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Evidence, Proof and Judicial Review in EU Competition Law
by Fernando Castillo de la Torre and Eric Gippini Fournier
Edward Elgar 2017; xxxviii + 376 pp.
£112.50; Hardback

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Issues of evidence and judicial review in European Union competition law have attracted significant attention in recent years – and with good reason. On a practical level, administrative authorities, lawyers and courts involved in competition cases are regularly confronted with questions pertaining, among others, to the burden of proof, the standard of proof and the admissibility or probative value of different types of information. On a theoretical level, on the other hand, evidence rules and standards of review delineate administrative action and judicial control, as well as the court-agency relationship, while their setting may give rise to complicated debates about due process and fundamental rights. While the competition jurisprudence of the EU Courts contains valuable guidance on these issues, the latter is at the very least in need of codification. Castillo de la Torre and Gippini Fournier’s impressive book strives to do exactly this. Drawing on their extensive experience as members of the European Commission’s Legal Service, the two authors have contributed to competition scholarship by shedding light on how evidence is assessed in EU competition enforcement and how decisions finding a violation of Articles 101 and 102 TFEU and imposing financial penalties are reviewed.

The volume starts off with an introductory chapter which explains the need for a book on this topic and offers some preliminary remarks with a view to setting the background for the subsequent analysis. In particular, the authors take note of the different ways in which continental and common-law systems conceptualise matters of evidence; of the criticisms often raised against the judicial review exercised by the EU Courts over Commission decisions; of the distinction between fact and law and its relevance; and of the administrative and judicial phases of the EU competition enforcement model. With these considerations in mind, the second chapter examines the burden and standard of proof in EU competition law. In this context, the authors briefly describe the various manifestations of the burden of proof (‘legal’ and ‘evidential’), while they emphasise that continental systems are rather unfamiliar with the concept of the standard of proof as such. Focusing on the case-law of the EU Courts, they consider the compatibility of the burden of proof with the presumption of innocence. In addition, they discuss the variables which may influence the ‘persuasive effect’ of the evidence, as well as the operation of the evidential burden of proof in practice, and conclude by stressing that the evidence is in any event assessed holistically.

Chapter 3 is then dedicated to evidence issues in relation to four specific areas: single and continuous infringements; the duration of an antitrust violation; the various defences that undertakings may invoke; and the setting of fines. This part of the book is particularly valuable in that the authors shed light on rather convoluted strands of jurisprudence and explain how the case-law of the EU Courts has evolved over the years, whilst illustrating how evidence law

works in practice. Chapter 4 is equally important in that it attempts to identify the factors which may determine the probative value of different means of evidence. After paying some thought to the circumstances under which evidence may be declared inadmissible, the authors observe that its assessment is subject to the general requirement of reliability. Drawing on the jurisprudence of the EU Courts, they then endeavour to detect specific criteria which may influence the probative value of contemporaneous documents, as opposed to information drafted *ex post*.

Chapter 5 shifts its attention to evidence in court and addresses a variety of procedural issues by reference to the existing case-law. Among the matters considered are pleadings; the role of annexes; the timing of the submission of evidence; the role of the judge in the fact-finding process and the types of measure they may adopt; as well as the use of oral testimony and of expert reports. Chapter 6 then examines the scope of judicial review with respect to findings on the constituent elements of an infringement and fines. Importantly, the authors provide a concise, yet illustrative presentation of the evolution of limited review. In so doing, they contemplate the requirements of the right to a fair trial, as interpreted by the European Court of Human Rights and applied by the EU Courts in a number of significant developments in the relatively recent past, and they discuss what marginal review looks like nowadays taking the view that, while it may be ‘different’ in nature, it is not necessarily ‘limited’. The rest of the chapter is dedicated to the judicial review of fines: over approximately 50 pages, the authors shed light on the operation of unlimited jurisdiction, its nature, its relation with legality review and the practice of the EU Courts.

All in all, Castillo de la Torre and Gippini Fournier have managed to inject a sense of structure in our understanding of the labyrinthine jurisprudence on matters of evidence and judicial review in EU competition law. Indeed, this book provides a succinct, yet comprehensive and insightful presentation of the existing case-law of the EU Courts on these issues – which is in itself a major feat. Given its subject, its practical focus and the clarity of its analysis, this is a title which should not be missing from the library of anyone working in the field of competition law – be it authority officials, practitioners, judges or academics.