The Requisite Legal Standard for Economic Assessments in EU Competition Cases Unravelled through the Economic Approach

By

Edith Loozen

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The Requisite Legal Standard for Economic Assessments in EU Competition Cases Unravelled through the Economic Approach

Edith Loozen*

Erasmus University Rotterdam

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Abstract

It is currently unclear how the requisite legal standard should be interpreted for economic assessments in EU competition cases. This article clarifies how the economic approach can help unravel this issue. I propose an evidentiary framework for economic assessments in EU competition cases which is based on a welfare economics interpretation of EU competition law. The latter means that those rules must be interpreted in order to fulfil their objective, that is the maximisation of consumer welfare. Accordingly, each evidentiary step will be functionally explained and defined in this article. It is argued that the evidentiary framework must apply to all economic assessments, since the distinction between complex and non-complex economic assessments is not compatible with the economic approach.

Introduction

In the *Baustahlgewebe* ruling, it was held that an infringement of the EU competition rules is proven when the Commission presents evidence that demonstrates "to the requisite legal standard the existence of the circumstances constituting an infringement". However, it is currently unclear what this implies for economic assessments.[1] Complex economic assessments are submitted to a "manifest error" standard that mirrors the margin of discretion enjoyed by the Commission when appraising complex economic matters.[2] For many years, the assumption was therefore that the role of judicial review in complex economic assessments would be limited.[3] However, over the course of the last 15 years, the EU judicature has stepped up its

* Assistant Professor (JD and PhD) with the Institute of Health Policy & Management of Erasmus University Rotterdam.

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[1] *Baustahlgewebe v Commission* (C-185/95 P) [1998] E.C.R. I-8485; [1999] 4 C.M.L.R. 1203 at [58].

[2] Traditionally, the manifest error standard holds a reasonableness review that is confined to "verifying whether relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers." See e.g. *Remia v Commission* (42/84) [1985] E.C.R. 2566; [1987] 1 C.M.L.R. 1 at [34].

[3] See *Remia* (42/84) [1985] E.C.R. 2566 at [34]; *John Deere v Commission* (C-7/95 P) [1998] E.C.R. I-3111; [1998] 5 C.M.L.R. 311 at [34]; *Microsoft v Commission* (T-201/04) [2007] E.C.R. II-3601; [2007] 5 C.M.L.R. 11 at [87] and [482]; *Bertelsmann and Sony Corp of America v Independent Music Publishers and Labels Association (Bertelsmann)* (C-413/06 P) [2008] E.C.R. I-4951; [2008] 5 C.M.L.R. 17; and *KME Germany AG, KME France SAS and KME Italy SpA v Commission (KME Germany)* (T-127/04) [2009] E.C.R. II-1167; [2009] 5 C.M.L.R. 8. On this point: D. Bailey, "Scope of Judicial Review under Article 81 EC" (2004) 41 C.M.L. Rev. 1327; B. Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts" (2005)

judicial control of complex economic assessments, initially in concentration cases.[4] In addition, the Court of Justice of the European Union (the Court) determined in the *KME Germany* and *Chalkor* rulings that, when conducting a legality review, the EU judicature "cannot use the Commission's margin of discretion … as a basis for dispensing with an in-depth review of the law and of the facts".[5] Unfortunately, the Court did not explain how this "in-depth review of the law and the facts" should be translated into a specific threshold for EU Courts to attain in order to be persuaded that the finding of a competition infringement is in accordance with the law. Nor did the Court of the European Free Trade Association (EFTA Court) in *Posten Norge* define "the [Commission's] leeway that necessarily follows from the limitations inherent in the system of legality review".[6] Some legal authors have suggested that a precise definition of the requisite legal standard for economic matters is not necessary. After all, it is the "personal conviction" of the judge that is the decisive factor.[7] This article takes the opposing view.[8] It is certainly true that the essential function of evidence is to convince the judges concerned,[9] but wherever possible this should be done on the basis of objectified evidentiary standards.

The aim of this article is to develop an objective evidentiary framework for economic assessments in EU competition cases based on the economic approach. In order to do this, the fundamentals of the evidentiary framework will first be clarified briefly. It will be explained that the economic approach in fact boils down to a functional interpretation of EU competition law at large, which means that those rules must be interpreted as to fulfil their objective. Next, it will be analysed what welfare objective provides the best standard for interpreting EU competition law functionally and what burden of proof follows therefrom. Once these fundamentals have been explained, the requisite legal standard pertaining to economic assessments will be defined in functional terms. This exercise will be split into two parts. The first part will cover the standard of proof—that is, the level of proof the Commission must meet in order to decide

1 E.C.J. 3. In addition, Fritzsche and Nazzini have argued that the institutional balance imposes a limited review: A. Fritzsche, "Discretion, Scope of Judicial Review and Institutional Balance in European Law" (2010) 47 C.M.L. Rev. 361; and R. Nazzini, "Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective" (2012) 49 C.M.L. Rev. 971. By contrast, Siragusa, Slater, Thomas, and Waelbroeck, as well as Bronckers and Vallery, have argued that a limited legality review does not meet the requirements set by the principle of effective judicial protection as provided for in art.47 of the Charter and art.6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. M. Siragusa, "Celebration of 20 Years of the Court of First Instance of the European Communities", Speech of September 25, 2009; D. Slater, S. Thomas and D. Waelbroeck, "Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?" (2009) 5 E.C.J. 97; and M. Bronckers and A. Vallery, "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law" (2011) 34 World Comp. 535.

[4] *France v Commission (Kali and Salz)* (C-68/94 and C-30/95) [1998] E.C.R. I-1375; [1998] 4 C.M.L.R. 829; *Gencor v Commission* (T-102/96) [1999] E.C.R. II-753; [1999] 4 C.M.L.R. 971; *Airtours v Commission* (T-342/99) [2002] E.C.R. II-2585; [2002] 5 C.M.L.R. 7; *Schneider Electric v Commission* (T-310/01) [2002] E.C.R. II-4071; [2003] 4 C.M.L.R. 17; *BaByliss v Commission* (T-114/02) [2003] E.C.R. II-1279; [2004] 5 C.M.L.R. 1; *Commission v Tetra Laval* (C-12/03 P) [2005] E.C.R. I-987; [2005] 4 C.M.L.R. 8; *General Electric v Commission* (T-210/01) [2005] E.C.R. II-5575; [2006] 4 C.M.L.R. 15.

[5] *KME Germany AG, KME France SAS and KME Italy SpA v Commission (KME Germany)* (C-272/09 P) [2012] 4 C.M.L.R. 8 at [102]; *ChalkorAE Epexergasias Metallon v Commission (Chalkor)* (C-386/10 P) [2012] 4 C.M.L.R. 9 at [62]; and, *KME Germany AG, KME France SAS and KME Italy SpA (KME Germany)* (C-389/10 P) [2012] 4 C.M.L.R. 10 at [129]. Annotated by A.-L. Sibony (2012) 49 C.M.L. Rev. 1977.

[6] *Posten Norge* (E-15/10) April 18, 2012 at [100]. Commented on by J. Temple Lang, "Judicial Review of Competition Decisions under the European Convention on Human Rights and the Importance of the EFTA Court: The Norway Post Judgment" (2012) 37 E.L. Rev. 464.

[7] E. Gippini-Fournier, "The Elusive Standard of Proof in EU Competition Cases" (2010) 33 World Comp. 187, 192; and F. Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases" (2009) 32 World Comp. 505.

[8] See also Vesterdorf, "Standard of Proof in Merger Cases" (2005) 1 E.C.J. 3, 5: "The importance of a clear standard of proof is of course undeniable."

[9] *Tetra Laval* (C-12/03 P) [2005] E.C.R. I-987 at [41].

that a competition infringement is proven in law.[10] The second part will cover the standard of review—that is, the level of persuasion EU Courts have to attain when reviewing the legality of an economic assessment put forward by the Commission.[11]

A functional definition of the standard of proof relates to the nature of economic assessment. This is because the level of proof the Commission can possibly be expected to attain when evidencing anti-competitive effects of market behaviour is determined by the degree of certainty inherent in economic assessment. Once the level of proof has been objectively identified, it will then be analysed whether it applies to *all* competition infringements (including "restrictions by object"?) and if so, to *what extent* (unambiguously or as a benchmark for risk analysis?).

