

# Evidence Standards in EU Competition Enforcement

*The EU Approach*

Andriani Kalintiri

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING  
Bloomsbury Publishing Plc  
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

Copyright © Andriani Kalintiri, 2019

Andriani Kalintiri has asserted her right under the Copyright, Designs and Patents Act 1988 to be identified as Author of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©. All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©. This information is reused under the terms of the Open Government Licence v3.0 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) except where otherwise stated.

All Eur-lex material used in the work is © European Union,  
<http://eur-lex.europa.eu/>, 1998–2019.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Kalintiri, Andriani, author.

Title: Evidence standards in EU competition enforcement : the EU approach / Andriani Kalintiri.

Other titles: Evidence standards in European Union competition enforcement

Description: Oxford [UK] ; Portland, Oregon : Hart Publishing, 2019. |

Series: Hart studies in competition law

Identifiers: LCCN 2018044753 (print) | LCCN 2018045926 (ebook) |

ISBN 9781509919673 (Epub) | ISBN 9781509919666 (hardback)

Subjects: LCSH: Evidence (Law)—European Union countries. | Competition, Unfair—European Union countries. | Antitrust law—European Union countries. | Restraint of trade—European Union countries. | Civil procedure—European Union countries. | BISAC: LAW / Antitrust. | LAW / International.

Classification: LCC KJE3926 (ebook) | LCC KJE3926 .K35 2019 (print) | DDC 343.2407/21—dc23

LC record available at <https://lcn.loc.gov/2018044753>

ISBN: HB: 978-1-50991-966-6

ePDF: 978-1-50991-968-0

ePub: 978-1-50991-967-3

Typeset by Compuscript Ltd, Shannon

Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

To find out more about our authors and books visit [www.hartpublishing.co.uk](http://www.hartpublishing.co.uk).

Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

# 1

---

## Introduction

---

### I. Evidence Matters in the Spotlight

The past few decades have witnessed a landscape evolution of European Union (EU) competition law. Covering a wide spectrum of commercial conduct, ranging from anti-competitive agreements to abuses of dominance and concentrations with an EU dimension, the EU competition rules have come a long way and have contributed their share to the proper functioning of the internal market.<sup>1</sup> However, substantive legal rules remain a dead letter in the absence of a fair and workable enforcement system. Therefore, as EU competition law has been becoming mature, the debates over the substantive reach of the competition provisions have been complemented by an increased awareness of the importance of sound procedures.

By and large, the growing attention paid to procedural matters can be traced back to two significant developments in EU competition enforcement: the expansion of the European Commission's powers and the tightening of its fining policy in infringement cases. As is well known, the EU Treaties have vested the responsibility for ensuring compliance with the competition provisions in the Commission.<sup>2</sup> Accordingly, the authority may investigate suspected infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) or the compatibility of a concentration with an EU dimension with the common market; it may take remedial action as appropriate; and it may impose fines on the perpetrators of antitrust violations.<sup>3</sup> Nevertheless, the detection of certain infringements – mainly cartels – proved to be considerably challenging. In recognition of the difficulties that the authority faces, Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU not only fully decentralised the enforcement regime, but also expanded the Commission's investigative powers with a view to easing its evidence-gathering efforts and ensuring

<sup>1</sup> See generally Heike Schweitzer and Kiran Klaus Patel (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press, 2013).

<sup>2</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU), art 105. See also Consolidated Version of the Treaty on European Union, Protocols – Protocol (No 27) on the internal market and competition [2008] OJ C115/309.

