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Standard of Proof in Competition Cases – CZ/SK/AUT

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Bratislava

No principle of legal proof

Free Evaluation of Evidence

	Czech Republic	Slovakia	Austria
Administrative Law	Principle of Material Truth (facts established beyond reasonable doubt)	Principle of Material Truth (reliably established facts)	*Objektive Beweislast* (who carries the consequence of non-liquet)
Criminal Law	Principle of Material Truth (facts established beyond reasonable doubt)	Principle of Material Truth (facts established beyond reasonable doubt)	Establish the truth (*Wahrheitserforschung)*
Civil Law	What the judge believes based on arguments and evidence provided by the parties (sufficient inner conviction in the level of practical security on the exitence or nonexistence of facts)		

Austrian Procedural Specifics

- National Competition Authority has no decision power – submits "fine requests" to the Cartel Court
- Separate Decisions against every Cartel Member – not tried jointly
- Only one instance which decides on the facts
- Mostly Settlement Decisions – facts "*außer Streit gestellt";* SPAR – settlements as indicia
- Only "legally enforceable" court decisions published – different concept than in CZ/SK (Cartel Court in first instance not published if appealed)
- Cartel Court – decides on requests of the NCA but also private enforcement under Code of Civil Procedure (under same standard of proof)
  - Fining Guidelines – cannot be binding on court
  - No "plea deals" – consequences for leniency and settlements
- Did not find decisions which would operate with "*beyond reasonable doubt*" standard or consequences of application of the "*in dubio pro reo*"

SPAR – 16 Ok 2/15b (1)

- Cartel Court – 3 million EUR, on appeal 30 million EUR
- Settlements
  - BRAU UNION AG
  - Stieglbrauerei Salzburg GmbH
  - Ottakringer Brauerei AG
  - Brauerei Ried Gen
  - Brauerei Ried Gen
  - Vereinigte Kärntner Brauereien AG
  - Brauerei Schloss Eggenberg Stöhr GmbH & Co KG
  - Privatbrauerei Zwettl Schwarz GmbH
  - Mohrenbrauerei August Huber KG

SPAR – 16 Ok 2/15b (2)

- Cartel Court – 3 million EUR, on appeal 30 million EUR
- Settlements
  - Braucommune Freistadt
  - Brauerei Hirt GmbH
  - Brauerei Baumgartner GmbH
  - Vöslauer Mineralwasser AG
  - Pago International GmbH
  - Vorarlberger Mühlen- und Mischfutterwerke Gmb
  - Berglandmilch Gen
  - Emmi Österreich GmbH
  - Kärntner Milch GenmbH
  - NÖM AG

SPAR – 16 Ok 2/15b (3)

- Cartel Court – 3 million EUR, on appeal 30 million EUR
- Settlements
  - REWE / Merkur / Billa / Adeg
  - AFS Franchise-Systeme
  - Sutterlüty Handels GmbH
  - Mpreis Warenvertriebs GmbH
  - Pfeiffer HandelsgmbH / Zielpunkt GmbH
- Decision concerned only one product group
  - 15 more outstanding (REWE settled all for 20 million EUR)
- On substance
  - Margin neutrality – decrease/increase of price must have no influence on margin of SPAR
  - Price increase also agreed with competitors

SPAR – 16 Ok 2/15b (4)

- Evidence
  - Emails showing purchases (implementation of price increase)
  - Emails asking for price discipline of competitors, complaints about competition – „provocation“ through low prices
  - Witnesses – efforts of market stabilization
  - Documents – contracts establishing resale prices
- Appeal
  - Standard of proof – only when it reaches the level of „*Aktenwidrigkeit*“ – denied as effort for new evidence evaluation
  - Only if evidence is incorrectly restated and therefore incorrect facts are subject of legal evaluation.

A National Standard (1)

- Regulation 1/2003, Recital 5:
- "*In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to* ***the required legal standard.*** *It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied.* ***This Regulation affects neither national rules on the standard of proof*** *nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.*"
- *T-Mobile* – expectation that participants will make use of the information obtained – issue of substance or issue of procedure?
- *Eturas* – awareness of travel agencies that they were aware of a message – issue of substance or issue of procedure?

A National Standard (2)

- C-211/22, Super-Bock
- **The second question: proof of an 'agreement' within the meaning of Article 101 TFEU**
- *By its second question, the referring court asks, in essence, whether Article 101 TFEU must be interpreted as meaning that the existence of an 'agreement', within the meaning of that article, between a supplier and its distributors may be established only on the basis of direct evidence.*
- *According to the Court's case-law,* ***in the absence of EU rules on the principles governing the assessment of evidence and the requisite standard of proof in national proceedings for the application of Article 101 TFEU,*** *it is for the national legal order of each Member State to establish those rules, in accordance with the principle of procedural autonomy, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law* ***(principle of effectiveness)*** *(see, to that effect, judgment of 21 January 2016, Eturas and Others, C 74/14, EU:C:2016:42, paragraphs 30 to 32 and the case-law cited).*

A National Standard (3)

- C-211/22, Super-Bock
- **The second question: proof of an 'agreement' within the meaning of Article 101 TFEU**
- *It is clear from that case-law that the **principle of effectiveness** requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are **objective and consistent.** In most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together, may, **in the absence of another plausible explanation**, constitute evidence of an infringement of the competition rules (judgment of 21 January 2016, Eturas and Others, C 74/14, EU:C:2016:42, paragraphs 36 and 37 and the case-law cited).*
- *It follows that the existence of an agreement, within the meaning of Article 101(1) TFEU, on minimum resale prices may be established not only by means of direct evidence but also on the basis of consistent coincidences and indicia, where it may be inferred that a supplier invited its distributors to apply to follow those prices and that the latter, in practice, complied with the prices indicated by the supplier.*

Balance of Probabilities

Decision Antimonopoly Office, 2024/DOH/POK/R/6:

„V tejto súvislosti možno tiež poukázať na prax a judikatúru vo Veľkej Británii, z ktorej pre prípady súťažných vecí vyplynulo, že je dostatočným dôkazným štandardom tzv. „rovnováha pravdepodobností“. Rozsudky v týchto veciach vychádzajú zo špecifík súťažno-právnych sporov a jednoznačne odmietajú koncipovanie dôkazného štandardu „nad rozumnú pochybnosť“ vyplývajúceho z trestného práva.“

„In this context it is also possible to refer to the practice and case law in Great Britain where it followed in competition cases that the sufficient standard of proof is the „balance of probabilities“. Decisions in these cases are based on specifics of competition law disputes and clearly refuse the standard of proof based on „beyond reasonable doubt“ following from criminal law.“

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