To arrive at a functional definition of the standard of review, we need to deal with three issues. First, we need to specify which evidentiary standards are suitable in objective terms for the verification of economic assessments put forward by the Commission. Again, this exercise comes back to the nature of economic assessments. Next, we must determine when EU Courts ought to be persuaded that competition infringements have been adequately proven. Since the amount of judicial deference directly relates to the discretionary margin enjoyed by the Commission in economic matters, this section of our analysis will investigate the exact nature of the autonomy the Commission derives therefrom. It is submitted here that the principle of effective judicial protection as provided for by arts 47 of the Charter of Fundamental Rights of the European Union (Charter) and 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) co-defines the institutional balance between the Commission and the EU judicature as provided for by the EU Treaties, and therefore the interface between administrative discretion and intensity of judicial review. To conclude, we must clarify whether or not the manifest error standard is the proper standard for the judicial review of economic assessments in EU competition cases. In this context, the myth that a reasonableness review of economic assessments in EU competition cases is limited in principle will be debunked.

Finally, it will be explained that, in relation to the economic approach, the distinction between complex and non-complex economic assessment no longer holds true. In anticipation of this conclusion, we will refer simply to "economic assessments" throughout this article.

Economic approach, proper welfare objective and burden of proof

The economic approach is heavily underestimated by some. For example, it has been suggested that, in order to safeguard fundamental rights of effective judicial protection, the "more economic approach" is in urgent need of a "more legal approach".[12] This article argues the opposite to be true: it is the economic approach that makes it possible to construct an objectified evidentiary framework by inferring from the objective of EU competition law standards of both proof and review for economic assessments.[13]

What does the economic approach entail? The former Competition Commissioner Mario Monti denoted the economic approach as a welfare economic interpretation of EU competition rules.[14] It is a thesis of

[10] Vesterdorf, "Standard of Proof in Merger Cases" (2005) 1 E.C.J. 3, 6.

[11] Vesterdorf, "Standard of Proof in Merger Cases" (2005) 1 E.C.J. 3, 7; and P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006), pp.464–470.

[12] Editorial comments, "Towards a more Judicial Approach? EU Antitrust Fines under the Scrutiny of Fundamental Rights" (2011) 48 C.M.L. Rev. 1405.

[13] Please note that this article does not address issues relating to types of evidence and how they are handled under EU competition law, for example internal documents of parties, used in litigation before EU Courts.

[14] M. Monti, "EU Competition Policy", Speech at the Fordham Annual Conference on International Antitrust Law and Policy, New York, October 21, 2002; "Merger Control in the European Union: a Radical Reform", Speech at the European Commission/IBA Conference on EU Merger Control, Brussels November 7, 2002; "EU Competition Policy after May 2004", Speech at the Fordham Annual Conference on International Antitrust Law and Policy, New York,

this article that this means that these rules should be interpreted in such a way as to realise the objective they aim to achieve: the maximisation of welfare. As such, the economic approach actually boils down to a functional interpretation of EU competition law at large: legal notions are linked to their economic fundamentals in order to ensure that EU competition rules are enforced when this is appropriate from an economic perspective. Similar to the functional definition of the notion "undertaking", which ensures competition surveillance of economic activities,[15] a functional definition of the notions of "restriction of competition", "abuse of dominance", and "significant impediment of effective competition" ensures competition enforcement if market behaviour leads to a decrease in welfare.[16] A functional evidentiary framework ensures that the evidence presented adequately demonstrates that market behaviour leads to a decrease in welfare.

The next question is which welfare objective provides the best standard when interpreting EU competition law in functional terms. Three forms of welfare are relevant in this context: consumer welfare, producer welfare and total (or economic) welfare.[17] Consumer welfare can be defined as the sum of the welfare of all individual consumers active in a specific market. Similarly, producer welfare is the sum of the welfare of all individual producers active in a specific market. Total welfare is the sum of consumer and producer welfare within a specific market.[18] Since EU competition law serves to protect against market power,

October 24, 2003; and "A Reformed Competition Policy: Achievements and Challenges for the Future", Center for European Reform, Brussels October 28, 2004.

[15] *Höfner v Macrotron GmbH* (C-41/90) [1991] E.C.R. I-1979 ; [1993] 4 C.M.L.R. 306; *Poucet et Pistre Assurances Generales de France* (C-159 and 160/91) [1993] E.C.R. I-637; *Fédération Française des sociétés d'assurance* (C-244/94) [1995] E.C.R. I-4013; [1996] 4 C.M.L.R. 536; *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) [1999] E.C.R. I-5751; [2000] 4 C.M.L.R. 446.

[16] Please note that this article starts from an infringement of the competition rules. However, the same evidentiary standards apply mutatis mutandis for positive decisions based on art.10 of Council Regulation 1/2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1, and art.2(2) of Council Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L 24/1. Nor does this article take into account the shift in the burden of proof that occurs in the context of an efficiency defence under arts 101(3) TFEU and 2(3) of Council Regulation 139/2004. The reason is that "the facts relied on by [an] undertaking may be such as to oblige the [Commission] to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged …" (*GlaxoSmithKline Services Unlimited v Commission* (C-501/06 P), *Commission v GlaxoSmithKline Services Unlimited* (C-513/06 P), *European Association of Euro Pharmaceutical Companies v Commission* (C-515/66 P) and *Asociación de exportadores españoles de productos farmacéuticos* (C-519/06 P) (GlaxoSmithKline Services) [2009] E.C.R. I-9291 at [83]). As a result, the burden of proof ultimately bounces back to the Commission.

[17] All three forms of welfare should be understood as surplus standards in this article. However, it must be noted that welfare and surplus are widely used notions that differ. Welfare covers more aspects than price alone. For example, some externalities have no price and can therefore not be expressed in prices. Surplus can relate to one market, but also to more than one. For more detailed information on this issue, see G. Werden, "Consumer Welfare and Competition Policy" in J. Drexl, W. Kerber and R. Podszun (eds), *Competition Policy and the Economic Approach. Foundations and Limitations* (Cheltenham, UK/Northampton, MA: Edward Elgar Publishing, 2011) and L. Kaplow, "On the Choice of Welfare Standards in Competition Law" in D. Zimmer (ed.) *The Goals of Competition Law* (Cheltenham, UK/Northampton, MA: Edward Elgar Publishing, 2012).

[18] Some authors use the term "social welfare" as a synonym for total welfare. See for example S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 3rd edn (London: Sweet & Maxwell, 2010), and R. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford: Oxford University Press, 2011). This is not necessarily incorrect since both forms of welfare reflect the same amount of welfare: the sum of consumer and producer welfare. However, unlike total welfare, social welfare also refers to the (preceding) reallocation of resources by the state. The reason for this reallocation is that markets and competition may well result in an efficient outcome, but not necessarily in a socially desirable outcome. (See H.S. Rosen and T. Gaynor, *Public Finance*, 9th international edn (New York: McGraw-Hill International, 2010), Ch.3.) Since competition law prohibits anti-competitive market behaviour (thereby seeking to warrant that markets allocate resources efficiently, not that governments reallocate resources equitably), this article prefers the notion "total welfare" to "social welfare".

producer welfare cannot serve as a stand-alone standard for interpreting EU competition rules. The question is, therefore, whether consumer or total welfare provides the better standard.[19]

According to the Commission, EU competition law aims to promote consumer welfare.[20] At the same time, however, markets and competition (in theory) maximise total welfare (by providing Pareto efficient outcomes).[21] Since EU competition law serves to protect competition, total welfare would therefore seem the better standard by which to interpret those rules.[22] But there is one downside to total welfare: consumer surplus may well decrease while total surplus increases (where the increase in producer surplus is larger than the decrease in consumer surplus). Even though welfare is transferred from consumers to producers, the competition rules would not apply in such cases.[23]

The standard of consumer welfare would avoid the pitfall of excluding some welfare transfers from consumers to producers from competition surveillance, provided it is defined dynamically. Unlike static consumer welfare, which prevents welfare transfers from consumers to producers by prohibiting excess profits altogether,[24] dynamic consumer welfare allows for temporary excess profits that spur innovation and thus enhance welfare. However, unlike (long-term) total welfare, it only allows for increases in the producer surplus as long as the consumer surplus does not decrease permanently or over the long term. At the same time, the insights provided into the transfer of welfare from consumers to producers enable the Commission to weigh (short-term) consumer disadvantages against (long-term) consumer advantages.

It follows from the above that a dynamically defined consumer welfare standard would fit the economic approach best, since it provides the Commission with better tools to assess the anti-competitive effects of

[19] In fact, the economic approach identifies the welfare objective as the overarching objective of EU competition law; that is, other non-welfare or non-efficiency objectives can only be taken into account if they are compatible with the welfare objective. (See Nazzini, *The Foundations of European Union Competition Law* (2011) for a more elaborate account of this point.) The only exception to this is the secondary objective of EU competition law, market integration. When applied this secondary objective is to a large extent compatible with the welfare objective, except for the *hard core* qualification of certain vertical relations. This article does not address any evidentiary issues regarding the objective of market integration, however.

