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### **The Burden of Proof in Article 82 cases**

Even if in most cases the discussion on the burden of proof is somewhat academic in that the administration of justice is in reality often a product of contributions from both sides and of inferences from facts which are a mixture of direct evidence and indirect evidence, the debate on the burden of proof has again surfaced on the occasion of the publication of the Discussion Paper on Article 82.

It therefore seems useful to clarify certain aspects of the debate around the Discussion Paper on Article 82 so as to avoid misunderstandings. It will help the debate if we clearly distinguish between the standard of proof, the means of proof admitted by law and the burden of proof.

The **standard of proof** relates to the level of proof required to reach a certain finding, such as “beyond reasonable doubt” in criminal proceedings, “balance of probability” or “reasonable likelihood” in civil and administrative proceedings. In competition cases which can raise complex economic issues, proceedings against companies generally follow the standard of balance of probability with sometimes varying degrees of likelihood depending on the questions at stake.

The **means of proof** is the type of evidence admitted to be used to substantiate a finding at the level of the standard of proof required. This can include not only direct evidence but also circumstantial evidence of a more indirect nature. The means of proof can also include certain presumptions which can be legal presumptions or presumptions of fact. Legal presumptions can only be created by statute. Presumptions of fact are inferences that one can

normally draw from a given set of facts, in the absence of any countervailing indications (see examples quoted by the CAT in Napp, para. 110)<sup>1</sup>.

In the Discussion Paper on Article 82, the Commission has presented a number of elements for the assessment of unilateral conduct which creates an anticompetitive foreclosure effect likely to cause harm to consumers: capacity to foreclose, likelihood of significant foreclosure on the market, likely harm to competition and to consumers. The Commission has stated that at certain points of the assessment a presumption of fact can be inferred to conclude to a finding of abuse. These are not presumptions of law created by the Commission which it could not do in a set of guidelines. However, it is quite normal that an authority expresses a view on possible presumptions of fact subject to approval or disapproval by the Court of First Instance/Court of Justice. Authorities are not prevented from announcing in guidelines that, when certain factual evidence is present, it will infer certain consequences thereby requiring the dominant company to provide an explanation or justification, failing which the authority will conclude that the burden of proof has been discharged. It will be for the Court to decide whether in a given case the authority was right in drawing the conclusion it announced it would draw.

Examples of such presumptions of fact are unilateral conducts which have no economic justification but for the exclusion of competition on the market. Thus in the field of predation absent exceptional circumstances, sales below average avoidable cost can normally be presumed to have the intent to exclude and to produce an anticompetitive effect on the market, with the possibility for the defendant company to prove that such effect is not likely in the particular circumstances of the case<sup>2</sup>. Where, however, the sales price lies above average avoidable cost and the clear intent to predate cannot be proven, the authority has to prove the profit sacrifice and the likely anticompetitive effect on the market leading to harm to consumers.

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<sup>1</sup> UK Competition Appeal Tribunal, 15 January 2002. The examples mentioned by the CAT are that dominance may be inferred from very high market shares (*Hoffmann-La Roche v Commission* [1979] ECR 461, 41, par. 41; that sales below average variable costs may, in the absence of rebuttal, be presumed to be predatory (see opinion of Advocate-General Fennelly in case C-395/96P and 396/96P *Compagnie Maritime Belge v Commission* [2000] ECR I-1442 at par. 127), or that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged *Montecatini v. Commission*, Case C-235/92P [1999] ECR I-4575, Pars 177-181.

<sup>2</sup> ECJ in *AKZO Chemie BV v Commission*, Case 62/68, [1991] ECR I-3359, par. 71.

The **burden of proof** concerns the question of who has the burden of proving the facts on which a party relies to reach the standard of proof required. The party bearing the burden of proof has the obligation to come forward with any form of admissible evidence to support its claim and it continues to bear this burden until the applicable standard of proof has been met. From that moment onwards the burden of proof shifts to the other party which then again up to the applicable standard has to prove the contrary, at which point the burden of proof shifts again, etc. The final decision will be taken once both parties have brought forward all admissible evidence. In case the evidence put forward does not convince the deciding authority or court, it will decide against the party bearing the burden of proof.

