR) and the CJEU.

Chapter 2

Chapter 2 deals in more detail with theoretical concepts regarding the burden (who needs to invoke facts and adduce evidences) and the standard (level of confidence required to consider facts as proven) of proof and its application in cases regarding Articles 101 and 102 TFEU. The authors rely on literature and, of course, on the CJEU’s case law in order to distinguish the legal from the evidential burden of proof, concluding that the allocation of the latter conducts to situations in which one party alleges a fact so that the other may support the risk and the negative inferences if it cannot present “plausible alternative explanations”. Thus, this concept is the basis of the situations where evidence is so strong that it requires a response by the opposing party and the application of factual presumptions, both of which are developed by the authors in this chapter. They move on to address the definition of standard of proof, providing the evolution of the CJEU’s understanding, which has been influenced by some national legal systems, oscillating between the *in dubio pro reo* principle and the *intime conviction* of the judge. Although Fernando and Eric recognise the relevance of these definitions, they argue that, in practice, it is important to identify the variables likely to influence the judge, like the plausibility of the allegations – the so-called perception of normality. Another interesting conclusion at this stage, and which will be important for the understanding of the remaining chapters, is that the CJEU applies a lower standard to the examination of the consequences of the infringement, illustrated especially by the concerned practices’ cases. The authors also refer to the

risk of error that underlies a purely economic assessment, such as the test applicable to determine the rationality of predatory pricing, and commending the Commission for “basing its findings on several alternative calculation methodologies”. Additionally, the authors provide notions of “discretion” and “margin of assessment”, and end the chapter with a reflection upon the – in their words – “holistic” approach of the Commission, which relies on evidence dated outside the period of the infringement to help in its interpretation.

Chapter 3

In chapter 3, Fernando and Eric cover the application of the rules on evidence and proof to specific situations, like the boundaries between multiple and continued infringements, the determination of their duration (start, suspension/interruption and end), the justification of the infringement and the calculation of the applicable fine. It is interesting to see how the CJEU’s analysis has evolved with regard to the gap necessary to interrupt liability, to the contradiction of the “presumption of continuity” (even if there is no evidence of infringement regarding certain periods of time) and to the standard of proof applied in case of resumption. The authors conclude that, although the relevance given by the CJEU to the duration of the interruption has oscillated, once the interruption it accepted, the same standard of proof as the one applied to assess its entry applies to determine that the undertaking has, for instance, rejoined the cartel.

Chapter 4

Chapter 4 deals with the probative value of the following types of evidence, differentiated by the case law: in- or exculpatory, contemporaneous or *ex post facto*, direct or indirect, written or oral. Indeed, the case law shows some similar lines as regards the probative value of such documents.

However, according to the authors, it continues to state that the only valid criterion for evaluating evidence is its “reliability”. They argue, exemplifying with CJEU’s cases, that this reliability will depend on the relation of the evidence with other factors presented in the process.

The problem of evidence admissibility is also addressed in this chapter, although only from the Commission’s proceedings point of view (evidence admissibility in the context of judicial review is examined in the last chapter). The authors present a list of evidence which cannot be used by the Commission, based on CJEU’s decisions. This work of schematization, in

such a dense subject, enables readers' analysis of the subject matter and the usefulness of the book in practice.

The chapter concludes with a reference to the controversial issue of the probative value to be attributed to undertakings' attitude during the administrative proceedings. For instance, can an undertaking that proposes and accepts a settlement contest the Commission's final decision? The case law presented by the authors shows that it can, although they admit that the probative value of such agreements is yet to be determined. In general terms, recent case law recognizes relevance to the undertakings' attitude, but only as "part of the overall assessment of the evidence".

Chapter 5

Finally, the book addresses the EU regime of judicial review of competition decisions (the topic that occupies the last two chapters). Firstly, it provides an overview on the EU law principles applicable in this matter, the jurisdiction of the CJEU and the procedural (namely, evidentiary) rules applicable to the specificity of competition cases. Then, the authors explain that the amount of evidence on record and the scope of the judicial review will depend on the applicant's contestation of the Commission's decision. It is at this stage that the authors' experience stands out most. Fernando and Eric examine the admissibility of the evidence, the timing of its submission, the role of annexes to the pleadings, and the role of the judge, including the possibility on his part to order the parties to adduce evidence. In this context, the authors address to the problem with leniency statements. Then, they move on to the use of witnesses' oral testimonies (or the lack of it), distinguishing them from witnesses' written statements and informal hearings of individuals.