[20] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para.13; Guidelines on the application of Article 81 of the Treaty to technology transfer agreements [2004] OJ C101/2, para.5; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para.8; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6, para.10. More implicitly: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para.5.

[21] As described in the First Fundamental Welfare Theorem (Rosen and Gaynor, *Public Finance* (2010), p.34).

[22] M. Motta, *Competition Policy: Theory and Practice* (Cambridge: Cambridge University Press, 2005), pp.19–22. Also: K. Heyer, "Welfare Standards and Merger Analysis: Why Not the Best?" (2006) 2 CPI 29; D. Carlton, "Does Antitrust need to be Modernized?" (2007) 3 *Journal of Economic Perspectives* 155; Kaplow, "On the Choice of Welfare Standards in Competition Law" in *The Goals of Competition Law* (2012); and Nazzini, *The Foundations of European Union Competition Law* (2011), p.38.

[23] Advocates of a total welfare standard believe that, provided total welfare does not decrease, welfare transfers from consumers to producers are not relevant from the point of view of competition enforcement. The reason for this is that those welfare transfers introduce (welfare) distributional considerations that ought to be addressed through a compensatory tax on competition advantages. See e.g. Kaplow, "On the Choice of Welfare Standards in Competition Law" in *The Goals of Competition Law* (2012); and Nazzini, *The Foundations of European Union Competition Law* (2011). Although theoretically sound, this argument is flawed from a practical point of view, since such taxes are difficult and costly to enforce. See S. Salop, "Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard" (2010) 22 *Loyola Consumer Law Review* 336; but also Kaplow, "On the Choice of Welfare Standards in Competition Law" in *The Goals of Competition Law* (2012).

[24] From a strictly static perspective, consumer welfare would only allow for market behaviour that ensured short-term price reductions while any long-term efficiency gains would be disregarded. See Carlton, "Does Antitrust need to be Modernized?" (2007) 3 *Journal of Economic Perspectives* 157.

market behaviour.[25] The next step is to specify the burden of proof pertaining to competition infringements based on this welfare standard. Using Williamson's models,[26] that exercise results in four situations that in principle are in accordance with the policy guidelines published by the Commission. The first situation covers market behaviour that does not trigger any increase in market power (such as, all other things equal, a price increase simply put) and therefore does not lead to any decrease in consumer welfare. In the second situation, there is an increase in market power, but there are also efficiencies that compensate for the price increase as a result of which, on balance, the price decreases. Since market power does not lead to a decrease in consumer welfare, EU competition law is not infringed. The third situation is the same as the second, except that efficiencies will not lead to a net price decrease immediately, but only at some point in the future. Since market power does not lead to a decrease in consumer welfare, no infringement of EU competition law will have occurred.[27] The fourth situation is the same as the second and third, except that efficiencies (supposing these occur at all) will not compensate for the price increase since the competitive process will be impeded, meaning that innovation and market entry will come to an end. As a result of this, there will be a net increase in prices and it cannot be presumed that efficiencies will ultimately lead to an increase in consumer welfare. Such cases would represent an infringement of EU competition rules since market power will result in a decrease in consumer welfare. From this point onwards, the term "welfare" will be used to refer to dynamic consumer welfare.

Standard of proof under the economic approach

The next step in constructing an objectified evidentiary framework is to arrive at a functional definition of the standard of proof that should apply to economic assessments in EU competition cases. What specific standard should be required in order for the existence of welfare-decreasing market power to be proven adequately? The burden of proof concerns *what* is to be proven, while the standard of proof concerns *when* this has been adequately proven. As such, defining the standard of proof actually involves setting the level of proof that is required before a competition infringement can be found to have taken place. The level of proof attainable is determined by the manner in which welfare-decreasing market power is proven. The reason for this is that the manner in which such evidence is cited determines the degree of certainty that the Commission can offer. The presence of welfare-decreasing market power is proven by an adequate theory of competitive harm.[28] The core of such a theory is a causality analysis—that is to say, a logically consistent explanation of a chain of events that is triggered by the market behaviour in question and that will lead to anti-competitive effects.[29] Consequently, a functional definition of the standard of

[25] See Salop, "Question: What is the Real and Proper Antitrust Welfare Standard?" (2010) 22 *Loyola Consumer Law Review* 337; B. Lyons, "Could Politicians Be More Right than Economists? A Theory of Merger Standards", University of East Anglia, Centre for Competition and Regulation Working Paper CCR 02-1 (2002), available at *http://competitionpolicy.ac.uk/documents/107435/107587/ccp2-1.pdf* [Accessed January 8, 2014]; D. Neven and L.-H. Röller, "Consumer Surplus vs Welfare Standard in a Political Economy Model of Merger Control" (2005) 23 I.J.I.O. 829; S.-O. Fridolfsson, "A Consumer Surplus Defense in Merger Control" in V. Ghosal and J. Stennek (eds), *The Political Economy of Antitrust: Contributions to Economic Analysis* (Amsterdam: Elsevier, 2007), p.282; and R. Pittman, "Consumer Surplus as the Appropriate Standard for Antitrust Enforcement" (2007) 3-2 CPI 205.

[26] O. Williamson, "Economics as an Antitrust Defense: The Welfare Tradeoffs" (1968) 58 *American Economic Review* 18.

[27] In principle this would also imply that efficiencies that result in lower fixed costs should also be relevant when assessing welfare effects. Although such efficiencies would not affect prices in the short run, they would in the long run.

[28] See e.g. L.-H. Röller, "Economic Analysis and Competition Policy Enforcement in Europe" in *European Policy Perspectives* (2005), p.11.

[29] See e.g. A. Italianer: "We take into account quantitative and qualitative information to put together a coherent story. This is similar to the old journalistic habit of explaining the who, what, when, where, how and why … Ultimately, what we are looking to establish in each case is whether or not there is a likelihood of consumer harm. This is the

proof means that three issues have to be resolved. First, we must examine what level of proof coincides with the evidence provided by causality analyses. Secondly, we must determine whether all competition infringements require proof by causality analysis. Thirdly, we must analyse which infringements require the level of proof identified to be met unambiguously, and which infringements require the level of proof identified to be applied as a benchmark for risk analysis.

Level of proof is determined by the nature of an economic assessment

Since economic assessments have at their core a causality analysis, the degree of certainty inherent in such an analysis will actually determine the level of proof that can be attained when economic assessments are conducted. As a matter of fact, causality analyses are inherently uncertain. They do not take place in the real world, but in what might best be described as a laboratory situation. Since it is impossible to measure the actual anti-competitive effects of market behaviour, a recreation of the real world is achieved by classifying economic data according to economic theories. However, economic data are typically based on assumptions (to start with, the definition of the relevant market for example), and economic theories are debatable by nature (economics being a social science). This implies that causality analyses are, by definition, characterised by likelihood scenarios.

This is not all. Within this re-creation of reality, a causality analysis will nevertheless aim to establish *ceteris paribus* causality—that is to say that, working on the basis that all other circumstances remain equal, its purpose will be to establish a causal link between the market behaviour in question and welfare-decreasing market power. It is important to note that this level of proof is not always attainable. One could compare this to findings of "fact" that, after all, cannot always be established with factual certainty either. As a result of this, the aim is to establish with as much certainty as possible that an event has taken place as claimed. In many situations, this standard will therefore be used as a benchmark for risk-assessment: which scenario is most likely to occur?

This leads to the following two-tiered conclusion regarding the level of proof for economic assessments. An economic assessment will, by definition, involve a *presumption* since all causality analyses result in a likelihood scenario. This being the case, an economic assessment must nevertheless aim to demonstrate as clearly as possible causality between the market behaviour concerned and welfare-decreasing market power. After all, irrespective of the fact that the nature of an economic assessment will involve a likelihood scenario, it is also necessary to establish an *economically valid presumption*.

Standard of proof applies to all competition infringements

The following question is whether the economic approach requires all competition infringements to be evidenced by an adequate theory of competitive harm that proves causality between market behaviour and welfare-decreasing market power. Logic would appear to indicate an affirmative answer; however, some authors have questioned the applicability of the economic approach to "restrictions by object".[30] Especially since the Court has maintained the traditional definition of this legal concept in recent case law such as *T-Mobile Netherlands*.[31] Here I contend that the traditional definition of a "restriction by object"

concept that governs our enforcement action …". See "'Quantity' and 'Quality' in Economic Assessments", Speech at the Charles River Associates Annual Conference, Brussels December 7, 2011, p.3.

