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

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1. In the field of competition law, the standard of proof and the burden of proof play a key role in assessing anti-competitive behaviour and ensuring the fair and efficient functioning of the market. Within the Slovak Republic, the topic of standard of proof is relatively current and concerns the practice of the Antimonopoly Office of the Slovak Republic (hereinafter referred to as the "**Office**") as well as the court review of its decisions, whereas the fulfilment of the standard of proof is being repeatedly objected by the parties in the proceedings before the Office as well as before the courts.

1. General overview of standard of proof and burden of proof

2. During the evidentiary process, there is always present a certain degree of uncertainty. This is because, it is not possible to fully prove the existence or course of a certain behaviour, when such behaviour has already taken place. In this regard, the Constitutional Court of the Slovak Republic confirmed that **certainty** which does not allow any theoretical doubts about a different course of events **cannot be required as a standard of proof**.¹

3. The Office's cases are conducted as administrative proceedings. In every proceeding, however, an important question is to what extent the Office is required to apply evidentiary standards from criminal proceedings.

4. Within the area of the Slovak criminal law, the standard of proof is established as a **relative certainty**. This means that it is not required to establish the objective truth, as a complete knowledge of what actually happened, but it is sufficient to find out the facts about which there are no reasonable doubts, to the extent necessary for a fair decision. The term "*reasonable doubt*" is not legally defined in the Slovak legal system. However the term "*reasonable doubt*" can be understood as a doubt which, after a careful and impartial evaluation of all the presented evidence, does not allow the court to reach an unambiguous conclusion about the guilt of the accused person.

5. Slovak administrative law, which also includes the competition law, does not have an explicit legal regulation of the standard of proof. However, certain form of regulation of standard of proof arises from the basic principles of administrative law, namely (i) the principle of the material truth in connection with (ii) the principle of legality and (iii) the principle of free evaluation of evidence, whereas the administrative bodies are obliged to ascertain the factual situation of the case accurately and completely.

6. Since the Office is the administrative body, and there is no other legal regulation that would exclude the application of these principles towards the Office, the Office is obligated to apply the above-mentioned principles within its activities.

7. According to the principle of material truth, the decisions of the administrative bodies must be based on the reliably established factual situation of the case. In other words:

¹ The Finding of the Constitutional Court of the Slovak Republic File No.: II. ÚS 716/2016.

1. the administrative body is obliged to carry out evidence in such a way that all decisive circumstances important for the assessment of the case are properly clarified (this corresponds to the requirement of the completeness of findings), and
 2. the administrative body must ensure that the findings correspond as closely as possible to the reality (which corresponds to the requirement of the accuracy of the findings).
8. The principle of material truth is not absolute, i.e. administrative bodies do not have the obligation to find out the complete and absolute truth, but they are supposed to determine the factual situation of the case "only" reliably, that means, in such a way that it is possible to make a proper, timely and fair decision.²
9. The principle of legality requires for the administrative bodies to act in accordance with the provisions of legal regulations. This means that during the evidentiary process, the administrative bodies are obligated to comply with all of the legal provisions including the principle of the material truth.
10. If the administrative body did not follow the principle of material truth during its decision-making, it is a serious procedural error, which justifies the annulment of the issued decision due to its illegality.
11. Within the terms of the principle of free evaluation of evidence, the evaluation of the evidence is internal process of the administrative body, whereas the administrative body evaluates each evidence individually, but also within their mutual connections. No legal regulation determines a specific hierarchy of evidence and it is up to the administrative body to determine the value of each evidence.
12. The obligation of the administrative body (including the Office) to prove the guilt of the investigated subject derives from the research principle. The Office is obligated to procure the evidence to establish the factual situation of the case and the Office bears the responsibility for collecting sufficient evidence for its decision. **Under the research principle, the Office is therefore obligated to clarify the circumstances testifying against the parties of the proceeding as well as in their favour.**
13. Slovak legal regulation thereby respects the Art. 7 of the Recommendations of the Committee of Ministers of the Council of Europe no. (91) 1 on administrative sanctions, which establishes the rule that the burden of proof in procedures in which administrative liability is imposed, should be placed on the administrative body.

