BUSINESS at OECD

Comments by the
***Business at OECD* (BIAC) Competition Committee**
to the OECD Competition Committee

The Standard and Burden of Proof in Competition Law Cases

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I. Introduction

1. *Business at OECD* (BIAC) is grateful for the opportunity to comment on the standard and burden of proof in competition law cases.

2. The standard and burden of proof in competition law cases are complex and vary significantly across jurisdictions. The fundamental principle remains that the party alleging a claim must prove the facts on which that claim is based. This principle often means that it is incumbent on the competition authority (or private claimant when there is private enforcement) to prove the infringement and present related evidence. The challenge lies in balancing the goals of competition law with the need to create clear and administrable rules. This balance is challenging to achieve given the inherent tension between narrow rules and more flexible standards.

3. Allied to these considerations are whether the offense is civil or criminal in nature, leading to different burdens and standards. In civil cases, the standard is typically a "preponderance of evidence" meaning that the claim is more likely to be true than not. In criminal cases, the standard is ordinarily "beyond a reasonable doubt," a much higher threshold. Also key to bear in mind is that certain jurisdictions have fundamental right protections. For example, Article 6(2) of the European Convention on Human Rights (ECHR) explains that companies also have fundamental rights and protections including the presumption of innocence. These principles are crucial in competition law cases, where the consequence of a finding of infringement can be severe.

4. Bright-line rules, such as per se prohibitions in the U.S. and by object restrictions in the EU, have also evolved over time to offer predictability and ease of administration, but they come at the expense of possible errors. Conversely, detailed effects-based analyses, known as the rule of reason in the U.S., minimize errors but can be resource-intensive. The qualification of a business practice as either subject to per se rules or the rule of reason has profound procedural consequences, particularly on the allocation and shifting of the burden of proof. Per se illegality implies an irrebuttable presumption of harm for certain categories of conduct, while other forms of conduct with less certain competitive effects can create a rebuttable presumption of likely harm. And these standards remain subject to the jurisdictional requirements for both burdens and standards of proof. This evolution is discussed in more detail in BIAC's companion submission on the Use of Structural Presumptions in Antitrust Cases.

II. The Interplay Between "By Object" and "By Effect" Variations in the EU

5. Although the per se/rule of reason standard and the burden of proof are distinct concepts, they have a deep connection in competition law. Which of these standards is used (i.e., per se or rule of reason) often determines who carries the heavier burden of proof. While even in a per se case, an agency must show the

prima facie elements of the claim, this burden is much lighter when elements like market definition and anticompetitive effects are not required or are presumed. Conversely, in a rule of reason case, the burden to show every element of the claim is much more challenging. Thus, the balance of this submission looks at the impact of the per se and rule of reason standards on burdens of proof.

6. In EU competition law, the use of per se rules and presumptions is generally accepted for effectiveness and efficiency. However, even in instances where presumptions or "restrictions of competition by object" are traditionally accepted, there are cases where the EU courts require some level of effects analysis. For instance, in the *Intel* case, the European Commission fined the dominant undertaking €1.06 billion for implementing exclusivity rebates.[1] The EU General Court held that exclusivity rebates give rise to "a mere presumption" of abuse and are not "per se" abusive.[2] Therefore, the dominant undertaking can defend its exclusivity rebates by adducing evidence that its conduct was not capable of producing anticompetitive effects, and the European Commission must undertake an economic analysis to assess such evidence. If the dominant undertaking reaches a certain level of proof, the burden shifts back to the authority.

7. In this specific case, the European Commission had not only relied on a presumption to find an abuse but had also conducted a cost/price analysis. Intel challenged the Commission's analysis. The EU General Court assessed the analysis and found that the Commission had not established, to the requisite legal standard, that the rebates granted were capable of having or likely having anticompetitive foreclosure effects. The General Court discussed the standard of proof the Commission must satisfy in such cases and emphasized that the starting premise must be the presumption of innocence.[3] Still, the level of proof required in such cases has not been entirely clarified.

