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

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Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

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Czech Republic

1. Introduction

1. General public often perceives competition authorities as insufficiently active in combating anticompetitive practices, and the Czech Republic is no exception. The Czech Office for the Protection of Competition (hereinafter "Czech NCA") has faced criticism for allegedly not taking sufficient action against cartels that are perceived to lead to price increases of goods and services in recent years. However, proving the existence of anticompetitive behaviour is often more complex and challenging than it may seem at first glance, as it requires strict legal standards.

2. In a state governed by the rule of law, it is essential that individuals and legal entities are not convicted solely on the basis of assumptions. Accordingly, the Czech NCA is obligated to present evidence that adequately substantiates the existence of circumstances constituting a breach of competition law. Furthermore, it must address any arguments raised by undertakings regarding the sufficiency of the evidence it relies upon, ensuring a rigorous and fair enforcement process.

3. Due to the volume of complaints, the Czech NCA uses prioritization authorized by the Act No. 143/2001 Coll., on the Protection of Competition (hereinafter "Czech Competition Act").[1] This allows efficient allocation of resources to cases with a high impact on competition and consumers. The likelihood of successfully proving anticompetitive behaviour is also taken into account.

4. The purpose of this contribution is to provide a comprehensive overview of the standard of proof required to conduct a dawn raid and to establish the existence of anticompetitive conduct in the Czech Republic. This also entails the allocation of the burden of proof and the role of (rebuttable) presumptions in competition law enforcement.

2. Reasonable suspicion for conducting a dawn raid

5. Like other competition authorities, the Czech NCA possesses the power to conduct dawn raids as part of its investigative tools. This is undoubtedly one of the most effective tools that can be used to detect and investigate cartel agreements, abuse of dominance and other types of competition infringements.

6. Unlike most other competition authorities, the Czech NCA does not need prior court approval to conduct an on-site inspection of the estates and all premises, rooms and means of transport used by undertakings in their economic activities (business premises).[2] Dawn raids are thus carried out only on the basis of a written authorisation issued by the Chairman of the Czech NCA.[3]

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[1] Cf. Art 21 of the Czech Competition Act.

[2] Cf. Art. 21f of the Czech Competition Act.

[3] For the sake of completeness, it may be noted that if the Czech NCA would like to conduct a dawn raid on premises other than business premises (e.g. home of an individual), the Czech NCA needs the court's consent. However, in its history, the Czech NCA has never conducted a dawn raid on such premises.

7. However, the above does not mean that the conduct of a dawn raid is entirely within the discretion of the Czech NCA or its Chairman, as their legality may be subject to ex post judicial review. The Czech NCA must have a reasonable suspicion that an anticompetitive conduct may have been committed. The lack of reasonable suspicion is the most common objection raised in practice by undertakings in front of the courts challenging the legality of a dawn raid. If the court reaches the same conclusion as the plaintiff, it will declare the dawn raid illegal, precluding the use of any seized documents within the administrative proceedings.

8. According to case law, the existence of reasonable suspicion for conducting dawn raid shall be assessed in relation to the facts established on the basis of the documents in the case file at the date of the dawn raid.[4] Courts[5] recognise that the Czech NCA cannot be required to have all the necessary information about the anticompetitive conduct before conducting the dawn raid itself, as in such case, it would be actually unnecessary to conduct a dawn raid.[6] Nevertheless, the recent case law has clarified that the combination of information that emerges from the documents in the file must be sufficiently specific (verifiable in further investigation by the Czech NCA) to give reasonable grounds to believe that it is a description of conduct that could very well have taken place, it could have made reasonable economic sense to the undertakings (if kept secret, it could have provided them with a substantial economic advantage) and the manner in which it was carried out is consistent with the general knowledge of the usual perpetration of anticompetitive conduct of this type in a given constellation of undertakings (e.g. market structure and market shares of individual players) in the relevant market.[7]

9. As to the source of information itself, the courts have repeatedly acknowledged anonymous complaints as a relevant source of information that may give rise to a reasonable suspicion of anticompetitive conduct.[8] In the case of complaints brought by competitors, they will generally not primarily pursue the public interest in a market environment undistorted by prohibited conduct, but more or less their own economic interests. However, this does not mean that the information in the complaint cannot be relevant and credible in the sense that it could provide sufficiently definite input about possible anticompetitive conduct. This applies even if the complaint was motivated by an attempt to harm competitors, no matter how problematic this may be from a moral or private law perspective.[9]

3. Proving the existence of anticompetitive conduct

10. The ideal scenario for the Czech NCA is to collect direct evidence of anticompetitive conduct. For example, in bid-rigging cases, this could include emails between competitors discussing a predetermined tender winner and the submission of cover

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[4] Regional Court in Brno, decision of 30 April 2019, nr. 29 A 7/2019 – 173, para 78.