<sup>3</sup> These powers were first granted through Council Regulation 17/1962 (EEC) implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

## 2 Introduction

that it has sufficient tools at its disposal to carry out its enforcement duties.<sup>4</sup> Shortly thereafter, a similar rationale underpinned the adoption of Council Regulation 139/2004 on the control of concentrations between undertakings (hereinafter the EU Merger Regulation (EUMR)). Indeed, the latter also identified a need for the Commission's powers of investigation in the context of merger proceedings to be strengthened so as to ensure that competition will be effectively protected and distortions will be prevented in a timely fashion.<sup>5</sup>

The expansion of the Commission's investigative powers was received with uneasiness by undertakings, which started feeling that the existing procedural safeguards were inadequate to mitigate the far-reaching scope of the tools that the authority now possesses. This feeling became particularly acute when the Commission started imposing higher and higher fines for antitrust violations, sometimes totalling billions of euros.<sup>6</sup> The tightening of the Commission's fining policy triggered claims that antitrust fines amounted to 'criminal charges' within the meaning of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as interpreted by the European Court of Human Rights (ECtHR).<sup>7</sup> In this context, the question emerged whether EU competition enforcement is sufficiently 'fair' and meets the due process demands of the Charter of Fundamental Rights of the European Union (CFR) and the ECHR. However, the multiple functions of the Commission, which combines the roles of the prosecutor, investigator and adjudicator, and the application of a marginal standard of review by the EU Courts,<sup>8</sup> where a Commission decision entails policy choices or complex economic evaluations, have obscured the answer.<sup>9</sup>

In view of these developments, it is hardly surprising that questions of evidence gradually came into the spotlight. Indeed, evidence standards constitute an intrinsic element of what makes a trial 'fair' and judicial protection 'effective'.<sup>10</sup>

<sup>4</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003), Recital 25. Regulation 1/2003 abolished the compulsory notification system for agreements falling within the scope of the antitrust rules, whereas it provided that national competition authorities and national courts also have the power to apply art 101(3) TFEU.

<sup>5</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1 (EUMR), Recital 38.

<sup>6</sup> See, eg, the Cartel Statistics published on the website of the Directorate General (DG) of Competition, available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

<sup>7</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

<sup>8</sup> References to the EU Courts must be understood as references to the Court of Justice of the European Union (CJEU) and the General Court of the European Union (GCEU).

<sup>9</sup> See, eg, Wouter Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 *World Competition* 201; Ian Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 *European Law Review* 81; Ian Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2010).

<sup>10</sup> The terms 'evidence standards' and 'standards of evidence assessment' are used throughout this book to collectively refer to the rules and principles that instruct how evidence is, or should be, evaluated.

In this sense, evidence rules and principles form part of the procedural safeguards afforded to undertakings, which find themselves involved in competition proceedings. For this reason, the way in which evidence is assessed and relied on by the Commission must live up to the expectations of the CFR and the ECHR. However, what this means in practice is not entirely clear. For example, the ECHR-criminal nature of antitrust fines, coupled with the EU Courts' settled position that the presumption of innocence applies to proceedings that may culminate in the imposition of high financial penalties for the undertakings concerned, has generated some concern that the standard of proof that the Commission must satisfy in antitrust cases may not be high enough.

In any event, the growing interest in matters of evidence in EU competition enforcement can be also attributed to changes in the way in which evidence is collected, the most important being the adoption of the Commission's Leniency Programme in cartel cases. As one would expect, undertakings which consciously violate the competition rules tend to go to great lengths to eliminate any evidence of their unlawful activities by destroying 'dangerous' records and maintaining an overall secretive profile. Such practices, however, thwart the Commission's efforts to detect unlawful conduct and minimise its chances of retrieving evidence capable of establishing the existence of a violation. Although the broadening of its investigative powers has been helpful in this regard, the problem has remained exceptionally acute in the case of cartels. For this reason, the Commission launched its Leniency Programme with a view to incentivising cartelists to blow the whistle and come forward with evidence of a cartel in exchange for immunity or generous reductions in their fine.<sup>11</sup> This 'carrot approach' – as it is often called – has been very successful in strengthening the Commission's battle against cartels. Yet, at the same time, it has fundamentally reshaped the way in which cartels are proved by often turning leniency statements into the main piece of evidence making the Commission's case. This shift has not gone unnoticed; on the contrary, undertakings and scholars alike have taken issue with both the admissibility and the high probative value usually attributed to evidence proffered by leniency applicants.<sup>12</sup>

Finally, evidence matters in EU competition enforcement have gained considerable prominence in the wake of the so-called 'more economic' approach.<sup>13</sup> Indeed, the early application of the competition rules by the Commission has been criticised as formalistic; the authority tended to equate restrictions in the parties' freedom of action with restrictions of competition, whereas it favoured

<sup>11</sup> Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17 (Leniency Notice).