[30] See, for example, Bailey: "Likewise there is no need for any margin of appreciation [that is linked to an economic assessment, EL] when the legal form of an agreement dictates whether it is caught by the prohibition contained in Art. 81(1). Anti-competitive agreements are prohibited as soon as they have as their object the restriction of competition." Bailey, "Scope of Judicial Review under Article 81 EC" (2004) 41 C.M.L. Rev. 1327, 1340.

[31] See L. Korsten, "T-Mobile e.a./NMa" (2009) 6 *Markt & Mededinging* 197, who has observed that the Court has opted for a dogmatic rather than an effects-based approach. See also D. Bailey, "Restrictions of Competition by Object under Article 101 TFEU" (2012) 49 C.M.L. Rev. 559.

is in fact compatible with the requirement to provide an adequate theory of competitive harm. Indeed, a functional interpretation of the judgment in *T-Mobile Netherlands* cannot lead to any other conclusion.

This can be seen by examining the judgment of the Court more closely. First, it recollects that the finding of a "restriction by object" follows from "the precise purpose of the concerted practice, in the economic context in which it is to be pursued".[32] Next, it notes that,

> "where … an analysis of the terms of the concerted practice does not reveal the effect on competition to be sufficiently deleterious, its consequences should … be considered."[33]

In that case, "it is necessary to find that those factors are present which establish that competition has in fact been [restricted] to an appreciable extent."[34]

Taken together, it follows that both the finding of "restriction by effect" and also that of "restriction by object" require adequate proof of competitive harm. A restriction by object can only then be found to exist when the effect on competition of market behaviour is "sufficiently deleterious". It is thus similar to the finding of restriction by effect, which requires evidence that market behaviour will restrict competition "appreciably". To translate this into the terms of the economic approach, both findings require a theory of competitive harm that adequately demonstrates (an increase in) market power as a result of the market behaviour being examined.[35] In case of a restriction by object such proof follows from an analysis of the purpose that underlies the market behaviour concerned in the economic context in which it is pursued, while in cases of a restriction by effect such analysis has not yet yielded adequate proof of competitive harm, meaning that it is necessary to conduct a fully-fledged market analysis in order to establish such proof.[36]

Moreover, another reading of *T-Mobile Netherlands* would imply that the finding of a restriction by object may be established on the basis of presumption only. Such an interpretation of art.101(1) TFEU would contradict the presumption of innocence provided for by arts 48(1) of the Charter and 6(2) ECHR, a principle that, according to the Court, is applicable in EU competition cases that may result in the imposition of fines or periodic penalty payments—among which are restrictions by object.[37]

Unambiguous proof or benchmark for risk analysis?

One last question remains regarding the standard of proof for economic assessments. Which competition infringements require unambiguous proof of causality and which competition infringements merely require this standard to be applied as a benchmark for risk analysis.

Unambiguous proof of causality

This article submits that under the economic approach, findings of restriction by object require clear-cut proof of causality. To date, however, the EU judicature seems to disagree. As part of its review of the determination of a fine, the General Court stated in *KME Germany* that the Commission is not under a

[32] *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland BV and Vodafone Libertel NV v Dutch Competition Authority (T-Mobile Netherlands)* (C-8/08) [2009] E.C.R. I-4529; [2009] 5 C.M.L.R. 11 at [28].

[33] *T-Mobile Netherlands* (C-8/08) [2009] E.C.R. I-4529 at [28].

[34] *T-Mobile Netherlands* (C-8/08) [2009] E.C.R. I-4529 at [28].

[35] In principle, both "restriction by object" and "restriction by effect" require proof of (an increase of) market power only, not of welfare-decreasing market power. The reason is that those findings take place within the realm of art.101(1) EU, not art.101(3) EU. Generally speaking, however, cartels will lead to deadweight loss which implies the presence of welfare-decreasing market power after all.

[36] See e.g. E. Loozen, "The Application of a More Economic Approach to Restrictions by Object: No Revolution after all (T-Mobile Netherlands (C-8/08))" (2010) 31 E.C.L.R. 146.

[37] *Hüls AG v Commission* (C-199/92 P) [1999] E.C.R. I-4287; [1999] 5 C.M.L.R. 1016 at [150].

duty "scientifically to demonstrate the existence of a tangible economic effect on the market and a link of cause and effect between the impact and the infringement …".[38]

The Court stated in *T-Mobile Netherlands* that,

> "in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition."[39]

There are two points to be made in relation to this. The General Court's position on the finding of a *tangible* economic effect on the market is consistent with the economic approach. As explained earlier, economic assessment does not generally take place on the basis of real world evidence and therefore does not necessarily involve measuring tangible effects. This said, however, there still is a requirement to establish an unambiguous causal relationship between market behaviour and anti-competitive effects. This is because the distinguishing feature of cartels (price-, quota-, and/or market-sharing arrangements between competitors) and other co-operative agreements is precisely the fact that such causality follows directly from the purpose of the particular agreement. In a cartel, competitors jointly function as if they were a (quasi) monopoly. They maximise profits by limiting production as a result of which prices rise and their profits also rise. As such, cartels imply market power by nature. In short, assuming that the legal notion of restriction by object in principle corresponds to the economic notion of "cartel" under the economic approach,[40] a restriction by object should only then be found to exist where there is an unambiguously established causal link between the market behaviour being examined and market power.

Accordingly, the Court's observation that the presence of a restriction by object would be sufficiently established if it is shown that co-ordinated market behaviour has the potential to have a negative impact on competition, is incorrect as well. This not only runs counter to the economic approach, it also contravenes the traditional definition of restriction by object that was reiterated earlier in the judgment as well as the presumption of innocence (see above). In addition, the interpretation advocated by the Court implies that restriction by object and restriction by effect can no longer be distinguished. This is not only contrary to art.101(1) TFEU but also to the Court's own case law which holds that both concepts constitute "alternative conditions".[41]

It may well be, however, that the Court "merely" meant to indicate that economic assessments are inherently uncertain and can—at best—lead to presumptions. For the Court referred explicitly to A.G. Kokott's argument that restrictions by object can be compared to risk offences in criminal law.[42] Unlike Kokott's assumption, however, the finding of a restriction by object cannot be compared to drunk-driving, where a person can be fined irrespective of the fact whether another person's life has actually been endangered. This is because within the confined laboratory situation typical of an economic analysis, the finding of a cartel presupposes that anti-competitive effects will in fact occur. [43] This will only be different when agreements have not been executed at all.

[38] *KME Germany* (T-127/04) [2009] E.C.R. II-1167 at [67]–[68].

[39] *T-Mobile Netherlands* (C-8/08) [2009] E.C.R. I-4529 at [31].

[40] Vertical hard core restraints are *hors catégorie* in this context (see fn.19).

[41] See e.g. *T-Mobile Netherlands* (C-8/08) [2009] E.C.R. I-4529 at [28].

[42] Opinion of A.G. Kokott in *T-Mobile Netherlands* (C-8/08) [2009] E.C.R. I-4529 at [47]. But see also Opinion of A.G. Trstenjak in *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (BIDS)* (C-209/07) [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6 at [46]; and Opinion of A.G. Vesterdorf in *Rhône-Poulenc SA v Commission* (T-1/89) [1991] E.C.R. II-867 at 945. See also Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases" (2009) 32 World Comp. 508.

[43] Even in case of potential competition, provided it is found to be realistic. Co-ordinated market behaviour that pursues to restrict realistic potential competition will by definition trigger anti-competitive effects and as a result qualify as a restriction by object.

Causality as a benchmark for risk analysis

Where there is a finding of "restriction by effect", "abuse of a dominant position" or "significant impediment of effective competition", causality will function as a benchmark for risk analysis under the economic approach. This is because in general causality cannot be determined unambiguously in those situations. The causal relationship between market behaviour and welfare-decreasing market power is highly complex and is also influenced by the specific circumstances of an individual case. In addition, the use of a prospective analysis further increases the uncertainty of the outcome of an economic assessment. A prospective analysis does not involve an examination of past or current events. Instead it serves as a prediction of events that are more or less likely to occur in the future if a decision prohibiting a concentration, or imposing conditions on it, is not adopted.[44] Thus, the first thing that must be examined is which events cause which effects, so that it can then be determined which scenario would be the most likely to occur.[45]

Drauz and König have suggested that the additional uncertainty regarding future events would imply that a higher level of proof is required in prospective analyses.[46] I would challenge this line of reasoning. The objective standard of proof cannot be higher for prospective analyses, simply because the uncertainty inherent in predicting future events can never be taken away.[47] At most, it can be argued that this additional uncertainty increases the extent of proof that needs to be provided. Vesterdorf, on the other hand, has suggested that prospective analyses require a lower level of proof.[48] Again, the objective standard of proof is obviously similar to that of actual or retrospective analyses: causality. Albeit in this case with the proviso that this standard can never be met unambiguously, but can "merely" apply as a benchmark for risk analysis. As such, the economic approach requires proof, at each step along the chain of events, that this is the most likely scenario to occur.