2. The standard of proof in Slovak competition law

14. Since the competition law in the Slovak Republic does not have a separate nor explicit regulation of the standard of proof, the Office applies the principles from general administrative law, i.e. the principle of material truth and others. At the same time the Office takes into account and applies the established case law of the courts of the European Union, (i) which requires convincing evidence that the alleged violation has been committed, while the evidence must be sufficiently precise and coherent and justifying the opinion that a violation has occurred and (ii) which applies the standard of proof "balance of probabilities".

² The Judgement of the Supreme Court of the Slovak Republic, File No.: 10Sžo/84/2014, dated 30 November 2015.

15. In recent years, the Office encountered the problems regarding the application of aforementioned standard of proof, caused mainly by the inconsistent and sometimes contradictory decisions of the courts. These court decisions introduced several problematic premises:

1. some decisions created a space for interpretation that the criminal proceedings principles, including the standard of proof “beyond reasonable doubt” (which is derived primarily from the Convention on the Protection of Human Rights and Fundamental Freedoms, as well as from the Recommendation of the Committee of Ministers of the Council of Europe no. R (91) to member states on administrative sanctions) should apply also in the administrative proceedings before the Office,
2. the requirement that if the national regulations of the standard of proof requires a higher standard than the European regulations, the national regulations must be applied.

16. The criminal law standard of proof is perceived as a higher standard compared to the standard of proof used in Slovak administrative law.

17. Participants in proceedings often refer to criminal law and the need to comply with the criminal law standard of proof through applying an analogy between administrative proceeding resulting in penalty and criminal proceedings. According to the Office such analogy is neither necessary nor desirable. Aforementioned intertwines with the basic question of whether the sanction imposed by the Office is of a criminal nature, which the participants in the proceedings generally claim is the case. In this regard the Office points to the Council Regulation No. 1/2003³, according to which even the sanctions imposed by the Commission do not have a criminal nature.

18. In relation to the requirement for the strict application of criminal law, the Office also points out, to the provisions of Slovak Administrative Court Rules⁴, according to which the courts that review the decisions of the Office should apply the basic principles of the criminal law, but not automatically and not all of them. It is always necessary to individually examine which of the given principles should be applied. However, the Administrative Court Rules does not specify in their provisions which of the basic criminal law principles must be taken into account within the administrative procedure. Likewise, the Constitutional Court of the Slovak Republic confirmed that the analogy with criminal law is not automatically applied to the competition law offenses.

19. The Office also points out that the criminal law standard of proof, which also has a higher social danger than an offence in administrative proceedings, could threaten the proper performance of the Office's role.

20. As mentioned above, some court decisions consider standard of proof arising from national regulation, i.e. principle of the material truth to be higher than the standard of proof provided by European law and therefore it is necessary to apply the standard of proof from the national legislation. This topic is sensitive precisely for the field of competition law, which is significantly specific and different from other areas of administrative law in the Slovak Republic, and therefore proving the violation of competition rules is quite difficult and requires a specific approach.

³ 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, 32003R0001

⁴ Slovak Act No. 162/2015 Coll. Administrative Court Rules, as amended.

21. Since the Office evidentiary process is primarily based on European jurisprudence and not on the rules on evidence from criminal proceedings, the standard of proof is in the Office's practice set out more moderately because of the nature of anti-competitive conduct and the difficulty of proving it (secret cartels etc.).

22. Such practice was upheld by The Regional Court in Bratislava in its decision⁵, when it stated that the Office is not required to prove the plaintiff's intention to participate in anti-competitive conduct by applying the beyond reasonable doubt standard of proof. In the given case, the court also referred to European case law (judgment of the Court of Justice of the EU in the case *Aalborg Portland and others v Commission*⁶).