<sup>12</sup> See, eg, the early criticisms articulated by Julian Joshua, 'Oral Statements in EC Competition Proceedings: A Due Process Short-Cut?' (2004) 26 *Competition Law Insight* 1.

<sup>13</sup> See generally Jordi Gual et al, 'An Economic Approach to Article 82' (July 2005), available at [http://ec.europa.eu/dgs/competition/economist/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf); Anne Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing, 2016); Denis Waelbroeck and Jacques Bourgeois (eds), *Ten Years of the Effects-Based Approach in EU Competition Law* (Bruylant, 2012).

an expansive construction of Articles 101 and 102 TFEU.<sup>14</sup> In response to these criticisms, the Commission revisited its approach to the enforcement of the competition rules, progressively moving towards an ‘effects-based’ analysis, under which the legal treatment of a practice depends on its impact on competition rather than its form.<sup>15</sup> The integration of economics in the application of the competition rules is a positive development. At the same time, however, it has given rise to new challenges from an evidence perspective. On the one hand, it has increased to an extent the complexity of administrative decision-making. On the other hand, it has led to the growing engagement of economic evidence as a means of lending support to the arguments of the authority or of undertaking. Since the assessment of complex economic evidence typically requires specialised knowledge, difficult questions have emerged about its admission into competition proceedings, the criteria of its probative evaluation and its evidential weight vis-a-vis other types of evidence.<sup>16</sup>

## II. A Simple Question, an Unclear Answer: What Standards Govern the Evaluation of Evidence?

Naturally, this complicated background – as just outlined – prompts a simple question: how is evidence assessed in EU competition enforcement? Or, to be more specific, what rules or principles inform or should inform its evaluation? The significance of this question cannot be overstated. Indeed, the Commission, when it applies Articles 101 and 102 TFEU, as well as the EUMR and the EU Courts, when they review Commission decisions, rely on evidence. Thus, evidence assessment is hardwired into both the administrative decision-making and the judicial ‘decision-checking’ process. Nevertheless, despite the significance of the question, the answer remains rather unclear.

To some extent, the uncertainty over the standards which underpin the assessment of evidence in EU competition proceedings can be attributed to the legislative silence on the matter. Indeed, the EU Treaties do not contain evidence rules, whereas – save for Article 2 of Regulation 1/2003, which allocates the burden of proof in disputes concerning the application of Articles 101 and 102 TFEU – there

<sup>14</sup>Valentine Korah, ‘EEC Competition Policy – Legal Form or Economic Efficiency’ (1986) 39 *Current Legal Problems* 85; Barry Hawk, ‘System Failure: Vertical Restraints and EC Competition Law’ (1995) 32 *Common Market Law Review* 973.

<sup>15</sup>This shift is manifested in the adoption of several economics-driven Block Exemption Regulations and Guidelines – eg, on vertical restraints, horizontal cooperation agreements and unilateral conduct.

<sup>16</sup>See, eg, Ioannis Lianos “Judging Economists”, Economic Expertise in Competition Litigation: A European View’ in Ioannis Lianos and Ioannis Kokkoris (eds), *The Reform of EC Competition Law: New Challenges* (Kluwer Law International, 2010); Nicholas Forwood, ‘The Commission’s “More Economic Approach” – Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review’ in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2010).

is no other provision either in Regulation 1/2003 or in the EUMR prescribing rules or principles for the assessment of evidence in competition proceedings.<sup>17</sup> Rather, most guidance on evidence-related matters, such as the operation of the burden of proof, the standard of proof, the use of presumptions and the admissibility or probative value of the evidence, is to be found in the EU Courts' competition jurisprudence. Undeniably, this guidance is highly valuable. Inevitably, however, it has been provided in a fragmentary manner. Therefore, it is at the very least in need of systemisation.

