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The Standard and the Burden of Proof in Competition Law Cases – Summaries of contributions

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Table of contents

Argentina 3

Austria 4

BIAC..... 5

Chile..... 6

Costa Rica 7

Czechia 8

EU 9

France..... 10

Greece..... 11

Hungary 12

Indonesia 13

Ireland 14

Israel 16

Italy..... 17

Japan 18

Kazakhstan 19

Latvia..... 20

Lithuania 21

Mexico 22

Poland..... 23

Romania 24

Slovak Republic 25

Sweden..... 26

Chinese Taipei 27

Argentina

In antitrust law, the standard of proof refers to the level of evidence required for a competition enforcement authority to consider the existence of an anticompetitive conduct proven. Sometimes, this standard may be challenged by the companies involved in anticompetitive acts, and analysed by judicial tribunals that assess such appeals. The courts' criteria may coincide with the evidentiary standard considered by the competition authority, or it may be a different one.

In Act No. 27.442 on the Defence of Competition (LDC, for its acronym in Spanish) there is no express mention of the standard of proof required to prove the different types of anticompetitive practices, although the legislation does differentiate between the standard of proof for the so-called “hard-core cartels” and that for other anticompetitive conducts, most notably abuses of dominance. With regard to other regulations, the National Commission for the Defence of Competition (CNDC, for its acronym in Spanish) has published the Guide for the Analysis of Cases of Abuse of Dominant Position of an Exclusionary Type, which, by defining the criteria for analysing this type of conduct, contributes to outlining the standard of proof, at least for these cases.

CNDC's jurisprudence on anticompetitive conducts consists of sanctions for abuse of dominance, as well as collusive practices, comprising market-sharing agreements and price agreements, including cases involving the exchange of commercially sensitive information between competitors. This jurisprudence, shaped by the CNDC's sanctioning decisions, provides an outline of the standard of proof in cases of anticompetitive practices, which, in short, consists of the level of proof required by the competition agency to prove the existence of the conduct, its participants, and the circumstances of time and place in which it occurred.

The objective of this contribution is to characterise the concept of the standard of proof and its application in the LDC to the different types of anticompetitive practices, and then to review a set of cases, assessing the standard used in each one and the results of such investigations. It will also analyse particular cases and the considerations of the courts of second instance that revised these decisions of the CNDC.

The first section of this note describes the concept of standard of proof and burden of proof, and the framework in which they are developed in the context of the LDC, analysing their applicability to different types of anticompetitive practices. The second section focuses on relevant cases of sanctions for abuses of dominance and cartels by the CNDC, with emphasis on the evidence used in each one, in order to outline general aspects of the standard of proof in the implementation of competition policy in Argentina. Finally, the third section presents the conclusions.

Austria

Institutional and Procedural Framework

In Austria, antitrust law enforcement involves a division of roles between administrative and judicial competition authorities. The Austrian Federal Competition Authority (AFCA) is responsible for investigations, utilizing powers such as inspections, information requests, and witness examinations. If the AFCA determines that a provable violation has occurred, it submits an application to the Cartel Court. The Cartel Court, which conducts non-contentious proceedings, reviews evidence and can impose fines or issue declaratory judgments. Appeals can be made to the Supreme Cartel Court, primarily limited to legal questions.

General Principles of Evidence

Austrian law follows the principle of the unlimited nature of evidence, where any type of evidence is permissible as long as it is relevant and truthful. The free evaluation of evidence principle allows judges to assess the sufficiency of evidence based on their conviction, applying a standard of a reasonable, prudent person. Typically, a high degree of probability is required for proof, rather than certainty. However, exceptions allow for lower standards, such as prima facie evidence, when legally stipulated.

Burden of Proof and Presumptions

The burden of proof typically lies with the party asserting a fact. If the party cannot prove the fact, the outcome is unfavorable for them. The Cartel Court operates under the inquisitorial principle, mandating that it seeks necessary evidence ex officio but maintains the distribution of proof among parties. Market dominance rules in the Cartel Act create presumptions that shift the burden of proof to dominant companies, who must then provide evidence to rebut these presumptions.

Special Cases

- **Search Orders:** The Cartel Court may authorize searches upon AFCA's request if there is reasonable suspicion, which does not require a strong or urgent level of suspicion.
- **Preliminary Injunctions:** The Cartel Court can issue these when evidence credibly supports that an infringement needs immediate action. This has a lower standard of proof compared to regular proceedings.

Judicial Review

The Supreme Cartel Court primarily reviews legal assessments and does not act as a fact-finding body. It can only address contradictions between findings and evidence or manifest errors impacting the decision. Challenges to the Cartel Court's evaluation of evidence are restricted to cases where findings are intolerable or unrealistic and impact the outcome.

This procedural and evidentiary framework ensures objectivity and thoroughness in competition law enforcement while balancing investigative rigor with fair adjudication.

BIAC

Business at OECD (BIAC) is grateful for the opportunity to comment on the standard and burden of proof in competition law cases.