Conclusion

When adducing evidence to demonstrate an infringement of EU competition law on the basis of the economic approach, the Commission's duty is to prove to the requisite legal standard that the market behaviour in question has or will lead to welfare-decreasing market power. Such proof is provided by a theory of competitive harm that, at heart, contains a causality analysis that, by definition, results in a likelihood scenario. The corresponding standard of proof is that of economic validity: the presumption of a causal relationship between the market behaviour being examined and welfare-decreasing market power must be economically valid. In the case of restriction by object, an economically valid presumption requires unambiguous proof of causality. In the case of restriction by effect, abuse of a dominant position, and significant impediment of effective competition, an economically valid presumption is established following a risk analysis in which causality serves as a benchmark.[49]

[44] *Tetra Laval* (C-12/03 P) [2005] E.C.R. I-987 at [42].

[45] *Tetra Laval* (C-12/03 P) [2005] E.C.R. I-987 at [43].

[46] G. Drauz and M. König, "The GE/Honeywell Judgement: Conglomerate Mergers and Beyond" (2006) 2 *Zeitschrift für Wettbewerbsrecht* 112.

[47] M. Bay and J. Ruiz Calzado, "Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions" (2005) 28 World Comp. 447.

[48] Vesterdorf, "Standard of Proof in Merger Cases" (2005) 1 E.C.J. 3, 11-12.

[49] See e.g. E. Loozen, F. Schut and M. Varkevisser, "Fusie Zorgverzekeraars Achmea en De Friesland. Hoezo Functioneel Concentratietoezicht" (2011) 5 *Markt & Mededinging* 169.

Standard of review under the economic approach

This section analyses how to arrive at a functional definition of the standard of review for economic assessments in EU competition cases. A functional approach actually dictates a standard of review that mirrors the standard of proof that the Commission has to meet—a competition infringement is proven in law if a finding of welfare-decreasing market power is based on an economically valid presumption of causality. Accordingly, Legal has observed earlier that,

> "standards of proof and standards of review are not two separate notions but two aspects of a single control system. Whatever the Commission has to prove is what the [EU courts] are empowered to verify. Imposing a burden of demonstration on the Commission only makes sense if the failure to discharge this obligation is apt to cause judicial annulment."[50]

That said, it remains unclear whether both standards do indeed fit, and if so, how. This article aims to solve this puzzle. In order to do so, I analyse first what evidentiary standards are suitable to verify the validity of an economic assessment and whether the evidentiary standards defined in *Tetra Laval* concur. I will then go on to examine when EU Courts ought to be convinced that the finding of welfare-decreasing market power has been adequately proven. This exercise begins with an analysis of the degree of discretion enjoyed by the Commission within the institutional balance. To be followed by an analysis of the degree of deference that EU Courts must or must not observe on the basis of the principle of effective judicial protection as stipulated in arts 47 of the Charter and 6(1) ECHR. To conclude, I pose that the manifest error standard constitutes the proper standard for EU courts to verify fully economic assessments in EU competition cases. It is vital in this regard that a reasonableness review does not contain a limited review of the merits of the evidence on economic causality.

Economic assessment—evidentiary standards of relevance and reliability

It must first be established what evidentiary standards follow from the nature of an economic assessment and are therefore suitable to verify the validity thereof. We submit here that the evidentiary standards developed by the US Supreme Court in the context of the admissibility of scientific expert testimony in trial courts may serve as an example.

Daubert, *Joiner* and *Kumho*

The case law of the US Supreme Court on the admissibility of scientific expert testimony in trial courts helps to clarify which type of evidentiary standards are appropriate for the judicial verification of economic causality evidence. The relevant landmark cases are *Daubert*, *Joiner*, and *Kumho*.[51] This trio of cases reveals that the admissibility of expert testimony that rests on scientific principles depends on the scientific

[50] H. Legal, "Standards of Proof and Standards of Judicial Review in EU Competition Law" in *International Antitrust Law & Policy: Fordham Corporate Law* (Juris Publishing, 2005), Ch.5. Also D. Bailey, "Standard of Proof in EC Merger Proceedings: a Common Law Perspective" (2003) 40 C.M.L. Rev. 845, 850: "The standard of proof is symbiotically linked to the standard of review applied by any court"; and Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts" (2005) 1 E.C.J. 3, 6: "albeit different concepts, the standard of proof and standard of review are so closely linked as to become inseparable".

[51] *Daubert v Merrell Dow Pharmaceuticals Inc* 509 U.S. 579 (1993); *General Electric Co v Joiner* 522 U.S. 136 (1997); *Kumho Tire Co v Carmichael* 119 S. Ct 1167 (1999). This case law is based on "Federal Rule of Evidence 702. Testimony by Experts", which states as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

validity of the explanatory theory that is put forward.[52] The scientific validity of an explanatory theory is appraised using two evidentiary standards: relevance and reliability.[53]

Both standards of evidentiary relevance and reliability actually serve to guarantee the trustworthiness of the theory proffered. The requirement of evidentiary relevance serves to guarantee that the theory put forward can explain the chain of events that is to be expected in a particular case in a logical and consistent manner. As such, evidentiary relevance requires that an explanatory theory is consistent with the facts of the case concerned.[54] The requirement of evidentiary reliability also serves to guarantee that the theory proffered can explain the chain of events in an individual case in accordance with scientific standards. As such, it requires that an explanatory theory is "grounded in the methods and procedures of science".[55] The starting point is that an explanatory theory should, first of all, be "state of the art" from a scientific point of view. [56] This requirement is further supplemented by the condition of "intellectual rigor", which implies that an expert must substantiate his reasoning as logically and consistently inside the courtroom as he does outside.[57] Consequently, it is possible for an explanatory theory to deviate from what has previously been accepted scientifically, provided that the expert "grounds his departure in demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry" so as to enable a trial judge to assess the reliability of the theory submitted.[58]

Tetra Laval meets standards of evidentiary relevance and reliability

Although EU competition proceedings differ from US trial proceedings and the Commission's role in EU competition cases is different from that of an expert in US trial court proceedings, judicial verification of the evidence of economic causality proffered by the Commission in EU competition cases is, in principle, quite similar to judicial verification of causality evidence proffered by scientific experts in US trial proceedings.[59] In *Tetra Laval*, the Court defined the following three-part test for judicial control of economic assessments.[60] First, the evidence presented must be verified as factually accurate, reliable and consistent. Secondly, the evidence must include all the information that needs to be taken into account in order to assess a complex situation (such as an economic assessment, EL). Thirdly, the evidence must be capable

[52] See for example Graham, who says: "Rather, the trial court should determine whether there are sufficient assurances present so that the expert witness explanatory theory, as actually applied in the matter at hand to facts, data, or opinions sufficiently established to exist, produces an accurate result to warrant jury acceptance." M. Graham, "The Expert Witness Predicament: Determining 'Reliable' Under the Gatekeeping Test of Daubert, Kumho, and Proposed Amended Rule 702 of the Federal Rules of Evidence" (2000) 54 *University of Miami Law Review* 317.

[53] M. Berger, "The Supreme Court's Trilogy on the Admissibility of Expert Testimony" in *Reference Manual on Scientific Evidence*, 2nd edn (Federal Judicial Center: Diane Publishing Co, 2000), p.9.

[54] *Daubert* 509 U.S. 579, 591 (1993). Also Berger, who refers to the "fit"-prong. Berger, "The Supreme Court's Trilogy on the Admissibility of Expert Testimony" in *Reference Manual on Scientific Evidence* (2000), p.12.

[55] *Daubert* 509 U.S. 579, 591 (1993).

[56] *Kumho* 119 S. Ct 1167, 1520–1521 (1999).

[57] *Rosen v Ciba-Geigy Corp* 78 F. 3d 316, 318 (7th Cir.), cert. denied, 519 U.S. 819 (1996); *Kumho* 119 S. Ct 1167, 1176 (1999).

[58] *Braun v Lorillard Inc* 84 F. 3d 230, 235 (7th Cir.), cert. denied, 519 U.S. 992 (1996). Also Berger, "The Supreme Court's Trilogy on the Admissibility of Expert Testimony" in: *Reference Manual on Scientific Evidence* (2000), p.25.