[5] The Regional Court in Brno has jurisdiction in competition cases. Its decision can then be challenged before the Supreme Administrative Court.

[6] Regional Court in Brno, decision of 30 April 2019, nr. 29 A 7/2019 – 173, para 78.

[7] Supreme Administrative Court, decision of 26 January 2022, nr. 7 As 438/2019 - 56, para. 52.

[8] Cf. e.g. Regional Court in Brno, decision of 30 June 2020, nr. 29 A 183/2019 - 142; Supreme Administrative Court, decision of 5 February 2021, nr. 5 As 140/2019 – 93.

[9] Supreme Administrative Court, decision of 21 December 2021, nr. 2 As 295/2019 – 99, para. 67.

bids. However, it is common that the activities of undertakings involved in anticompetitive conduct are generally carried out in secret and the related documentation is kept to a minimum.[10] Thus, even if evidence is found by the Czech NCA it is usually fragmentary and scattered.

11. The Czech Competition Act does not explicitly stipulate the standard of proof that must be met in competition cases, leaving courts to define it through case law. The courts are aware of the above mentioned, i.e. usually, the Czech NCA will not have direct evidence at its disposal. They concluded that even if none of the evidence gathered was sufficient on its own to prove anticompetitive conduct, a combination of indirect evidence can collectively meet the required standard. According to the courts, the circumstantial (indirect) evidence may constitute, in its entirety, evidence of an infringement of the competition rules if there is no other plausible (logical) explanation for the conduct of the undertakings under review.[11] In the context of the difficulty of proving concerted practices, the courts often find it necessary to rely on inference (deduction).[12]

12. Courts have also established that no legal regulation stipulates how extensive - especially in terms of the number of pieces of evidence - the decision punishing an offender for committing an offence must (may) be based on. From their point of view, the content of the documents and their relevance to the matter under consideration is relevant, and the chain of (even circumstantial) evidence may stem from even a single piece of evidence.[13]

13. With reference to the above, it can be concluded that the standard of proof applied in the Czech Republic in competition cases is close to beyond a reasonable doubt. The Czech NCA is of the opinion that the courts try to reflect to some extent the specifics of the individual cases, so it cannot be said that the standard of proof is rigid.

14. The Czech NCA has repeatedly and successfully proved the existence of a bid rigging cartel on the basis of the similarity of bids.[14] In one of the cases,[15] there was a mathematical relationship between the competitors' bids (the prices of the individual items therein) submitted in a tender in the field of civil engineering. The amounts for 16 of 17 individual items in one of the bids were always reduced by a coefficient of 0,99 compared to the bid of the other party. The last item was reduced by a coefficient of 0,98. The parties to the proceedings attempted to explain these similarities on the basis, for example, that they had the same subcontractor, but the explanations provided were, according to the courts, successfully refuted by the Czech NCA. Thus, this similarity could not reasonably be explained other than as the result of the interaction between the bidders prior to the submission of their bids to the tender. In this context, the court also stated that (indirect) evidence of anticompetitive coordination may be considered to be such conduct of undertakings whose reason (cause) cannot be explained in any other way, rational in the given situation, than by the mutual influence of several undertakings which preceded their conduct, while in order to accept this evidence it is necessary to refute any rational doubts (i) whether the joint conduct of the undertakings was the result of direct or indirect contact

[10] Cf. Regional Court of Brno, decision of 23 November 2021, nr. 29 Af 14/2020-169, para. 38.

[11] Supreme Administrative Court, decision of 21 December 2017, nr. 5 As 256/2016-231, para. 149.

[12] Regional Court of Brno, decision of 23 November 2021, nr. 29 Af 14/2020-169, para. 37.

[13] Regional Court of Brno, decision of 17 March 2022, nr. 62 Af 11/2020-361, para. 16.

[14] Cf. e.g. Supreme Administrative Court, decision of 16 December 2022, nr. 4 As 17/2022 – 143; Regional Court of Brno, decision of 17 March 2022, nr. 62 Af 11/2020-361.

