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The Standard and the Burden of Proof in Competition Law Cases – Note by Austria

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1. Institutional and procedural framework

1. The Austrian model of antitrust law enforcement provides for a division of tasks between administrative and judicial competition authorities. The Austrian Federal Competition Authority (AFCA - Bundeswettbewerbsbehörde/BWB), as the administrative competition authority, has typical investigative powers (inter alia inspections, requests for information, examination of witnesses) and investigates ex-officio possible violations of competition law. In case the AFCA, after completing its investigations, comes to the conclusion that a provable infringement has occurred, it submits applications to the Cartel Court for a declaratory judgment, the cessation of the conduct or the imposition of fines. The AFCA enjoys the status of an official party in such proceedings. The Cartel Court then conducts an evidentiary procedure and eventually reaches a decision applying the rules of the less formal non-contentious proceedings. Decisions of the Cartel Court can be appealed to the Supreme Court in its function as the Supreme Cartel Court. In terms of content, appeals are essentially limited to questions of law. Only in exceptional cases, questions relating to the facts of the case and the assessment of evidence can be referred to the Supreme Cartel Court. At all these levels, questions arise with regard to the probative value of evidence and whether the requirements for the existence of an infringement can be sufficiently demonstrated.

2. General principles

2. Austrian law is characterized by certain principles with regard to evidence, which essentially apply to all types of proceedings.

3. According to the **principle of the unlimited nature of evidence**, anything that is suitable for establishing the relevant facts and is appropriate in the individual case can be used as evidence. It follows that all sources of evidence used are of equal value in the abstract, i.e. their probative value does not depend on their formal qualification but only on their intrinsic truthfulness. In principle, so-called indirect or circumstantial evidence is also admissible.

4. The core of the **principle of free evaluation of evidence** is that the judge (or the person otherwise making the decision) is not restricted by rigid legal rules of evidence, but must assess whether sufficient evidence has been provided or not according to personal conviction. When assessing the evidence, there are no fixed guidelines that prescribe a certain probative value of the individual pieces of evidence, but only those facts that can be assumed to be true with a sufficiently high degree of probability.

5. However, the free evaluation of evidence does not take place completely without determinants. Rather, the question arises as to when something may be assumed to be true, namely the question of the necessary degree of conviction. For the avoidance of arbitrariness, the judge is bound by a standard of proof that determines the degree of probability or certainty that allows a finding to be made. According to the prevailing view, the standard of proof regularly applied is a high degree of probability and not a degree close to certainty. Even in exceptional cases where the law expressly allows a lower standard of proof to suffice, such as showing a plausible explanation (certification) or the admissibility

of prima facie evidence, findings of fact may only be made on the basis of full personal conviction of their validity.

6. This standard of proof has a certain range and flexibility and therefore depends both on the objective circumstances of the individual case and on the subjective assessment of the judge. Applying the personal and general life experience of a reasonable person as well as any specialized knowledge acquired, the strength of the evidence must be measured objectively against the standard of a prudent, conscientious and experienced person.

7. There are certain deviations from this principle in connection with deeds. Thus, innocuous public deeds provide full proof of the accuracy of their content; signed private deeds provide proof that the content originates from the signatory, but not of the accuracy of the content.

8. The question of the standard of proof must be distinguished from the question of the burden of allegation and proof. In principle and in absence of specific provisions distributing the burden of proof in another way, the party wishing to rely on a fact that is favorable to it in terms of creating or destroying rights must assert and prove its existence. If the proof is not successful, this is to their disadvantage because the fact is not accepted as proven.

3. Threshold for the AFCA to take action

9. The position of the AFCA in relation to the proceedings before the Cartel Court is sui generis in several respects. Although organized as an administrative authority and anchored in administrative procedural law with regard to its investigations, its activities are not aimed at issuing decisions on the substance, but rather at preparing procedural acts as a party to the proceedings before the Cartel Court. Like a public prosecutor, the AFCA is obliged to be objective and must consider exonerating as well as incriminating facts. However, there are no clear rules as to when the AFCA is obliged to submit an application to the Cartel Court. An extreme limit can be derived from Section 41 of the Cartel Act, which provides for the obligation of the unsuccessful party to reimburse costs only in the event of frivolous action (or defence). This is the case if the party is aware of the incorrectness of its procedural position and enters into the proceedings in this awareness or if it is litigating to achieve a purpose that is not protected by the legal system. An incorrect but justifiable legal opinion is not frivolous.