[59] Similar evidentiary requirements can be found in the Commission's "Best Practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases" of October 17, 2011: "Economic analysis needs to be framed in such a way that the Commission and the EU Courts can understand and evaluate *its relevance* and *its significance* … It is therefore necessary to (i) ensure that economic analysis meets *certain minimum technical standards* at the outset … and (iii) use in an effective way *reliable and relevant evidence* obtained during the administrative procedure, whether quantitative or qualitative." (Emphasis added.)

[60] *Tetra Laval* (C-12/03 P) [2005] E.C.R. I-987 at [39].

of substantiating the conclusions drawn from it. Meanwhile, this three-part test qualifies as established case law.[61]

Although the three-part test defined in *Tetra Laval* does not mirror the *Daubert* evidentiary standards of relevance and reliability exactly, it can be understood as verifying the economic validity of the causality evidence put forward by the Commission in a broadly similar fashion. The second test corresponds with the requirement of evidentiary relevance: an explanatory theory must be consistent with the relevant facts of an individual case in order to explain the chain of events triggered by the market behaviour concerned appropriately. The first and third tests correspond with the requirement of evidentiary reliability: in order to be valid, an explanatory theory as applied must meet the economic standards in relation to the method applied and its reasoning must be logically consistent.

Effective judicial protection stipulates full judicial review

Once it has been established that the evidentiary standards defined in *Tetra Laval* are the logical corollary of economic assessment, the next issue is to precisely define the interface between administrative discretion and the intensity of judicial control. One of the theories posited in this context is that the institutional balance necessitates a limited legality review in the case of economic assessments because it provides the Commission with a discretionary margin in those matters.[62] It is submitted here that this theory is incorrect. In order to substantiate this position, I will first clarify exactly what autonomy the Commission may derive from the institutional balance when taking into account the requirements of effective judicial protection as provided for by arts 47 of the Charter and 6(1) ECHR.

Institutional balance provides policy discretion, not decisional discretion

The institutional balance can be qualified as an EU version of the separation of powers.[63]Article 13(2) TEU states that "[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them …". As to the scope of the jurisdictional powers of EU Courts, art.263 TFEU specifies that those are limited to a legality review (rather than the unlimited jurisdictional powers of EU Courts in regard to penalties, art.261 TFEU). As for economic assessments, the lack of unlimited jurisdiction is acknowledged in the discretionary margin awarded to the Commission and the corresponding reasonableness review. So the question is, then, what exactly does the discretionary margin entail?

It has consistently been held that the margin of discretion implies that the EU judicature is not allowed to substitute its own economic assessment for the Commission's.[64] Accordingly, the Court referred to its lack of power to substitute its own appraisal for the Commission's in *KME Germany* as the distinguishing

[61] *Spain v Lenzing* (C-525/04 P) [2007] E.C.R. I-9947; [2008] 1 C.M.L.R. 40 at [56]–[57]; *Microsoft* (T-201/04) [2007] E.C.R. II-3601 at [89]; *Bertelsmann* (C-431/06 P) [2008] E.C.R. I-4951 at [69]; *KME Germany* (C-272/09 P) [2012] 4 C.M.L.R. 8 at [94]; *Chalkor* (C-386/10 P) [2012] 4 C.M.L.R. 9 at [54]; and *KME Germany* (C-389/10 P) [2012] 4 C.M.L.R. 10 at [121].

[62] Fritzsche, "Discretion, Scope of Judicial Review and Institutional Balance in European Law" (2010) 47 C.M.L. Rev. 361; and Nazzini, "Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law" (2012) 49 C.M.L. Rev. 971.

[63] See e.g. *Meroni* (9/56) [1958] E.C.R. 11. See also: J-P. Jacqué, "The Principle of Institutional Balance" (2004) 41 C.M.L. Rev. 383, where he points out that it is not acceptable for one institution to extend its powers unilaterally to the detriment of another institution.

[64] *Microsoft* (T-201/04) [2007] E.C.R. II-3601 at [88]; *Pétrolessence SA and Société de gestion de restauration Routière SA v Commission* (T-342/00) [2003] E.C.R. II-1161; [2003] 5 C.M.L.R. 9 at [101]; *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD)* (T-158/00) [2003] E.C.R. II-3825; [2004] 5 C.M.L.R. 14 at [329]; *Societá Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission (SIV)* (T-68/89, T-77/89 and T-78/89) [1992] E.C.R. II-1403; [1992] 5 C.M.L.R. 302 at [160].

feature between legality review and unlimited jurisdiction.[65] If the Commission's discretionary margin corresponds to the lack of power on the part of EU Courts to conduct a de novo trial, this implies that the Commission's autonomy concerns its prerogative to enforce the competition rules as provided for by arts 101 and 102 TFEU and Council Regulation 139/2004. Issues of policy and strategy are, in principle, for the administrative authority to decide which means that the discretionary margin must be understood as—at the minimum—discretion relating to *policy*. Usually, the notion of "competition policy" is associated with the determination of notices and guidelines for the application of general rules in individual cases. In fact, the development of competition policy begins with the handling of individual cases which must necessarily precede the development of policy notices and guidelines. The corollary of this is that the discretionary margin in economic assessments—at least—includes the Commission's autonomy to choose an economic theory and/or model when explaining the presence of causality between market behaviour and welfare-decreasing market power. In the past, Legal has qualified this autonomy as "true discretion".[66]

Generally, policy discretion is also considered to imply *decisional* discretion in the sense that EU Courts would not fully verify the merits of economic causality evidence submitted by the Commission. Galligan, for example, observes that "discretion has come to connote … autonomy in judgment and decision".[67] In fact, legal scholars make a similar assumption when they derive the intensity of judicial review from the Commission's discretionary margin.[68] However, that assumption is biased since it implies that the institutional balance would favour the Commission's need for administrative leeway over society's need for effective judicial protection. That outcome is untenable. In the following sections I will identify the interface between administrative discretion and the intensity of judicial control in an objective fashion. In order to do this, the relationship between the principle of effective judicial protection and administrative discretion will be clarified. I will then explain that the principle of effective judicial protection applies to all economic assessments, not only to those that lead to substantial fines.

Effective judicial protection allows for policy discretion, but excludes decisional discretion

In *KME Germany* the Court determined that, based on the principle of effective judicial protection as provided for by art.47 of the Charter, the EU judicature "cannot use the Commission's discretionary margin … as a basis for dispensing with the conduct of an in-depth review of the law and the facts".[69]

So, what are the requirements of an "in-depth review" of economic assessments? Those requirements have in fact already been determined as part of the concept of "full jurisdiction" as defined by the European Court of Human Rights (ECtHR). In *Janosevic v Sweden*, the ECtHR determined that "full jurisdiction" includes "the power to quash in all respects, on questions of fact and of law, the challenged decision".[70] It added in *Valico v Italy* that the EU judicature "must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it".[71] It follows, then, that "full jurisdiction" in ECtHR terms

[65] *KME Germany* (C-272/09 P) [2012] 4 C.M.L.R. 8 at [103]; *Chalkor* (C-386/10 P) [2012] 4 C.M.L.R. 9 at [63]; and *KME Germany* (C-389/10 P) [2012] 4 C.M.L.R. 10 at [130].

[66] Legal, "Standards of Proof and Standards of Judicial Review in EU Competition Law" in *International Antitrust Law & Policy: Fordham Corporate Law* (2005), Ch.5.

[67] D. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1990), p.8.

[68] Fritzsche, "Discretion, Scope of Judicial Review and Institutional Balance in European Law" (2010) 47 C.M.L. Rev. 361; and Nazzini, "Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law" (2012) 49 C.M.L. Rev. 971.

[69] See fn.6.

[70] *Janosevic v Sweden* (34619/97) May 21, 2003.

[71] *Valico v Italy* (70074/01) ECtHR 2006-III, p.13.

does not require the judicial body to conduct, as Wils observed earlier, "a de novo trial, starting from a blank slate …".[72] However, it is necessary to,

> "[review] the contested decision (fully, examining all pleas, factual and legal, raised by the applicant), and [quash] the decision whenever it disagrees with the contested decision's findings."[73]

In other words, the concept of "full jurisdiction" in ECtHR terms excludes any decisional discretion whatsoever: EU Courts must verify the merits of economic causality evidence submitted by the Commission in full.

