



Assessing the evidence in antitrust cases

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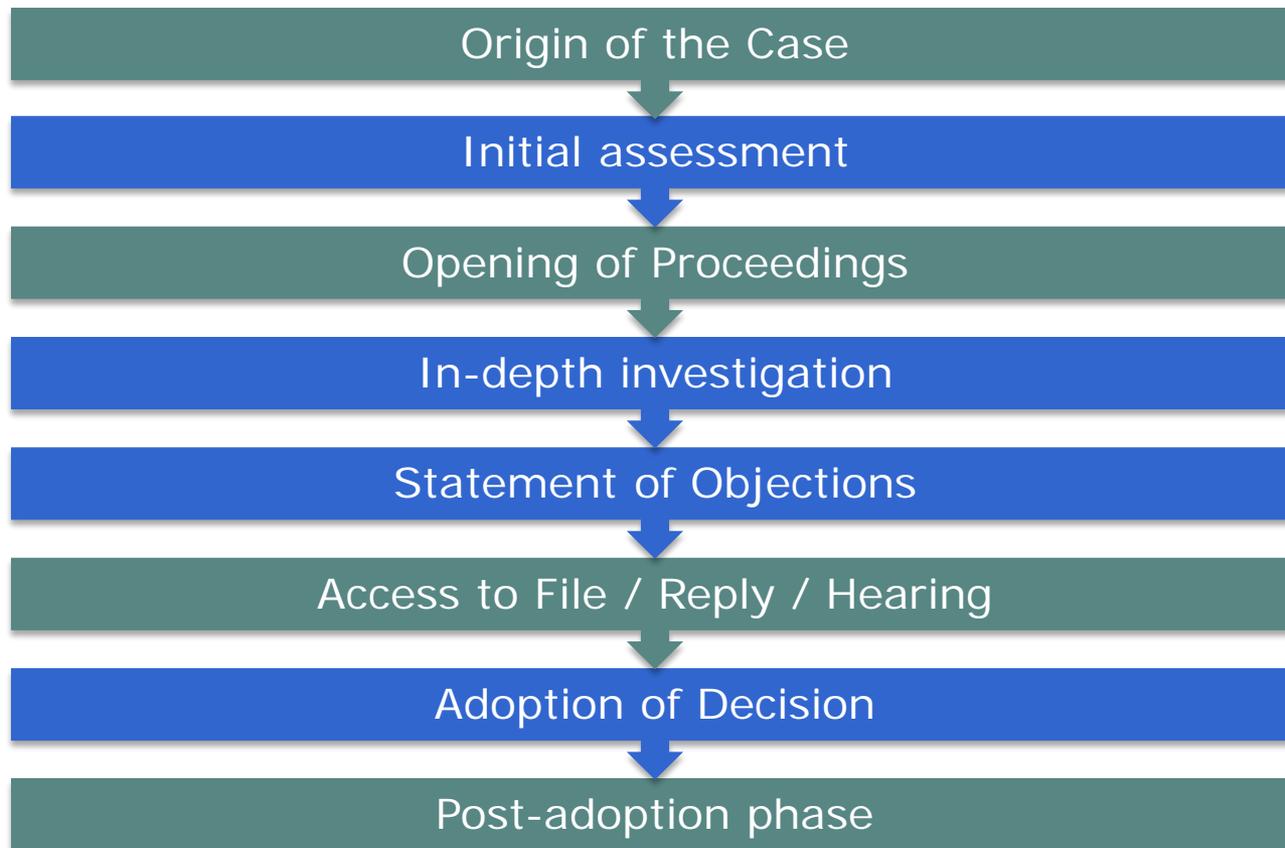
COMP/E2 (Antitrust: Consumer Goods,
Basic Industries and Manufacturing)