10. Within the scope of the discretion available to the AFCA, it must therefore be assumed that there must at least be a reasonable suspicion that is adequately supported by the evidence.

4. Decisions of the Cartel Court

11. As mentioned before, the Cartel Court uses the non-contentious proceeding. A central aspect of this type of procedure is the application of the inquisitorial principle. This means that the court must obtain the necessary evidence ex officio, even without a party filing a motion to that effect. However, this does not change the distribution of the burden of assertion or the burden of proof. A party must at least conclusively assert a set of facts that may be subject of the court's investigation. If a fact that is a prerequisite for the existence of a claim cannot be proven, that claim will not be granted. Furthermore, the parties to the proceedings have a duty to cooperate. They must assist the court in conducting the proceedings and present and offer all facts and evidence known to them that are relevant

to the decision, truthfully and in full, and answer all questions from the court aimed at obtaining such information.

12. At several points in the law, the Cartel Act contains presumptions, particularly in connection with the rules on market dominance, which effectively reverse the otherwise applicable burden of proof. The reason for this different distribution of the burden of proof is that the market-dominant company generally possesses or is otherwise closer to the evidence relevant for the assessment.

13. For example, the law assumes the existence of market dominance when certain market share thresholds are met. It is incumbent on the company to present facts that refute this presumption. Similarly, a dominant company bears the burden of proof for the rebuttal of the presumption of sales below cost price as well as for providing an objective justification for such sale. In the same way, a new law for dominant companies in the energy sector requires them to prove the objective justification for a deviation of their prices or other business conditions from a customary standard.

4.1. Special case: Order of searches at premises by the Cartel Court

14. Pursuant to Section 12 of the Competition Act, the Cartel Court shall order, upon application by the AFCA, that the premises be searched where there is reasonable suspicion of an infringement and where this is necessary to obtain information from business documents.

15. According to the Supreme Cartel Court's established case law, a reasonable suspicion requires that it can be presented in a rationally comprehensible manner. This requires facts from which it can be reasonably and comprehensibly concluded that an infringement of the relevant provisions of competition law has occurred. A strong or urgent suspicion of an offense in order to conduct a search is not required. The circumstances for the reasonable suspicion must be substantiated with evidence, whereby the certification threshold for issuing a search warrant is set well below the standard of proof for an antitrust violation itself.

4.2. Special case: Preliminary injunctions

16. Pursuant to Section 48 of the Cartel Act, the Cartel Court shall give the necessary orders by way of interlocutory injunctions, where it is credibly certified that the conditions to terminate an infringement are fulfilled. In this case, only immediately available evidence is used. The standard of proof in provisional proceedings is thus lower than in regular proceedings. The Supreme Cartel Court allows the party providing evidence a further easing of the burden of proof if that party is in a situation where it is unable to provide evidence due to the fact that it does not have the evidence at its disposal. In this case, the likely presentation of a fact in the sense of prima facie evidence is admissible.

5. Judicial review by the Supreme Cartel Court

17. The Supreme Cartel Court is essentially limited to reviewing the legal assessment by the Cartel Court and is not a court of fact.

18. Therefore, with regard to the findings of facts by the Cartel Court, only the case of a contradiction between the specific finding and the content of the specific evidence on which the finding is based, can be taken up. If the content of evidence is incorrectly reproduced, the legal assessment is based on manifestly false facts. In addition, an appellant

can challenge the trial court's failure to make relevant findings of facts because of the Court's incorrect legal assessment.

19. The Cartel Court's evaluation of evidence, on the other hand, can only be challenged to a very limited extent in the appeal proceedings. According to the case law, this is limited to intolerable findings of decisive facts and completely unrealistic results of the evaluation of evidence with reference to evidence on the record while taking into account the entirety of the considerations on the probative value of the evidence by the trial court. In addition, the contested findings must be relevant to the decision and have an impact on the outcome of the proceedings.