8. Another case where the European Courts leaned towards an "effects-based" approach despite the finding of a "by object" restriction was *Cartes Bancaires*.[4] The European Court of Justice (CJEU) held that the object of the measures at issue was not, by its very nature, harmful to competition and that, in general, by object restrictions need to be interpreted restrictively.[5] According to the higher court of the EU, a finding of a restriction "by object" requires robust evidence showing anti-competitive effects, considering the agreement's content, objectives, and economic context. The case shows that arrangements which are novel or exist in complex economic settings require more careful examination of their economic context and market circumstances.[6]

9. Despite the European Courts limitation of "by object" approaches, the European Commission recently outlined in a policy brief on antitrust in labor markets that wage-fixing and no-poach agreements

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1 Case COMP/37.990—Intel, Comm'n Decision (May 13, 2009) (summary at 2009 O.J. (C 227) 13), *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_18.pdf.

2 Case T-286/09 RENV, Intel Corp. v. Comm'n, ECLI:EU:T:2022:19, ¶ 124 (Jan. 26, 2022).

3 *Id.* ¶¶ 160-166.

4 Case C-67/13 P, Groupement des Cartes Bancaires v. Comm'n, ECLI:EU:C:2014:2204 (Sept. 11, 2014).

5 *Id.* ¶ 58 ("[I]n the light of that case-law, the General Court erred in finding . . . that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.").

6 *Id.* ¶ 78 ("In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary, in accordance with the case-law referred to in paragraph 53 above, to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place . . . . ").

should generally qualify as restrictions by object under Article 101(1) and are unlikely to meet the requirements for an exemption under Article101(3).[7] The Commission adopted this approach despite not yet having adopted a decision concerning a self-standing labor market agreement.

10. However, the CJEU in *Budapest Bank* set out conditions for when a "by object" rule should be applied, emphasizing that "there must be sufficiently reliable and robust experience for the view to be taken that that agreement is, by its very nature, harmful to the proper functioning of competition."[8] This judgment also clarifies that the effects of an agreement which are pro-competitive or ambivalent are relevant not only under Article 101(3) TFEU but also in the context of a by object assessment. Despite the European Commission's lack of established precedent in the no-poach field, with no decisions to date, the policy brief notes that "relevant experience already exists in decisions on buyers' cartels, which the Court has classified as by object infringements."[9] This suggests that the Commission's approach equates buyer cartels with no-poach agreements, a stance that appears prejudicial. Afterall, industrial organization economists generally agree that there can be pro-competitive reasons for no-poach agreements. The Commission's policy view does not align well with the "sufficiently reliable and robust experience"[10] condition set out by the CJEU. Given that a "by object" finding significantly impacts the rights of the parties involved, it is expected that the CJEU meant sufficiently reliable and robust experience in dealing with the specific theory of harm, not just a general analytical approach.

III. The Interplay Between "Per Se" Rules and "The Rule of Reason" in the U.S.

11. As in the EU, courts in the U.S. are hesitant to apply "per se" rules to more complex cases or when the effects of a restraint are not certain. Over time, the definition of what is "anticompetitive" has evolved. For example, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the U.S. Supreme Court overturned nearly a century of precedent by ruling that resale price maintenance (RPM) agreements should be assessed under the rule of reason rather than under the per se standard, as an evolution to meet the dynamics of the present economic conditions.[11] The Court concluded that a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... upon formalistic line drawing."[12]

12. Similarly, some years ago, in *Monsanto Co. v. Spray-Rite Service Corp.*, the Supreme Court broadened the standard of evaluating vertical restraints.[13] *Monsanto* involved an alleged conspiracy between a product supplier and its dealers to fix minimum resale prices. The District Court held that Monsanto's conduct should be deemed per se unlawful if it was in furtherance of a conspiracy to fix prices. However, the Supreme Court distinguished between independent actions taken by a manufacturer (governed by the rule of reason), concerted action between a manufacturer and distributors on nonprice restrictions (governed by the rule of reason), and agreements to fix prices (classified, at that time, as per se illegal).

13. The Court elevated the evidentiary standard for the latter category. This was in an effort to reduce the costs of error both in terms of false positives and in terms of deterring legitimate conduct for fear of antitrust liability. The Court reasoned that a lenient standard for establishing a conspiracy to fix minimum

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7 European Comm'n, *Antitrust in Labour Markets*, Competition Policy Brief No. 2/2024 (May 2024), https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en [hereinafter *EC Labor Markets Brief*].