The requirement of "full jurisdiction" in ECtHR terms has been considered to be of limited significance, however. For example, the EFTA Court observed in *Posten Norge* that:

> "As has been pointed out by ESA, art. 6 ECHR does not in all cases apply with its full stringency … Thus, to what degree these guarantees apply in a given case, must be determined with regard to the weight of the criminal charge at issue."[74]

As a consequence, the Commission would only lack decisional discretion in cases where economic assessments have led to the imposition of fines. This makes no sense. Since the legality of all economic assessments is verified on the basis of the manifest error standard defined in *Tetra Laval*, the intensity of judicial control exercised by the EU judicature should also be the same in all cases. Take note that the Court did qualify the principle of effective judicial protection as a *general* principle of EU law in *KME Germany*.[75] Allowing for the fact that the legitimacy principle implies administrative accountability for all EU competition cases,[76] I submit that the requirements of an "in-depth review" equal those of "full jurisdiction" in ECHR terms, while those standards apply to all EU competition cases.

Fritzsche and Nazzini have suggested that a level of persuasion that prevents the Commission to enjoy any decisional discretion would be unconstitutional and inefficient.[77] Lack of decisional discretion would be contrary to the EU Treaties: the difference between a legality review and unlimited jurisdiction would no longer apply since annulment proceedings might well be as effective as a de novo trial. Such a division of powers would be inefficient because the EU judicature would repeat work that had already been done by the Commission.

Both of these findings are incorrect, however. A legality review that allows for policy discretion, but excludes decisional discretion, is fully in line with the institutional balance within the European Union. It is important to distinguish between the Commission's power to opt for a particular economic theory or model to prove the presence of welfare-decreasing market power in an individual case on the one hand, and the verification of the legality of how this has been applied on the other hand. A legality review of economic assessments does not allow for the theories and models chosen by the Commission to be replaced. Rather, it must be limited to verifying the relevance and reliability of the theories and models put forward in an individual case. Thus, annulment proceedings can indeed be as effective as a de novo trial in superseding the Commission's findings (and rightly so, considering the requirements of effective judicial

[72] W. Wils, "The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR" (2010) 33 World Comp. 19.

[73] Wils, "The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR" (2010) 33 World Comp. 19.

[74] *Posten Norge* (E-15/10) April 18, 2012 at [89].

[75] *KME Germany* (C-272/09 P) [2012] 4 C.M.L.R. 8 at [92], *Chalkor* (C-386/10 P) [2012] 4 C.M.L.R. 9 at [52], *KME Germany* (C-389/10 P) [2012] 4 C.M.L.R. 10 at [119].

[76] D. Geradin and N. Petit, "Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment" (2011), SSRN, *http://ssrn.com/abstract=1698342* [Accessed December 13, 2013].

[77] Fritzsche, "Discretion, Scope of Judicial Review and Institutional Balance in European Law" (2010) 47 C.M.L. Rev. 361, 365 and 392; and Nazzini, "Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law" (2012) 49 C.M.L. Rev. 971, 1000 and 1005.

protection explained earlier.) Moreover, since an "in-depth review" does not include a de novo trial, it will not lead to a "duplication of effort and waste of resources".[78] As befits a constitutional state, an "in-depth review" serves to prevent arbitrary decision-making by the Commission, while securing effective judicial protection of the legal status of the activities concerned.[79]

Manifest error standard contains a reasonableness review that is full and unrestricted and thus mirrors standard of proof

Now that it is established that the principle of effective judicial protection precludes any decisional discretion in favour of the Commission, the next question is whether the manifest error standard provides the proper standard for judicial control of economic assessments. It has been posited that the manifest error standard does not, in principle, meet the requirements of effective judicial protection since it contains a reasonableness review that is, by definition, limited in scope.[80] Opposing that limited review, the appellants in *KME Germany* have suggested that "the doctrine of 'margin of appreciation' and 'judicial deference' should no longer be applied".[81] Clearly, the manifest error standard has not provided a great deal of clarity so far.[82] And even now, in *KME Germany*, the Court did not explicitly criticise the limited review argued for by the General Court.[83] This article contends, however, that the manifest error standard does contain the proper standard for economic assessments and does not need amendment.[84] Below, I explain that the manifest error standard ensures a full verification of the substantive merits of economic causality evidence. Subsequently, I explain that the idea that a reasonableness review of economic assessments is necessarily limited is based on a misunderstanding.

Manifest error standard—a full verification of economic assessments

How does a legality review of economic assessments work? Proceedings in the EU Courts are inter partes and one of the consequences of this is that the scope and intensity of judicial review may vary according to the need for judicial protection in an individual case.[85] It is vital, however, that applicants are free to raise all pleas in law against a theory of competitive harm advanced by the Commission, and to adduce evidence in support of those pleas.[86] This is the case. Both evidentiary standards of relevance and reliability are sufficiently flexible to enable applicants to dispute fully the economic validity of an explanatory theory

[78] Nazzini, "Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law" (2012) 49 C.M.L. Rev. 971, 1000.

[79] See also in this context D. Geradin and N. Petit, "Judicial Remedies under EC Competition law: Complex Issues Arising from the 'Modernisation' Process" in *International Antitrust Law & Policy: Fordham Corporate Law Institute* (2005), Ch.17.

[80] Siragusa, "Celebration of 20 Years of the Court of First Instance of the European Communities", Speech of September 25, 2009; Slater, Thomas and Waelbroeck, "Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?" (2009) 5 E.C.J. 97; Bronckers and Vallery, "No longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law" (2011) 34 World Comp. 535.

[81] *KME Germany* (C-272/09 P) [2012] 4 C.M.L.R. 8 at [84].

[82] Paraphrasing Craig, who has concluded that "the repeated articulation of manifest errors conceals more than it reveals". See Craig, *EU Administrative Law* (2006), p.471.

[83] M. Bronckers and A. Vallery, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and which Role for the Courts after Menarini?" (2012) 8 E.CJ. 283.

[84] Otherwise: Bronckers and Vallery, "Fair and Effective Competition Policy in the EU" (2012) 8 E.C.J. 283.

[85] J. Schwarze and E. Schmidt-Aßmann, *Das Ausmaß der gerichtlichen Kontrolle im Wirtschaftsverwaltungs- und Umweltrecht* (Baden-Baden: Nomos, 1992), p.271.

[86] *KME Germany* (C-272/09 P) [2012] 4 C.M.L.R. 8 at [104]; *Chalkor* (C-386/10 P) [2012] 4 C.M.L.R. 9 at [64]; and, *KME Germany* (C-389/10 P) [2012] 4 C.M.L.R. 10 at [131].

advanced by the Commission.[87] Given the requirement for evidentiary relevance, applicants can object to the appropriateness of any theory submitted to explain a causal relationship between the market behaviour being contested and welfare-decreasing market power within the context of an individual case.[88] Accordingly, EU Courts are in a position to verify fully whether some other theory would have been more appropriate for analysing the competitive effects of the market behaviour in question (but if so, EU Courts cannot substitute their own theory of competitive harm for that of the Commission, but they are in a position to annul the Commission's decision, however). Given the requirement of evidentiary reliability, the applicants can dispute each and every step of the arguments advanced in the Commission's theory.[89] Consequently, EU Courts will also fully verify the soundness of the method applied and the logic and consistency of the reasoning applied.

Bailey has posited that,

> "the [General Court] is not concerned with whether the Commission reached the right decision, rather it checks whether it reached its conclusion in the legally correct manner."[90]

I do not agree with this point of view because both evidentiary standards of relevance and reliability compel EU Courts to assure themselves that economic assessments in EU competition cases "are firmly grounded in real world industry characteristics and hard data."[91] Directed by appellants who are required,

> "to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence — direct or circumstantial — to demonstrate that its objections are well founded",[92]

both evidentiary standards require EU Courts to fully verify whether the Commission's finding of welfare-decreasing market power is based on an economically valid presumption of causality. It follows that, based on the economic approach, the manifest error standard defined in *Tetra Laval* provides for an "argumentative-narrative" verification model[93] that secures "single right" decisions in the sense that *false negatives* and *false positives* are precluded, insofar as possible. [94]

Debunking the myth of limited review

Our analysis raises the question: why was a legality review of economic assessments interpreted as limited in the first place? This can be explained as follows. Until now, the scope of judicial review of economic assessments has been assessed according to two distinctions. The first distinction is that between unlimited jurisdiction and a legality review (art.263 TFEU). The second distinction is between a legality review that

[87] See on this point G. Werden, "Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory" (2003–04) 71 Antitrust L.J. 719.

[88] *Babyliss* (T-114/02) [2003] E.C.R. II-1279 at [362]

[89] *Ryanair* (T-342/07) [2010] E.C.R. II-3457 at [182].

[90] Bailey, "Scope of Judicial Review under Article 81 EC" (2004) 41 C.M.L. Rev. 1327, 1328.

[91] G. Werden, "The admissibility of expert testimony" (2008), SSRN, *http://ssrn.com/abstract=956397* [Accessed December 13, 2013].