14 March 2014

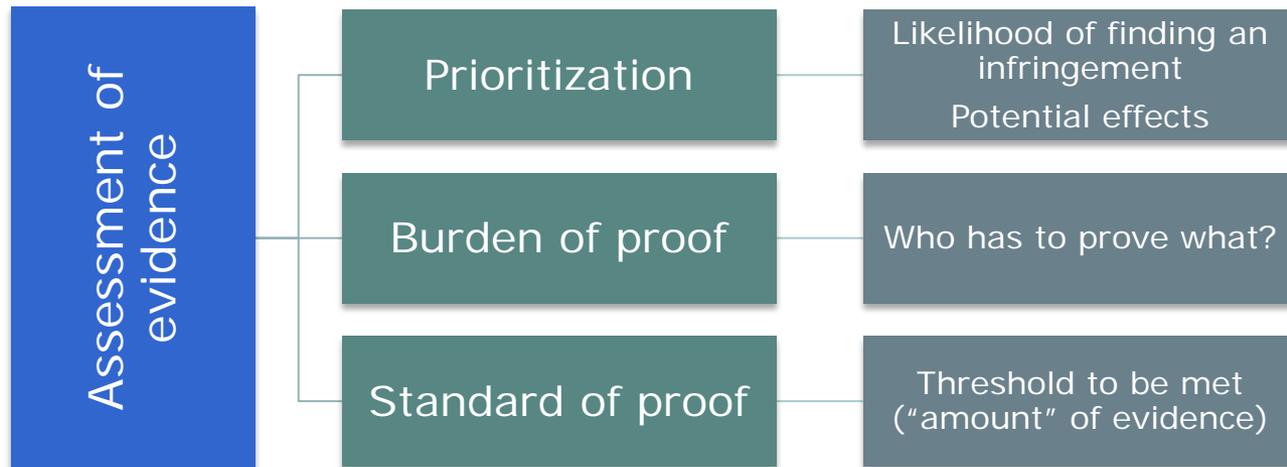
Outline

1. Implementing a sound competition policy
2. Assessing the evidence in the context of the EU antitrust procedure
3. Taking good decisions on the basis of available evidence
4. Assessing the evidence: a few general remarks
5. Impact of procedural & legal rules on the handling of evidence
6. The standard of proof
7. Increased role of economics in competition enforcement





Taking good decisions on the basis of available evidence



Gathering and evaluating evidence in order to conclude whether competition law is infringed is at the heart of what any Competition Agency does

Assessment of evidence

There is always an interpretative element in the assessment of evidence

Assessing evidence implies taking a view on...

... what conclusions may be inferred from the available evidence

... whether the evidence at hand constitutes a sufficient basis for taking a sound decision, which will stand up to judicial scrutiny

While the need for robust evidence is essential, it is unrealistic to believe that decisions can only be taken in the presence of « perfect information »

The handling of evidence is intrinsically linked to the procedural and substantive rules that control and organize DG Competition's work

Main factors:

Available resources

Relevant timeframe

Powers of investigation

Burden of proof

Standard of proof (and standard of judicial review)



Standard of proof:

Beyond reasonable doubt...? Balance of probabilities...? Intermediate standard...?

Some general considerations:

Principle of the presumption of innocence

The Commission must show precise, convincing and consistent evidence in support of its decisions

The Commission must put forward evidence which is factually accurate, reliable and consistent and contains all relevant data that must be taken into account in appraising a complex situation and capable of substantiating the conclusions drawn from it (ECJ's case law: Microsoft, Tetra)

Margin of appreciation of the Commission in economic/technical matters

Nature of the theory of harm on which the assessment is based

Type of intervention pursued



European
Commission

MICROSOFT v COMMISSION

JUDGMENT OF THE COURT OF FIRST INSTANCE (Grand Chamber)

17 September 2007*

In Case T-201/04,

Microsoft Corp., established in Redmond, Washington (United States), represented by J.-F. Bellis, lawyer, and I. Forrester QC,

applicant,

supported by

The Computing Technology Industry Association, Inc., established in Oakbrook Terrace, Illinois (United States), represented by G. van Gerven and T. Franchoo, lawyers, and B. Kilpatrick, Solicitor,

DMDsecure.com BV, established in Amsterdam (Netherlands),

MPS Broadband AB, established in Stockholm (Sweden),

Pace Micro Technology plc, established in Shipley, West Yorkshire (United Kingdom),

* Language of the case: English.

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MICROSOFT v COMMISSION

89 **However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, concerning merger control, Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 39).**

90 It is in the light of those principles that the Court must examine the various pleas which Microsoft puts forward in support of its application for annulment of the contested decision.

2. Admissibility of the content of certain annexes

91 The Commission, supported on this point by SIIA, claims that in a number of annexes to the application and to the reply Microsoft relies on arguments not found in the actual body of those pleadings. On various occasions, moreover, Microsoft makes a general reference to reports annexed to its pleadings. The Commission further criticises the fact that certain expert opinions produced by Microsoft are based on information to which neither the Commission nor the Court had access, and contends that the Court cannot take account of those arguments, reports or expert opinions.

92 Microsoft asserts that the 'relevant passages of [the] application' contain the essential matters of fact and of law on which the action is based. According to the case-law, specific points in the text of the application can be supported and completed by references to specific passages in documents attached (order in

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Case T-201/04, Microsoft/Commission
[2007] ECR II-3601, paragraph 89



The **role of economics** in competition enforcement has grown significantly over the last two decades: the interplay between law and economics has never been greater

EU competition enforcement has progressively moved from a « form-based approach » to an « effects-based approach »

This increased focus on economic effects has been driven by the European Commission, but also by the European Court of Justice

Ultimately, cases have to be proven before a court, to the relevant legal standard: economic analysis is used to support the construction of legally robust cases

Competition cases are typically an intricate combination of legal arguments backed by solid economic analysis