8 Case C-228/18, Gazdasági Versenyhivatal v. Budapest Bank and Others, ECLI:EU:C:2020:265, ¶ 76 (Apr. 2, 2020).

9 *EC Labor Markets Brief*, *supra* note 7, at 4.

10 *Id.*

11 Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

12 *Id.* at 887 (quoting Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977)).

13 Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

resale prices would increase the likelihood of judicial error because of the similarity of competitive consequences of price and nonprice vertical intrabrand restraints and the disparity of treatment accorded under previous decisions. Because price restraints can have the same effect as nonprice restraints, they could be mistaken for price restraints by a jury and erroneously condemned under the per se rule.

14. U.S. antitrust regulators, like their EU counterparts, have increasingly turned their attention to competition in labor markets. The U.S. Department of Justice and the Federal Trade Commission issued its *Antitrust Guidance for Human Resource Professions* in October 2016.[14] In that guidance, they explained that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."[15] They explained that such agreements are per se illegal under the antitrust laws but despite this standard of proof, they have met with mixed success in the courts. The DOJ voluntarily dismissed with prejudice a no-poach case that was ready for trial following the loss of four no-poach cases.[16]

15. This track record appears to illustrate that courts and juries are skeptical that wage fixing and no-poach agreements should be treated as categorically criminal. They also appear to be adopting a more nuanced approach that requires the DOJ to effectively show more effects-based harm. This illustrates that agencies should remain mindful of how courts and juries are responding to actions by the agencies and align their approaches to ensure an appropriate balance in the standard and burdens of proof for effective competition law enforcement.

IV. Conclusion

16. The complexities surrounding the standard and burden of proof in competition law cases are evident across various jurisdictions, each with its own set of rules and practices. "Per se" rules and associated presumptions play a crucial role in competition law enforcement where they help streamline processes and save resources. However, they also increase the risk of errors, necessitating a careful approach in their application.

17. Ultimately, achieving an effective balance in the standard and burden of proof is essential for robust competition law enforcement. This balance ensures that competition authorities can effectively prevent anticompetitive practices while minimizing errors and maintaining fairness in the adjudication process. However, courts have increasingly promoted more effects-based analyses or limited the scope of per se rules. Courts have, therefore, focused more on the actual impact of business practices on market competition rather than relying solely on formalistic criteria. This allows for a more nuanced and accurate assessment of whether certain behaviors are harmful to competition especially when conduct is novel or when the economic effects warrant a more detailed analysis. This can come at the expense of administrability and places more of a burden on authorities to meet the requisite standards. But courts appear to be weighing this consideration as part of their own review and continue to apply more robust effects-based approaches, nonetheless. In addition, the tools and powers of investigation available to agencies have significantly ramped up over recent years (e.g., extending to private premises and the proliferation of digital communications) along with enhanced leniency programs, therefore there is a broader scope for agencies to identify relevant evidence to establish violations that meet the evolving standards and burdens of proof. Finally, it also worth noting that the EU's Digital Markets Act (DMA) has taken a novel approach to

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[14] U.S. DEP'T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 20, 2016), https://www.justice.gov/atr/file/903511/dl.

[15] *Id*. at 4.

[16] *See* United States v. Jindal, No. 20-cr-00358 (E.D. Tex. filed Dec. 9, 2020) (jury acquitted defendants on no-poach and wage -fixing charges); United States v. DaVita Inc., No. 21-cr-00229 (D. Colo. filed July 14, 2021) (jury acquitted defendants on all charges); United States v. Patel, No. 21-cr-00220 (D. Conn. filed Dec. 15, 2021) (court ordered acquittal of all defendants prior to jury deliberations); United States v. Manahe, No. 22-cr-00013 (D. Me. filed Jan. 27, 2022) (jury acquitted defendants on all charges).

regulating competition in digital markets, and essentially puts the burden of proof on gatekeepers, requiring these companies to prove compliance with the specific rules, and imposing fines if they do not. Similar approaches are being considered globally with similar ex ante regulation.