The standard and burden of proof in competition law cases are complex and vary significantly across jurisdictions. The fundamental principle remains that the party alleging a claim must prove the facts on which that claim is based. This principle often means that it is incumbent on the competition authority (or private claimant when there is private enforcement) to prove the infringement and present related evidence. The challenge lies in balancing the goals of competition law with the need to create clear and administrable rules. This balance is challenging to achieve given the inherent tension between narrow rules and more flexible standards.

Allied to these considerations are whether the offense is civil or criminal in nature, leading to different burdens and standards. In civil cases, the standard is typically a “preponderance of evidence” meaning that the claim is more likely to be true than not. In criminal cases, the standard is ordinarily “beyond a reasonable doubt,” a much higher threshold. Also key to bear in mind is that certain jurisdictions have fundamental right protections. For example, Article 6(2) of the European Convention on Human Rights (ECHR) explains that companies also have fundamental rights and protections including the presumption of innocence. These principles are crucial in competition law cases, where the consequence of a finding of infringement can be severe.

Bright-line rules, such as per se prohibitions in the U.S. and by object restrictions in the EU, have also evolved over time to offer predictability and ease of administration, but they come at the expense of possible errors. Conversely, detailed effects-based analyses, known as the rule of reason in the U.S., minimize errors but can be resource-intensive. The qualification of a business practice as either subject to per se rules or the rule of reason has profound procedural consequences, particularly on the allocation and shifting of the burden of proof. Per se illegality implies an irrebuttable presumption of harm for certain categories of conduct, while other forms of conduct with less certain competitive effects can create a rebuttable presumption of likely harm. And these standards remain subject to the jurisdictional requirements for both burdens and standards of proof. This evolution is discussed in more detail in BIAC’s companion submission on the Use of Structural Presumptions in Antitrust Cases.

Chile

This joint contribution submitted by Chile's Tribunal de Defensa de la Libre Competencia (TDLC) and Fiscalía Nacional Económica (FNE) examines standard and burden of proof in competition law in Chile.

Courts have developed an intermediate standard of "clear and convincing evidence," that is in between the "balance of probabilities" applicable in civil cases and the "beyond any reasonable doubt" of criminal cases. This standard aims to balance the risk of errors, considering the significant consequences of antitrust sanctions. Merger control provides an exception, since the standard applied by the FNE is in line with the "balance of probabilities", reflecting the forward-looking nature of such decisions.

The basic rule on burden of proof is that the accusing party must prove all the elements of the accusation, which has become difficult in the age of digital and encrypted communications. Such rule can be altered by judicial presumptions used by the TDLC to address gaps in evidence.

Costa Rica

The document analyzes the standards and burden of proof in competition cases in Costa Rica, focusing on anticompetitive practices such as collusion, abuse of dominance, and unnotified mergers. It highlights the roles of COPROCOM and SUTEL, which rely on direct and indirect evidence, economic analyses, and forensic tools to investigate and sanction violations.

Key Points:

- Absolute Monopolistic Practices (AMPs):** These involve secret agreements (cartels) for price fixing, limiting supply, or dividing markets. Authorities use methods like dawn raids, expert testimony, and market behavior analyses to gather evidence. AMPs are presumed inherently harmful, and evidence focuses on proving explicit or tacit agreements.
- Relative Monopolistic Practices (RMPs):** These include abuse of market power, which requires economic evidence to define the relevant market, identify entry barriers, and establish the presence of substantial market power. The evidence must demonstrate the anticompetitive nature of the practice, focusing on displacing competitors or creating exclusive advantages.
- Merger Control:** The burden of proof lies on parties to demonstrate efficiencies or procompetitive effects. Authorities evaluate whether transactions could harm competition or consumer welfare. Specific frameworks guide this analysis, including the use of circumstantial evidence when direct evidence is unavailable.
- Highlighted Cases:
 - Rice Sector Collusion:** Agreements among competitors to delay purchases from producers until price decrees were published. Sanctions amounted to over \$8 million.
 - Telecom Dominance (ESPH):** Abuse of dominance through exclusivity agreements in a condominium, restricting competitors' access and limiting consumer choice.
 - Unnotified Merger:** An inferred merger between Transdatelecom S.A. and Cable Arenal del Lago S.A., proven through indirect evidence like shared infrastructure and client portfolios.
- Technological Tools:** Innovative systems like SMAC enhance market monitoring, integrating regulatory, procurement, and market behavior data to support investigations. Tools for digital forensic analysis ensure the integrity of evidence collection.

The document underscores the need for robust legal frameworks, institutional collaboration, and technological innovation to safeguard competition and consumer interests effectively.

Czechia

The Czech Republic's contribution discusses evidentiary standards followed by the Czech NCA in competition law cases. Public perception suggests that the Czech NCA is often viewed as insufficiently proactive in tackling anticompetitive behavior. In response to some recent criticisms for insufficient cartel enforcement, the Czech NCA points out high evidentiary standards required under Czech law to establish anticompetitive conduct.