Admittedly, academics have endeavoured to make sense of evidence evaluation in EU competition proceedings over the last few years. Nevertheless, scholarly efforts so far have been rather limited in scope and – sometimes – depth. In terms of scope, the vast majority of the existing studies have explored only a particular aspect of the problem. For instance, some works have examined a specific type of evidence only, such as leniency statements or economic evidence. Others have focused on a particular type of cases, such as cartels or mergers. Last but not least, other commentators have looked only into a specific rule, such as the burden of proof or the standard of proof. As a result, a comprehensive academic study on evidence standards is currently missing from the legal literature on EU competition enforcement.<sup>18</sup> The need for such a study becomes ever more apparent and urgent, given the regularly inaccurate use of the various evidence concepts by both scholars and – occasionally – the EU Courts, which only adds to the general confusion.

### III. Purpose, Approach and Scope

#### A. The Purpose and Approach in this Book

This book examines the standards which inform the evaluation of evidence in EU proceedings concerning the application of Articles 101 and 102 TFEU, as well as the EUMR. In this light, it seeks to answer two questions.

First of all, the book considers what standards govern the assessment of evidence in EU competition enforcement. The primary intention behind this question is to organise the evidence-related case law of the EU Courts and present

<sup>17</sup>The Rules of Procedure of the EU Courts do not address matters of evidence *evaluation*, but rather contain rules on the *production* or *presentation* of evidence (Rules of Procedure of the General Court [2015] OJ L105/1 (RPGC); Rules of Procedure of the Court of Justice [2012] OJ L265/1 (RPCJ)).

<sup>18</sup>The most complete work on evidence assessment in EU competition enforcement so far is the following book: Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar, 2017). The present research is different in at least two respects: first, its scope extends to merger control; and, second, it examines evidence standards from a normative perspective too, whereas it also reflects on their implications for EU competition enforcement on a broader level.

it in a systematic, coherent and comprehensive manner. As mentioned, there are almost no rules on evidence in EU legislation. Accordingly, identifying the standards which underpin evidence evaluation in EU competition proceedings becomes possible only through a deductive investigation of the jurisprudence of the EU Courts. For the purposes of conducting this investigation, this book starts from the premise that the process of evidence assessment requires consideration of the following points: (a) what has to be proved; (b) who has to prove it; (c) how much is enough in order for evidence to be treated as ‘proof’ of an allegation; (d) what evidence the parties may produce to establish their arguments; and (e) how probative value is assigned to specific items of evidence. Except for the first one, which is a matter of substantive EU competition law, the rest of these correspond to the various standards of evidence assessment, namely, the burden of proof, the standard of proof and the principles governing the production of evidence and the appraisal of its probative weight. In practice, the Commission and the EU Courts do not always distinguish among the various evidence standards – at least not explicitly. Nevertheless, being aware of the different stages and elements of the evidence assessment process is essential in order to avoid inaccuracies in the use of the various concepts and properly classify and analyse the guidance provided by the EU Courts.

Second, the book examines the implications of the applicable evidence standards for EU competition enforcement. Academic research on the rules governing evidence assessment in EU competition proceedings has been dominated by debates over their fairness. A possible explanation for this might be that evidence rules are sometimes thought of as mere procedural technicalities that parties must satisfy. However, such a narrow conception of evidence standards is rather shortsighted and fails to do justice to their potential impact on, and contribution in, the enforcement system of which they form part. Therefore, this book takes a broader perspective and seeks to identify the various ways in which the applicable evidence standards may shape, inform or affect the enforcement of the EU competition rules. Specifically, the book considers: (a) their connotations for the allocation of risk in EU competition enforcement; (b) their potential contribution in the fairness of the enforcement system; (c) their implications for the application of the substantive competition rules; (d) their connotations for the Commission and the EU Courts; and (e) their capacity to pave the way for further procedural convergence at the national level.