[15] Regional Court of Brno, decision of 17 March 2022, nr. 62 Af 11/2020-361.

between them, (ii) that the conduct in question was not random, and (iii) that the conduct in question was not merely the logical consequence of economic conditions in the market.[16] In the context of bid rigging, the Czech NCA also repeatedly used metadata to prove that undertakings' bids were prepared by the same person.[17]

15. However, the Czech NCA is not always successful with circumstantial evidence before the courts. This was the case, for example, when the Czech NCA fined two undertakings for bid rigging in the tender for garden equipment. The undertakings submitted bids that were almost identical and were submitted on the same day (20 minutes apart). The similarities were both visual (identical photographs, one in color and the other in black and white) and substantive. The bids were identical in text structure, offered the same types of machines, the photographs of the machines were identical, the declaration of conformity was always issued by the same body, and they were of the same date. Furthermore, both bids contained machines from the same subcontractor with the same price. They were also identical in the same wording and structure and in identical typing. The envelopes in which the bids were submitted were also identical; both envelopes were mislabeled and contained an identical error in the name of the contracting authority's director. Despite all these facts, the courts concluded, on the basis of the testimony of a witness - executive director of the subcontractor - who was supposed to prepare the bids for both undertakings, that other plausible explanation for the similarity of the bids could yet be ruled out and annulled the decision of the Czech NCA.[18]

16. It should be added that in cases where there is insufficient evidence or there is another plausible explanation, it is usually the Czech NCA that decides that there was no anticompetitive conduct and consequently decides to terminate the investigation or administrative proceeding in case it has been formally initiated.

17. It is worth noting that the standard of proof applied in Czech competition cases has recently received minor changes in some areas. In 2022, decision of the Czech NCA was annulled by the courts because the Czech NCA did not describe all the sub-attacks of the continuing offence in a resale price maintenance (RPM) case. The courts ruled, unlike in the past, that the Czech NCA must identify, for each partial attack (each distributor), that there was a concert of wills on both sides and that it was therefore not merely a unilateral failure by the manufacturer to set retail prices. Thus, the Czech NCA cannot limit itself to a finding that the manufacturer entered into and carried out prohibited direct RPM agreements with its distributors.[19] Also in the light of recent CJEU case law,[20] the Czech NCA will likely need to place greater emphasis on the economic and legal context than it has in the past when it aims to classify conduct as a restriction of competition by object.

[16] Ibid., para. 20.

[17] Cf. e.g. Office for the Protection of Competition, decision of 20 October 2023, nr. ÚOHS-41179/2023/851.

[18] Supreme Administrative Court, decision of 10 May 2022, nr. 10 As 322/2019 – 67.

[19] Regional Court of Brno, decision of 24 August 2022, nr. 31 Af 5/2021 – 844; Supreme Administrative Court, decision of 6 November 2023, nr. 4 As 236/2022-161.

[20] Case C-211/22, *Super Bock Bebidas*, EU:C:2023:529.

4. Burden of proof

18. As regards the existence of anticompetitive conduct, the burden of proof lies with the Czech NCA. It must prove that an agreement was concluded with the object or effect of distorting competition; that a dominant undertaking has abused its position to the detriment of other competitors or consumers; that the proposed concentration is likely to result in a significant distortion of competition in the relevant market; or that a public authority has distorted competition in the exercise of public authority without justifiable reasons.[21] To bear the burden of proof, the Czech NCA seeks to obtain evidence from public sources, through requests for information and, in particular, by conducting dawn raids, in addition to the evidence received via leniency applications or complaints.

19. However, the Czech Competition Act mentions the reversal of the burden of proof on the undertakings in certain situations.

20. In the context of agreements between undertakings, the Czech Competition Act (in line with article 101(3) of TFEU) provides that agreements are not prohibited if they a) contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit; b) do not impose on the undertakings restrictions which are not indispensable to the attainment of the objectives pursuant to letter a); c) do not afford the undertakings the possibility of eliminating competition in respect to a substantial part of the market of goods, the supply or purchase which constitutes the objective of an agreement.[22] Prohibition pursuant to the Czech Competition Act also does not apply to agreements covered by block exemptions.[23] If the parties to the proceedings in the matter of prohibited agreements claim that they are a subject to one of these exemptions, they are obliged to prove the fulfilment of conditions for implementation of such exemption. In case the parties to the proceedings do not specify such evidence, the Czech NCA may consider such conditions as unfulfilled.[24]

21. Also, in the case of concentrations between undertakings, upon a request of the Czech NCA, party to the proceedings is obliged to propose evidence to prove compliance with commitments, measures or remedial measures imposed by the Czech NCA. If the parties do not identify such evidence, the Czech NCA may consider that such commitments and measures have not been fulfilled.[25]

22. Despite the challenges the Czech NCA may face in establishing evidence of anticompetitive conduct, it maintains that the current allocation of the burden of proof is appropriate. This perspective underscores the Czech NCA's commitment to ensuring that enforcement mechanisms align with established legal principles, even in the face of evidentiary hurdles.