23. However, later judgment of the court in different case, rejected the Office's opinion that the required standard of proof is “balance of probabilities” and not “beyond reasonable doubt”. The court was inclined to the fact that the standard of proof arising from European law is a lower standard than the standard resulting from the national regulation, therefore it is necessary to apply the national legal regulation in the given case, which ensures a higher standard of proof.⁷

24. In another case the Supreme Court of Slovak Republic stated that the Office is obligated to establish the basis for its decision as fully as possible, so that there are no reasonable doubts about the committed act, while the doubts are interpreted in favour of the accused. In this case, it is possible to notice again the inclination of the court towards the standard applied in the field of criminal law.⁸

25. However in the given case, the court further stated that to prove the administrative offense, it does not matter whether it is proven by one or a set of evidence, or proved through the form of a statement or document, as long as such evidence undoubtedly proves the guilt. The court also stated that the consideration and evaluation of legally obtained and legitimately used indirect evidence cannot be considered as a display of the arbitrariness of the Office. In this case, the court recognized as sufficient evidence the bids submitted in public procurement analysed by the Office, which showed obvious signs of coordination between bidders. However, the mentioned indirect evidence was also strengthened by the declaration of the leniency applicant.

26. In this context, we would like to compare the standard of proof for the purpose of conducting an inspection. In these cases, the Office applies, in a certain sense, a lower standard of proof in comparison with the deciding on the matter. At the given stage of the investigation is the Office still only collecting evidence proving reasonable suspicion. In recent years, the Office carried out several inspections, the justification of which was reviewed by the courts. In that cases courts upheld the standard of proof applied by the Office with regard to the inspections.

⁵ The Judgement of the Regional Court in Bratislava File No.: 2S/92/2020, dated 30 September 2020.

⁶ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P.

⁷ The Judgement of the Regional Court in Bratislava File No.: 5S/82/2018 – 1549, dated 14 December 2022.

⁸ The Judgement of the Supreme Court of the Slovak Republic File No.: 2Sžhk/2/2017, dated 25 November 2020.

3. The evidentiary process, means of evidence, the standard of proof

27. In administrative proceedings, the Office initiates the proceedings, ascertains the factual situation and, as case may be, holds the party of the proceeding liable.⁹ As for the evidentiary process, the Office is authorized to evaluate the evidence freely.

28. As for the means of evidence, all means that can ascertain and clarify the factual situation can be used as evidence in the proceedings before the Office. To ascertain the facts, the Office is authorized to use the following:

- the means of evidence, which bear the evidence verifying the defence arguments of the undertaking
- generally known facts (notoriety, for example, in the form of general geopolitical knowledge) or facts known to the Office from its official practice (formalities, for example, in the form of specific knowledge from other proceedings at national or union level), and also
- expert reports or evaluating opinions of authorized bodies.

29. The Office always applies the same standard of proof, and do not adapt its practices to different individual cases.

30. In accordance with the Commission's approach, the Office applies more economic, or effect-based approach. Compared to the past, the Office uses more economic evidence, in the form of various economic analyses, which are generally accepted by the courts, provided that the given set of evidence does not allow any other logical or acceptable explanation of the respective behaviour than anti-competitive behaviour.

31. The Office uses indirect and economic evidence in all assessed areas (agreements, abuse of a dominant position as well as concentrations).

32. Although most of the Office's cases represent a combination of direct and indirect evidence, the Office also dealt with several bid rigging cases, which were mainly proven by indirect evidence (fixing prices, identical irregularities, imperfections in price offers, or existence of incorrect calculations...) and information provided within the leniency programme.

33. The first and the most important case that was based mainly on indirect evidence, whereas this approach was upheld during the court review¹⁰ was an older case of a cartel consisting of six highway construction companies that coordinated their behaviour in a public tender. The anti-competitive behaviour was proven mainly on the basis of the analysis, according to which the ratios between the unit prices presented in the individual bids of the bidders showed extremely constant numerical data. Such a match was non-standard and could not be objectively justified.

34. In this case, the Supreme Court of the Slovak Republic:

⁹ "Boundaries between criminal offenses for which the court imposes punishment and offenses for which administrative authorities impose sanctions are determined by the expression of the will of the legislator" (For details, see: Judgment of the Supreme Court of the Slovak Republic, File No.: 8 Sžo 147/2008, dated 12 March 2009).