In considering the above issues, the book takes into account the following parameters, as appropriate. First, the analysis bears in mind the institutional context within which EU competition enforcement is pursued. As will be explained, evidence standards are autonomous, but not independent; while they perform a distinct function within the enforcement system, at the same time they are responsive to its specific features and needs almost by default. Therefore, an examination of evidence standards in EU competition proceedings may not disregard the institutional structure of the system and the administrative model of enforcement which is currently in place. Second, the book takes into account the substantive



legal tests that specify when the Commission may intervene in the market. As will be clarified, evidence standards and substantive legal tests are not completely airtight. Whilst the latter are not the main focus of this book, they will be taken into consideration to the extent that this is necessary in order to provide a full picture of the role of evidence standards in EU competition enforcement. Finally, the book is also mindful of the different manifestations of the ‘more economic’ approach to EU competition enforcement. Indeed, economics may be relevant at multiple levels – including the design of policy priorities, the formulation of legal tests and the assessment of evidence. The present work focuses on the latter issue with a view to better understanding the role that the applicable evidence standards have played or may play in the integration of economics in the application of Articles 101 and 102 TFEU, as well as the EUMR.

The approach of this book is both positive and normative. On a positive level, the analysis identifies the rules and principles that inform the assessment of evidence in EU competition proceedings and considers their impact on, or contribution in, the enforcement of the EU competition rules. On a normative level, it determines what evidence standards should apply in EU competition enforcement and provides certain recommendations.

## B. The Scope of the Book

This book focuses on the standards which underpin the process of evidence evaluation, as mostly developed by the EU Courts in the context of their review of Commission decisions concerning the application of Articles 101 and 102 TFEU, as well as the EUMR. However, for the sake of completeness, two related issues are also explored.

First of all, part of the book is dedicated to the presumptions which are most commonly invoked and relied on in EU competition proceedings. One might argue that, strictly speaking, presumptions are not evidence *standards*, that is, *rules* or *principles* governing the evaluation of evidence. Yet, they are one of the main mechanisms through which a party may satisfy its standard of proof and thus discharge its burden of proof too. Cartel enforcement specifically is heavily reliant on presumptions, which have been developed by the EU Courts and are frequently employed by the Commission in its decision-making. Therefore, an analysis of evidence standards in EU competition enforcement would be incomplete without at least a brief consideration of presumptions as a tool for meeting the standard of proof. Second, part of the analysis is dedicated to the interaction between evidence standards and standards of judicial review. Matters of judicial review in EU competition enforcement merit their own separate investigation and, as such, they fall outside the scope of this book. Nonetheless, evidence standards are typically engaged as part of the scrutiny to which the EU Courts subject the Commission’s decisions. For this reason, issues of proof and issues of judicial review cannot be entirely disentangled. In this sense, in order to fully appreciate the function of

evidence standards in the enforcement of the EU competition rules, some thought must be paid to the subtleties of their symbiosis with the applicable standards of judicial review.

By contrast, a number of issues are not considered in this book. First of all, matters of evidence production and evidence presentation are excluded from the analysis, save where they may have an impact on the formulation of standards for the evaluation of evidence. In this regard, the words ‘assessment’ or ‘evaluation’ or ‘appraisal’ are used interchangeably throughout the book as umbrella terms describing all the different aspects of the process through which evidence is examined and relied upon, first, in order to justify a Commission decision finding a *violation* of Articles 101 and 102 TFEU or declaring the compatibility or incompatibility of a concentration with an EU dimension with the common market, and, second, in order to enable the EU Courts to verify the legality of such a Commission decision.