Furthermore, the authors analyse the compatibility of the CJEU's autonomy regarding the hearing of witnesses and the right to a fair trial, relying, therefore, on the case law of both the CJEU and the ECtHR.

Finally, the relevance and probative value of the expert reports is examined, namely in the field of economics.

Chapter 6

In this final chapter, Fernando and Eric focus on the scope of the judicial review of competition decisions made by the CJEU. They start by distinguishing between the review of the legality of the findings of the Commission's decision which declares the infringement and the review of

the setting of the fine, which is subject to an unlimited jurisdiction according to Regulation 1/2003 and can be canceled, reduced or increased by the CJEU. At this final stage, the authors deal once more with the above-mentioned criticism and examine it in more detail. First, they argue that the review of the act is not necessarily limited but is different in nature, due to the role of the principle of legality in that context, which is different from the discretion in setting the fine. Then, Fernando and Eric invoke the CJEU's case law that declares the "duty to conduct a diligent and impartial examination" to affirm that the Court has relied on this duty to annul Commission's decisions, enabling it to scrutinise the way the information on the basis of the decision was collected and assessed, as well as the plausibility of the conclusions drawn. According to the authors, the decision should be considered lawful if the evidence (i) is reliable and covers all the relevant facts; (ii) was assessed "carefully and impartially"; and, most importantly, (iii) supports the overall conclusions. They also inform the reader that the majority of the CJEU's annulments have not been based on "manifest errors", but in lacks of examination, without, however, specifying – as it should – such faults.

The limited review regarding "complex economic assessments" is also covered by the authors, who conclude that antitrust rules guide the Commission when choosing the lawful method, *i.e.*, the method able to prove the fact.

On the other hand, the authors analyse the CJEU's decisions according to the ECtHR's case law and seem to conclude, as advanced in chapter 1, that the standard applied by the CJEU is not infringing Article 6 ECHR, as opposed to other authors who only accept the limited nature of the judicial review provided that more guarantees are applied in the administrative stage. In addition, the authors argue that the use of the manifest error test has little practical applicability and that many important cases do not even refer that limitation. Furthermore, many Commission's decisions have a "safety margin" and the existence of critical views – in their words, "common to any area of law" – does not necessarily correspond to a systematic problem.

Afterwards, Fernando and Eric focus on the exercise of unlimited jurisdiction by the Court and, in the end of the book, look at the CJEU's understanding regarding certain specificities of competition litigation, such as the possibility of partial annulment and the extension of an annulment or a reduction of the fine to others applicants.

3. Critical Analysis

Evidence, Proof and Judicial Review in EU Competition Law delivers what it promises. As advanced in the context of the description, the book is well organised and developed with logic and clarity.

However, it would have been helpful if the authors had reserved a final chapter to present their general/final conclusions and to organise the arguments they drew from their work, in particular from the CJEU's case law, to support the position advanced in the first chapter. The topic is very extensive and, despite their extraordinary effort to treat it in a reasoned but concise way, the fact that the conclusions are scattered throughout the book makes it difficult to understand properly. Indeed, after reading almost 400 pages, it is not easy for the reader to remember the conclusions contained in the first chapters, for instance.

On the other hand, the major strengths of *Evidence, Proof and Judicial Review in EU Competition Law* are the consistency of its sources, namely the recent case law of the CJEU, and the rigorous and honest manner in which the issues, both complex and relevant, were divided and analysed.

The authors' defense of the current system, although founded, is not exempt from criticism, though. We must say that it is humanly impossible that Fernando and Eric's vast experience, as agents for the Commission in the CJEU, has not interfered with its analysis. In fact, it has not become clear to us that the standard of review for "complex economic assessments" does not raise problems at a fundamental rights level. We understand that actions for annulment guarantee the application of the principle of effective judicial protection. However, it is also true that the appeal for annulment does not have a suspensive effect. In addition, the admissibility of an application for suspension of the contested act depends on stringent criteria and on a weighing-up of interests.

Overall, it is an unparalleled book in the literature, not only due to its topic but also to the depth of the analysis therein. It is a true guide on the CJEU's case law of evidence, proof and judicial review and, therefore, of extreme value.

Practitioners and stakeholders interested in the practice of competition law at an EU level cannot but applaud Fernando and Eric's work. *Evidence, Proof and Judicial Review in EU Competition Law* has become a mandatory reading.

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