The Discussion Paper has introduced the perspective of allowing dominant companies to invoke an efficiency defence as a countervailing factor to otherwise negative competition effects on price, output or innovation. The Discussion Paper states that exclusionary conduct may escape the prohibition of Article 82 if the dominant company can provide an objective justification or demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence should rest on the dominant company (para. 77). This has been criticised, and it has been asked what this exactly means.

There are several good reasons why the burden of proof for objective justifications and efficiencies should be on the dominant firm, provided this rule is understood in the correct way.

The old Roman law principle on burden of proof is that the one who invokes a fact has to prove that fact: *“ei incumbit probatio qui dicit, non qui negat”*. The finding of an infringement of Article 82, like the finding of an infringement of Article 81, is basically composed of two elements: likely negative and likely positive effects which on balance must be negative to constitute an abuse under Article 82 or to constitute an infringement under Article 81. This analytical framework is therefore composed of two elements: proof of likely negative effects and proof of likely positive effects. This is the classical situation for any rule of reason analysis. While Article 81 contains an explicit rule of reason in the structure of Article 81(1) and 81(3), I submit that Article 82, which also covers agreements, contains an implicit rule of reason requiring equally an assessment of pro- and anti-competitive effects of

unilateral conduct. For this rule of reason assessment we should have a coherent approach for the allocation of the burden of proof both for Article 81 and 82.

In this framework the burden of proof for the negative effects must lie with the authority/plaintiff alleging an abuse. The authority has to prove all the constituent elements of the likely foreclosure effects: capacity of foreclosure, likelihood of foreclosure on the market, likely harm to consumers. As long as the authority has not proven likely anticompetitive effects, the dominant firm has no obligation to justify its behaviour or to prove countervailing efficiencies that counteract the likely harm to consumers that otherwise would occur.

It is only once the authority has proven likely anticompetitive effects that the dominant firm has the burden of proof of the likely positive effects, i.e. the obligation to come forward with sufficient evidence of positive competition effects which could either put into question the finding of the negative effects as such, or which could establish countervailing factors which on balance outweigh the negative effects and therefore take the contested behaviour out of the prohibition of Article 82. It is of course very likely that the dominant firm, having this burden of proof, does not wait until the authority has proven negative effects to produce the counter-evidence or the evidence of positive countervailing efficiencies. If the burden of proof is on the dominant firm, it is very likely to put forward this evidence at a much earlier stage so as to foster the investigation and possibly convince the authority to stop its investigation.

This distribution of burden of proof between the investigating authority or plaintiff and the defending party is not at odds with the need to have a global integrated assessment of both negative and positive effects of a given conduct of a dominant firm. Here, a distinction needs to be made between the investigation phase and the final decision to be taken by the authority or court. The ultimate decision is always taken on the basis of all the facts taken as a whole. Ultimately the decision maker has to decide whether the negative or the positive effects are likely to prevail (net harm or net benefit). However, this does not preclude a distribution of burden of proof for the purposes of the investigation which stimulates the defending party to come forward with sufficient evidence on positive effects at an early stage of the investigation so as to provide a comprehensive evaluation of all effects from the very beginning.

The argument has been made that Article 82 has no explicit exemption provision and that therefore it is an integrated test which does not know the structure of proof of a restriction combined with a defence of inapplicability like Article 81(3). I fail to understand this argument. Even if efficiency arguments form part of the constituent elements of the prohibition or abuse, and even if the provision in the statute is not explicitly structured by way of prohibition/exemption, it can be composed of different elements, some of which are supporting a finding of incompatibility and others which are supporting a finding of compatibility with the law. A defence to a violation of a statute is not only an express defence stated in the law or in the text book. Any countervailing factor such as objective justifications or efficiencies which render Article 82 inapplicable can qualify as a defence, for which the burden of proof normally has to be on the person invoking such defence. The fact that the countervailing factor has to be brought forward by the defending party does not preclude a global integrated assessment and balancing of all effects under Article 82. It does not either change the fact that the authority has the burden of proving the ultimate violation of Article 82. This means that if the defendant comes forward with sufficient evidence of facts which contradict the facts alleged by the authority or which outweigh or neutralise the negative effects identified by the authority, the authority/plaintiff either accepts this outcome or has to prove with further evidence that the evidence put up by the dominant firm is not sufficient to outweigh the negative effects shown by the authority.