Second, this book does not consider the Commission’s decisional practice. As mentioned earlier, with the exception of Article 2 of Regulation 1/2003, which allocates the burden of proof in antitrust cases, there are no evidence rules in EU legislation. For this reason, the development of specific standards of evidence assessment in EU competition proceedings has been predominantly left in the hands of EU judges. However, the judgments of the EU Courts are binding upon the Commission. Indeed, the lawfulness of the Commission’s decision-making is – among other things – dependent on the authority’s compliance with the applicable evidence standards as understood by the EU Courts. Therefore, to the extent – and on the assumption – that it deviates from the evidence standards developed by the latter, the Commission’s practice in relation to matters of evidence assessment will not be examined.

Third, and rather obviously, the focus is exclusively on evidence standards in EU *competition* proceedings. As such, questions or problems of evidence evaluation in other fields of EU law are not examined in this book. That said, some of the issues addressed herein may be present or of relevance in other areas of EU law too. However, the field of EU competition law was chosen owing to its unique cumulative combination of the following distinct features. First, Commission decisions finding a violation of Articles 101 and 102 TFEU or declaring the incompatibility of a concentration with an EU dimension with the common market have a direct adverse effect on individuals.<sup>19</sup> Second, where an infringement of Article 101 and/or 102 TFEU has been established, the fines that the Commission may impose are of at least a quasi-criminal nature. Third, EU competition enforcement typically requires the performance of complex economic evaluations. Last but not

<sup>19</sup>In contrast, in other areas of EU law, the adverse effects on individuals are typically indirect, such as in the field of risk regulation, or the Commission decisions are principally addressed to a Member State rather than an individual, such as is the case with state aid. Because of these differences, other fields of EU law do not give rise to fairness concerns similar to those arising in competition proceedings.

least, individuals who have been adversely affected by a Commission decision may bring an action for annulment before the GCEU, which has jurisdiction to review the legality of the said decision.

Fourth, this book does not examine questions of institutional reform. The consistent trend of record fines being imposed by the Commission for violations of the antitrust rules has prompted several commentators to question whether the current administrative model is appropriate to secure the effective judicial protection of the sanctioned undertakings and their right to a fair trial. In the wake of these concerns, various proposals for institutional reform have been put on the table. Nonetheless, the focus of the present research is on the applicable evidence standards. Therefore, issues of institutional reform associated with fairness concerns will be addressed only where necessary and merely in an ancillary way, the reference point of the analysis being the current administrative model of EU competition enforcement.

Finally, the book does not examine evidence standards in the enforcement of the EU competition rules at the *national* level, ie, by national competition authorities (NCAs), national courts and private parties. As briefly mentioned earlier, the applicable evidence standards are informed by – and sensitive to – the wider context within which they operate. However, the procedural and institutional framework within which private or decentralised public EU competition enforcement occurs may differ significantly from that of the EU. Accordingly, evidence standards in national proceedings concerning the application of the EU competition provisions will not be considered in this book, except where necessary.

## IV. Structure

Chapter 2 sets the scene for the analysis in the rest of the book. To this end, it asks two questions. The first of these is what evidence rules are for? The second is what features of EU competition enforcement may affect the design and content of the standards which inform the evaluation of evidence in that context? The chapter first offers a primer on evidence law and theory in order to highlight a somewhat underestimated point: that evidence rules have an autonomous function in legal proceedings. Specifically, they serve as fact-finding and decision-making devices with a view to enabling adjudicators to deal with uncertainty and evade deadlocks. However, the fact that evidence standards are autonomous does not mean they are completely independent; rather, the second point that the chapter emphasises is that their content is inevitably informed by the features of the enforcement system within which they operate. In EU competition enforcement in particular, regard must be had to the following aspects thereof: the prevailing administrative model, the consequences that Commission decisions may have for the undertakings involved, and the interplay between competition law and economics.