[92] *KME Germany* (C-272/09 P) [2012] 4 C.M.L.R. 8 at [105]; Chalkor (C-386/10P) [2012] 4 C.M.L.R. 9 at [65]; and, KME Germany (C-389/10 P) [2012] 4 C.M.L.R. 10 at [132].

[93] R. Soares Pereira, "Evidence Models and Proof of Causation" (2013) 12 *Law, Probability and Risk* 207.

[94] R. Dworkin, *Law's Empire* (London: Fontana Press, 1996). Dworkin posed the single right answer thesis holding that for each hard case there is one right answer that is reached through "legal reasoning". Dworkin poses that "legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be." When translated to a competition law context the "single right economic assessment" is the one that provides the best story explaining the relation between the market behaviour in question and welfare-decreasing market power.

is comprehensive for questions of law and assessments of fact, but limited for economic assessments (consistently held since *Remia*).[95] However, as it turns out, that second limitation is one too many: art.263 TFEU only limits the scope of the jurisdictional powers of the EU judicature, not the scope of its review powers. The reason is that the economic approach brings along that the finding of a "restriction of competition", "abuse of dominance" and "significant impediment of effective competition" is evidenced to the requisite legal standard in case an economically valid presumption of welfare-decreasing market power can be demonstrated. In other words, economic assessments qualify as questions of law further to the economic approach (albeit as a sui generis category, but still).

In *KME Germany* the Court posits two important points in this context. First, as mentioned earlier, the Court qualifies the lack of power of EU Courts to substitute their own appraisal for that of the Commission as the feature that distinguishes a legality review from unlimited jurisdiction.[96] Secondly, in the context of the calculation of the fine, it points out that the repeated references of the General Court to the "'discretion', 'substantial margin of discretion' or 'wide discretion' of the Commission … did not prevent the General Court from carrying out the *full and unrestricted review*, in law and in fact, *required of it*." (italics added).[97] Taken together, the Court actually points out that, also in case of economic assessments, the application of a legality review only limits the scope of the jurisdictional powers that EU Courts have, not the scope of their review powers.[98]

Now, does this "demise of deferential review" imply that judicial control of economic assessments is actually moving towards a "correctness standard" as suggested by Nazzini? [99] For two reasons it does not. A correctness standard is, in principle, not appropriate for the verification of economic causality evidence. Not only because economic assessments are inherently uncertain, as explained above, but also because the same evidence may yield more than one equally plausible conclusion since not all theories will produce the same outcome in a given situation. Secondly, a reasonableness review fits with the nature of economic assessments and therefore is appropriate to verify the validity thereof. In fact, the evidentiary standards defined in *Tetra Laval* translate the legality review provided for by art.263 TFEU for economic causality evidence.[100] It follows that the manifest error standard presents the proper standard for effective judicial review of economic assessments.

Conclusion

A functional definition of the requisite legal standard pertaining to economic assessments in EU competition cases requires a standard of review that mirrors the standard of proof which the Commission has to meet—a competition infringement is proven in law when the finding of welfare-decreasing market power is based on an economically valid presumption of causality. Thus the standard of review must satisfy two requirements. First, it must contain evidentiary standards that are consistent with the nature of economic assessments (i.e. economic causality evidence). Secondly, it must ensure full judicial control of the

[95] See case law referred to in fn.3.

[96] *KME Germany* (C-279/09 P) [2012] 4 C.M.L.R. 8 at [103]; *Chalkor* (C-386/10 P) [2012] 4 C.M.L.R. 9 at [63]; and *KME Germany* (C-389/10 P) [2012] 4 C.M.L.R. 10 at [130].

[97] *KME Germany* (C-279/09 P) [2012] 4 C.M.L.R. 8 at [109]; *Chalkor* (C-386/10 P) [2012] 4 C.M.L.R. 9 at [69], and *KME Germany* (C-389/10 P) [2012] 4 C.M.L.R. 10 at [136].

[98] In her evaluation of *KME Germany* (C-272/09 P), Sibony also distinguishes between jurisdictional and review powers. She maintains, however, that judicial review of competition infringements is limited after all. First, because EU courts would in fact "reserve their discretion to preserve the Commission's discretion". Secondly, because parties' submissions and evidence delineate the obligations of EU courts. See annotation by Sibony in (2012) 49 C.M.L. Rev. 1977, 1996 and 1999.

[99] Nazzini, "Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law" (2012) 49 C.M.L. Rev. 971, 1005.

[100] Sibony (2012) 49 C.M.L. Rev. 1977.

economic causality evidence that is advanced. The manifest error standard, as defined in *Tetra Laval*, satisfies these requirements. It accords with both evidentiary standards of relevance and reliability that are suitable to verify judicially the validity of economic causality evidence. Although it includes a reasonableness review, it also ensures full judicial control since both evidentiary standards allow undertakings to fully dispute the validity—and as such the substantive merits—of the economic causality evidence advanced.

Complex economic assessments

There is one final point to be made. It has consistently been held that the manifest error standard only applies to *complex* economic assessments.[101] Simple economic assessments should be qualified as assessments of facts. The reason for this is that failing that distinction, judicial control of all economic assessments would take place "outside or at best in the margins of judicial control" which would "clearly [be] an undesirable result for any one".[102] This line of reasoning no longer holds true. Both assessments are governed by the same requisite legal standard and, as we have seen in this article, the legality review of economic assessments is just as substantive as that of assessments of facts. The only difference is that economic assessments differ in nature from factual assessments which leads to different kinds of evidence and, consequently, different levels of proof. In the case of actual assessments, the goal is to establish factual certainty. In case of economic assessments the goal is to establish an economically valid presumption of causality. Accordingly, the manifest error standard does not aim to secure factual correctness, but economic validity. In light of the fact that a distinction between complex and simple economic assessments cannot be economically substantiated, nor can it be defined legally, I would propose abandoning the distinction between complex and simple economic assessments altogether.

Conclusion

This article has proposed an evidentiary framework for economic assessments in EU competition cases that is based on the economic approach. The economic approach is understood to include a functional interpretation of EU competition law at large, meaning that those rules must be interpreted in order to fulfil the objective they aim to achieve. A functional definition of the evidentiary framework starts out by identifying the proper welfare objective and the burden of proof that follows from that. It has been argued that dynamic consumer welfare provides a better standard when interpreting EU competition law in a functional manner (rather than long-term total welfare). Using Williamson's models, it follows that, when adducing evidence of a "restriction of competition", "abuse of dominance", or a "significant impediment of effective competition", it is the task of the Commission to prove that the market behaviour being contested leads or will lead to market power and a decrease in dynamic consumer welfare.

Having identified the fundamentals of the evidentiary framework, I have subsequently defined the requisite legal standard. A functional standard of proof will ensure that the evidence adduced adequately demonstrates that the market behaviour in question is leading to or will lead to welfare-decreasing market power. Since economic assessments have economic causality evidence at their core, I argue that the corresponding standard of proof requires the Commission to put forward an economically valid presumption of causality. This requirement must be met unambiguously in order to prove the finding of a restriction by object; it serves as a benchmark for risk-analysis in order to prove the findings of a restriction by effect, abuse of dominance, or significant impediment to effective competition. A functional standard of review mirrors the standard of proof: judicial control serves to establish that an economic assessment put forward

[101] See case law referred to in fn.3.

[102] Legal, "Standards of Proof and Standards of Judicial Review in EU Competition Law" in *International Antitrust Law & Policy: Fordham Corporate Law* (2005), Ch.5.

by the Commission is indeed economically valid. I have argued that the standards consistent with the judicial verification of the validity of economic causality evidence are those of evidentiary relevance and reliability. The threefold test defined in *Tetra Laval* coincides with those evidentiary standards and enables EU Courts—directed by applicants in the course of adversarial proceedings—to conduct a full review of the validity and therefore the substantive merits of the economic assessments advanced. It follows that the manifest error standard is the proper standard of review. Indeed, far from necessitating a novel legal approach, the economic approach puts an end to an era of legal confusion by promoting a functional interpretation of EU competition law. One source of the current confusion is that a reasonableness review (of economic assessments) is necessarily limited in scope (since the margin of discretion the Commission enjoys would include decisional discretion) and therefore contrary to the principle of effective judicial protection. As it turns out, all three assumptions are incorrect because the sequentiality of legal reasoning is wrong. Actually, the starting point is the principle of effective judicial protection that co-defines the institutional balance between the Commission and the EU judicature. This principle requires full judicial control of economic assessments. It follows therefrom that the Commission does not enjoy any decisional discretion, only policy discretion. While art.263 TFEU only limits the jurisdictional powers of the EU judicature, not its review powers. The result is a reasonableness review that provides for full and unrestricted control of the economic validity of the causality evidence advanced.