¹⁰ The Judgement of the Supreme Court of the Slovak Republic File No.: 5Sžh/2/2015, dated 2 November 2016.

1. accepted such indirect evidence and referring to the case law of the Court of Justice of the European Union, emphasized that the indirect evidence is still relevant evidence in the proceedings,
2. stated that the plaintiffs as part of their right to defence were burdened to plausibly explain this price match differently than it was explained by the Office,
3. stated that this indirect evidence was joined by a whole range of other indirect evidence, namely the opinion of other company (Národná diaľničná spoločnosť, a.s.), expert opinion or a comparison with other tenders in the respective sector,
4. rejected the plaintiff's claim that one piece of indirect evidence is not sufficient to prove the fact and such evidence has probative force only in connection with other evidence – the court did not exclude that such a situation could arise, it is up to the Office to sufficiently prove anti-competitive behaviour,
5. stated that it is up to the Office to determine the extent, manner and detecting the evidence to support its claims,
6. confirmed that factual behaviour of competitors on the market can also be accepted as an indirect evidence if it indicates the coordination and cannot be explained in other way than as a direct consequence of previous communication on the given topic.

4. Conclusion

35. The recent case law of some courts in the Slovak Republic indicates certain increased requirements for proving the anti-competitive behaviour. Different views of some courts on the assessment of the standard of proof can be perceived as problematic and in the future, specific legal regulation in competition law could help.

36. It is possible to conclude that courts reviewing decisions of the Office applied the jurisprudence of the CJ EU concerning the horizontal agreements, there is acceptance of „indirect evidence“ – consistency, other possibilities for explanation of the behaviour were excluded, mainly in bid-rigging cases. In that sense, important was Regional Court in Bratislava judgment 2S/92/2020, 30.09.2020 upholding the Office's decision where the court explicitly refuses the standard of proof „beyond reasonable doubt“ and refers to the Aalborg Portland and BPB plc judgments¹¹. Courts also accepted tests at regarding Art. 102 TFEU cases, e.g. margin squeeze, with reference to the EU law.

37. There is also the judgement in „RAJO“ case (Art. 101 TFEU – RPM, vertical agreement) in December 2022 (appeal/cassation complaint of the Office is pending before the Supreme Administrative Court of Slovak republic), where the Regional Court in Bratislava agreed with the applicants, who claimed that the evidence should be assessed and the infringement proved „beyond reasonable doubt“; the EU standard of does not apply, as it is lower than the standard stemming from the national law which is the „material truth“. The court did not react within the assessment to the evidence, i.e. it is not clear whether the evidence would be „enough“, should the court apply the EU standard of proof or why the evidence provided does not satisfy the material truth.

38. In several cases from the last few years, the Office also challenged the problematic court decisions by judicial remedies in the matters that concerned the question of standard

¹¹ The Case Aalborg Portland and others v Commission C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P and Case BPB plc v Commission T – 53/03.

of proof with aim to seek a stabilization of a case law. Within these remedies the Office presented its concerns that an unreasonably high expectations for proving anti-competitive behaviour pose a possible threat for the Office and its ability to ensure a functioning competition in the markets.

39. The stabilization of court practice is also important for the Office from the view of the parallel application of national and European competition law, when it is necessary to ensure the effective application of competition rules in accordance with the principle of effectiveness and the principle of equivalence.

40. In conclusion it is necessary to state, that the balance between effective enforcement, legal certainty and effective judicial review has not been yet achieved in the Slovak republic. Training of judges is still essential in competition area. Overloading of the courts delays the effect of competition decisions, which are expected to intervene promptly in the markets, especially in fast developing markets. The Office needs more consistent case law in order to be able to adapt its practice and the decisions of both the Office and the courts could meet the standard of legitimate expectations. On some of the most problematic issues, it will be appropriate, as already mentioned, to consider clarifying the legislation. Increased interactions between the Office and the courts on the basis of academic exchange of information through joint training, conferences, etc., can contribute to this goal as well.