With these preliminary remarks in mind, Chapters 3, 4 and 5 turn their attention to the specific rules and principles which underpin the various stages of

the evidence assessment process. Chapter 3 starts with the burden of proof and analyses how this is – or should be – allocated in EU competition enforcement. After providing a brief account of its forms and significance, the chapter examines how the burden of proof is divided between the Commission and the investigated undertakings in infringement and merger proceedings alike, and cautions against the implications of the current bifurcated allocation for the scope of the EU competition rules, as well as its incompatibility – in Article 101 and 102 TFEU proceedings – with the presumption of innocence. Chapter 4 then shifts its focus to the standard of proof in EU competition enforcement. Although the question whether the produced evidence has been ‘sufficient’ stands at the very core of evidence evaluation, the applicable standard of proof has been rather elusive. Mindful of this elusiveness, the chapter draws on the case law of the EU Courts in order to infer how the standard of proof is, or should be, regulated in infringement and merger proceedings, while it also sheds some light on the factors which may ease or complicate its discharge. Chapter 5 then examines how evidence is admitted and weighed in EU competition proceedings.<sup>20</sup> Indeed, not all items of information may qualify as ‘evidence’ and not all evidence will bear the same probative value. The chapter inspects the case law of the EU Courts in order to set out the principles and criteria that determine the admissibility and probative value of the evidence in EU competition proceedings, while it also considers potential shortcomings in the applicable admissibility and evaluative standards.

For the sake of completeness, Chapters 6 and 7 are then dedicated to two peripheral, yet highly pertinent issues: the use of presumptions in EU competition enforcement and the interaction between evidence standards and standards of judicial review. Although – technically speaking – presumptions are not a core evidence *rule* or *principle*, they still play a crucial role in the evidence assessment process by providing the party who bears the burden of proof with an expedient mechanism for satisfying the standard of proof and by re-allocating the evidential onus between the claimant and the defendant. For this reason, Chapter 6 takes a closer look at the presumptions that the EU Courts have developed over the years in their competition jurisprudence and examines their function in the evidence evaluation process, as well as their implications. In any event, because evidence standards are engaged as part of the control that the EU Courts exercise over the Commission’s decisions, issues of proof and issues of judicial review cannot be entirely detached. For this reason, Chapter 7 examines the interaction between

<sup>20</sup> The choice to discuss the admissibility and probative value of the evidence after the burden and standard of proof is justified by the fact that the burden and the standard of proof are decision-making *rules* applying to the *totality* of the evidence and, as such, their regulation is informed by similar considerations (mainly fairness and risk allocation). By contrast, the admissibility inquiry, as well as the probative weight analysis, are governed by *principles* (rather than rules, strictly speaking) and apply to *individual* items of information rather than the body of the evidence as a whole. Accordingly, it makes sense to identify first the general threshold that needs to be satisfied in order for evidence to amount to proof and then the factors that guide the assessment of specific pieces of evidence.

evidence standards and standards of judicial review and expounds the subtleties, but also importance, of their symbiosis.

Finally, Chapter 8 draws upon the previous analysis in order to illuminate the implications of the applicable evidence standards for EU competition enforcement from various angles. Indeed, this book shows that the rules and principles which inform the evaluation of evidence in EU competition proceedings are not dry technicalities; rather, they are essential components of an underlying framework which complements the substantive legal tests and shapes enforcement in its own right. As Chapter 8 explains, the applicable evidence standards have multifaceted connotations and implications. First of all, they may provide insights into the enforcement system's proclivity towards risk. Second, coupled with the standards of review, they have the capacity to compensate for the 'fairness deficit' in the administrative model of enforcement and may contribute to its overall compatibility with the principle of effective judicial protection. Third, from a substantive point of view, they may accommodate the 'more economic' approach, whilst serving as a 'quality filter' for the integration of economics in the analysis, and at the same time, they may affect the scope of the EU competition rules. Fourth, from a practical standpoint, they can be translated into specific obligations for – or expectations from – the Commission and the EU Courts. And last but not least, they are prone to paving the way for further procedural convergence in the application of the EU competition rules at the national level.<sup>21</sup>

<sup>21</sup> This book has examined the case law of the EU Courts as at 25 June 2018.