[21] On the latter, according to Art. 19(1) of the Czech Competition Act a public authority shall not distort competition in the exercise of its powers without justifiable reasons, in particular by a) favouring a certain undertaking or a group of undertakings; b) eliminating a certain undertaking or a group of undertakings from competition; or c) eliminating competition from the relevant market.

[22] Art. 3(4) of the Czech Competition Act.

[23] Art. 4 of the Czech Competition Act.

[24] Art 21d(1) of the Czech Competition Act.

[25] Art. 21d(2) of the Czech Competition Act.

5. Presumptions in Czech competition law

23. In alignment with practices in other legal fields, Czech competition law allows for the application of legal presumptions. These presumptions can benefit either the Czech NCA or the undertakings involved, and may stem from statutory provisions within competition law or from established case law. This framework plays a role in shaping the evidentiary standards and legal strategies employed in competition cases.

24. The Czech Competition Act e.g. provides for a rebuttable presumption that unless the contrary is proven by the indicators set out in the Czech Competition Act, an undertaking or undertakings in joint dominance shall be deemed not to be in a dominant position if its/their share in the relevant market achieved during the examined period does not exceed 40 %.[26]

25. According to the Czech Competition Act, it is also presumed that if the combined market share of the merging competitors in the relevant market does not exceed 25 %, their merger does not result in a significant distortion of competition, unless the assessment of the merger proves otherwise.[27]

26. In addition, presumptions that are common in EU competition law and stem from CJEU decisions are also applied in the Czech Republic. These include, for example, the presumption of parental responsibility of a wholly owned subsidiary[28] and the presumption that an undertaking has participated in the agreement or concerted practice if it attended an anticompetitive meeting.[29]

6. Final remarks

27. The standard of proof required by courts, along with the allocation of the burden of proof, plays a significant role in the effective enforcement of competition law. While discrepancies may arise between the Czech NCA and the courts regarding the evidentiary requirements for demonstrating specific anticompetitive conduct, it is generally acknowledged that the prevailing standard of proof aligns with the expectations of the Czech NCA. This alignment fosters a more coherent approach to competition law enforcement, ensuring that cases are adjudicated with an appropriate degree of rigor. Current case law requires the Czech NCA to establish a solid and convincing body of evidence before determining that a violation of competition law has occurred. The burden of proof lies with the Czech NCA to demonstrate the existence of anticompetitive conduct, with evidence that can withstand scrutiny both from the undertakings involved and from judicial review.

28. The case law is continuously evolving, and it is essential for the Czech NCA to adapt its decision-making accordingly. This requires staying up to date with new judicial interpretations and developments, ensuring that decisions align with current legal standards and reflect the latest understanding of competition law. Flexibility and responsiveness to

[26] Art. 10(3) of the Czech Competition Act.

[27] Art. 17(3) of the Czech Competition Act.

[28] Case C-97/08 P, *Akzo Nobel*, ECLI:EU:C:2009:536, para. 60.

[29] Cf. Cani Fernández, Presumptions and Burden of Proof in EU Competition Law: The Intel Judgment, Journal of European Competition Law & Practice, Volume 10, Issue 7, September 2019, Pages 448–456, https://doi.org/10.1093/jeclap/lpz052

these changes are key to maintaining effective and credible competition enforcement in the Czech Republic.

29. In general, undertakings are exhibiting heightened caution in engaging in anticompetitive behaviour, which complicates the process of gathering evidence. This raises critical questions about the future of competition law enforcement. Competition authorities may need to adapt their strategies, employing innovative investigative techniques and collaborative approaches with other regulatory bodies to navigate these challenges. Such proactive measures could enhance their capacity to uphold competition law in an increasingly cautious market environment. As far as the Czech NCA is concerned, it can be mentioned that since last year the Czech NCA may, in some cases, use wiretapping records obtained by the police during criminal investigations.[30] Currently, the Czech NCA is proposing to amend the Czech Competition Act to allow it to impose penalties on individuals who have participated in anticompetitive conduct (it should, among other things, lead to a stronger motivation to submit leniency applications and report cartels). The Czech NCA also proposes legislation that would give it access to data collected by about a dozen state agencies and institutions. All these changes aim to make the Czech NCA more effective in detecting and proving anticompetitive conduct.

[30] Cf. Art. 21ga of the Czech Competition Act.