To illustrate this framework of analysis by an example, we could take a rebate scheme. Rebate schemes can create efficiencies in terms of lowering of production and distribution costs. If that is the only effect, there is no start of any discussion on abuse of dominance. If, however, the rebate scheme also creates a loyalty-enhancing effect with exclusionary effects on competition which are likely to harm consumers, then it becomes important to prove the level of the cost savings to balance them against the negative effects on competition and to establish whether the net effect is negative or positive for consumers. If the efficiencies are sufficient to counteract the potential harm that consumers might otherwise suffer, then Article 82 is not applicable. For that purpose the dominant firm should have the burden of proof to demonstrate the cost savings and their sufficiency to outweigh the negative effects. This distribution of burden of proof does not hinder an integrated assessment of all positive and negative effects when the final decision is being taken.

The dominant firm has not only to prove the existence of efficiencies but also that they are sufficient to outweigh the likely negative effects. The balancing is an inseparable element of the efficiency defence. If the alleged efficiencies are not sufficient to outweigh the negative effects, the defence is not effective. The defendant company can only win if it demonstrates sufficient countervailing positive effects which at least neutralise the alleged negative effects.

Once the defendant has advanced its evidence on positive effects, the authority can only decide that there is an abuse to the extent it can prove that the efficiencies advanced by the defendant are not outweighing or at least neutralising the demonstrated negative effects. That exercise inevitably also involves the obligation to balance the positive and negative effects of the conduct in question. The balancing is thus an inseparable element of both the proof of an abuse of Article 82 and the counter-proof of efficiencies as countervailing factor. The decision maker can only conclude to an abuse if he demonstrates two things: one, the likely negative effects, and two, that these negative effects outweigh the demonstrated positive effects. If the positive effects outweigh or neutralise the negative effects, the authority has to conclude to the absence of an infringement.

The allocation of the burden of proof for the positive effects on the dominant firm has the consequence that the dominant firm has the incentive to come forward with all positive arguments at an early stage of the proceedings; it is not sufficient to just produce some arguments in defence and then wait each time until the authority tells it whether or not such arguments are sufficient to lead to a positive outcome. In other words, it puts the defending party under the obligation to produce sufficient evidence in due time. In case of failure to reach the threshold of overcoming or at least neutralising the negative effects, the decision goes in favour of prohibition so as to protect the consumer rather than to protect uncertain or unproven efficiencies.

The burden of proof of the positive effects should be on the dominant firm for several reasons:

- the one who invokes a fact or defence has to prove it. This is a general principle of law which makes a lot of sense because it puts the burden on the person who has the strongest incentive to prove a particular alleged fact.

- the knowledge about justifications and efficiencies is normally in the hands of the dominant firm which is therefore best placed to demonstrate their existence and their sufficiency in relation to the negative effects demonstrated by the authority/plaintiff.
- the proof of the absence of objective justification or of the absence of sufficient countervailing efficiencies would be a devil's proof. The authority or plaintiff would have to prove that the conditions attached to the objective justification or efficiencies are not met which is not possible without having identified and proven these justifications or efficiencies in the first place.

If the defending party had only a burden of proof to produce some evidence on efficiency and could then force the authority each time to prove that these efficiencies are not sufficient to outweigh the demonstrated negative effects, and this process would continue until the authority would recognise that at last sufficient evidence has been produced, this would be a highly inefficient procedure. Such a procedure would neither be very economical nor justified for an end result, which would be the same as when a clear burden of proof is put on the company invoking a specific fact. On the contrary, the legal burden of proof creates a clear and efficient means of adjudication by obliging the defending party to cooperate in the administration of justice.

The burden of proof on the dominant firm for objective justifications and efficiencies should not be confused with the obligation of the authority to investigate “*à charge*” and “*à décharge*”, i.e. to observe neutrality in investigating the facts and circumstances of an alleged infringement of Article 82, whether they are inculpatory or exculpatory. This obligation of neutrality during the investigation cannot however impose an obligation on the public authority to investigate out of its own initiative all thinkable exculpatory evidence to prove the absence of evidence relating to objective justifications or efficiencies.

Some have argued that Article 2 of Regulation 1/2003 precludes allocating any burden of proof to the defending party in an Article 82 proceeding. I do not find this argument convincing. By stipulating that “the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement” the Regulation has not changed the general principle of law that the one who invokes a

counterargument or a defence has to prove its facts. Article 2 of Reg. 1/2003 must be interpreted in the light of Recital of that Regulation which states:

*“In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied.”*

This recital clearly confirms that Article 2 is only a declaration in that it states a general principle of law<sup>3</sup>. Article 2 means that the authority/plaintiff has to prove all the negative effects on competition which, absent any objective justification or absent sufficient countervailing efficiencies, lead to the proof of an infringement of Article 82. Article 2 of Reg. 1/2003 could not have stated exhaustively all possible defences leading to the inapplicability of Article 81 or 82.

The principle that the one who relies on a defence has to prove it is also generally recognised by the Court of Justice in the context of “objective justification” under Article 82 (see in particular *United Brands*, *British Airways*, *Michelin II*, *Magill*, *Bronner*, *Irish Sugar*)<sup>4</sup>. Even if Article 82 does not follow the same structure as Article 81, the burden of proving a defence is still on the one who invokes it. It would be difficult to understand why efficiencies under Article 81(3) would have to be proven by a non-dominant firm while a dominant firm would be in a better position not having to prove sufficient efficiencies to outweigh negative effects of unilateral conduct which have been identified and demonstrated by the authority.

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<sup>3</sup> In *Cement* (ECJ 7 January 2004 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S*, Par. 78) the Court also made a general reference to this principle outside the context of Article 81 (3) EC.

<sup>4</sup> *United Brands*, ECJ 14 February 1978 Case 27/76. *European Court reports 1978 Page 207, Pars. 158 and 159*, *British Airways* Case T-219/99. nyr., , pars 270-292, *Michelin II* pars 107-110, *Magill*, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743 Par. 55, *Oscar Bronner* GmbH & Co. KG v *Mediaprint* Case C-7/97, *European Court reports 1998 Page I-7791* Pars. 40-41, *Irish Sugar* Case T-228/97. *European Court reports 1999 Page II-2969, Pars 142-144 and 188-189*.



The fact that the authority would have to prove that sufficient outweighing efficiencies do not exist before finding an infringement is not part of the legal standard for finding an abuse under Article 82. It is only upon allegation and proof of sufficient efficiencies that the authority has to decide on the non-violation of Article 82. One cannot expect the authority or plaintiff to prove the absence of justifications/efficiencies or to have to disprove every possible justification which might be put forward by the dominant firm. This is also the reason why even the critics of this division of the burden of proof accept that at least an evidentiary burden falls upon the party making a specific assertion in rebuttal. But if this evidentiary burden is only an obligation to produce some evidence and not an obligation to produce sufficient plausible evidence to outweigh the demonstrated negative effects, then the procedure remains inefficient. The onus of proof can only shift back to the authority or plaintiff who demonstrated negative effects when the evidence of positive effects is sufficient to outweigh, or at least neutralise, the negative effects under the standard of proof of balance of probabilities.

The above reasoning applies to all the elements required to be proven to establish the positive effects. For the efficiencies defence, the Discussion Paper on Article 82 has stipulated the same four cumulative conditions as under Article 81(3) and the Commission Merger Guidelines. An efficiency defence is only successful if it proves the existence of sufficient countervailing positive effects; these efficiencies must benefit the consumers in the sense that consumers are not worse off as a result of the unilateral conduct (either pass-on of cost savings or benefit of other efficiencies like innovation), the unilateral conduct must be indispensable to achieve these efficiencies (no realistic other less foreclosing alternative) and it may not eliminate competition for a substantial part of the products concerned. Only efficiencies which fulfil these conditions are to be balanced against the negative effects of a particular unilateral conduct before deciding whether or not Article 82 is violated.

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