To conduct a dawn raid of business premises, the Czech NCA does not need prior court approval, but is subject to ex post judicial review. To avoid it being declared illegal by the courts, the Czech NCA needs reasonable suspicion that an anticompetitive conduct may have been committed, typically inferred from various sources, including anonymous complaints.

When establishing the existence of anticompetitive behavior, direct evidence is preferred but often scarce. In these cases, the Czech NCA may rely on circumstantial evidence. It follows from the Czech case law that anticompetitive conduct may be proved on the basis of circumstantial evidence if there is no other plausible explanation for the conduct of the undertakings concerned. However, the standard of proof required by the courts has evolved over time and the Czech NCA is forced to respond to the changes. For example, the Czech NCA must now describe (prove) all the partial acts constituting the continuing offence in resale price maintenance cases.

The Czech NCA bears the primary burden of proof in competition cases. Yet, under specific conditions, such as claiming exemptions under the Czech equivalent of Article 101 (3) of TFEU, the burden may shift to undertakings.

The Czech competition law also applies rebuttable legal presumptions in favor of the Czech NCA or the undertakings concerned. For example, undertakings with a market share of less than 40 % are presumed not to have a dominant position.

In conclusion, the Czech contribution highlights the rigorous standards in proving anticompetitive conduct, the careful balance in burden allocation, and evolving practices to address the complexities of competition law enforcement in the Czech Republic.

EU

The standard and burden of proof, respectively, define the level of proof required to reach a particular finding, and the role of each party in the establishment of such finding. The burden of proof can be distinguished in the legal burden of proof, which refers to proving a certain substantive element and the evidentiary burden of proof, which determines which party must produce the required evidence.

Given their importance in ensuring efficiency, legal certainty and due process of competition enforcement procedures, a clear and workable allocation of the burden of proof and well-defined standard of proof are key to effective competition enforcement.

The emergence in recent years of complex competitive dynamics and market structures, as well as the increasing reliance on economic analyses, led competition cases to grow more and more sophisticated, thereby challenging the work of competition enforcers and raising questions about the applicable standard and burden of proof.

As regards mergers, the burden and standard of proof have been particularly influenced by the Union courts. The introduction in 2004 of a new legal test for the assessment of mergers (“Significant Impediment of Effective Competition”), sparked a legal debate on its implementation in practice and revived the discussion on the applicable burden and standard of proof in merger cases. The neutrality of the EU Merger Regulation coupled with the inherent uncertainty and complexity of ex-ante merger analyses also played an important role in the discussions. In a recent landmark judgment, the Court of Justice enunciated the boundaries and legal implications of each concept. While the Commission bears the legal burden of proof, the evidentiary burden of proof is shared between the Commission and the merging parties, the latter also bearing the burden of providing the information that can reasonably be expected from them, necessary for the Commission to carry out its competitive assessment. There are nevertheless some exceptions: where a merger generates some efficiencies for example, it is on the merging parties to demonstrate that efficiencies benefit consumers, are merger-specific and verifiable. In relation to the standard of proof, the relevant standard is that of a balance of probabilities (“more likely than not”), which must be established on the basis of “convincing” sufficiently clear, rigorous, and coherent evidence.

As regards antitrust, the legal burden of proof is governed by Regulation 1/2003. The evidentiary burden of proof and the standard of proof, on the other hand, are specified in jurisprudence. The burden for showing an infringement under Article 101(1) or Article 102 TFEU lies with the party or the authority alleging the infringement. This burden is reversed in relation to the defences that an undertaking may present to tackle any prima facie finding of infringement, such as efficiencies. The evidentiary burden of proof falls predominantly and as a starting point on the Commission, but, as in the case of merger control, it may shift during the investigation. This is, for instance, the case where there is a presumption in relation to a certain element of the assessment. As regards the standard of proof, the Union courts generally require a ‘firm conviction’ regarding the overall finding of an infringement and have largely avoided to refer to a specific threshold of probability in the sense of common law. That said, the Union courts have occasionally used ‘probability language’, which in combination with the difficulty in operationalising the threshold of the “firm conviction” of the judge creates a level of uncertainty. Meeting the burden and standard of proof is subject to judicial scrutiny.

France

The *Autorité de la concurrence* (hereinafter the "*Autorité*") and, before it, the *Conseil de la concurrence* (Competition Council, hereinafter the "*Conseil*", which became the "*Autorité de la concurrence*" in 2008) have issued a large number of decisions sanctioning anticompetitive vertical agreements between suppliers and distributors with a view to fixing the resale price of distributed products. These cases have produced a rich body of decision-making practice and case law, particularly on one point, namely proving that there was a concurrence of wills behind the anticompetitive agreement.

For vertical agreements, as for any other type of agreement, it is settled case law that proof of an agreement, within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union, or Article L. 420-1 of the French Commercial Code (*Code de commerce*), requires the demonstration of an agreement of wills to thwart the rules of the market.

When direct proof of the concurrence of wills (for instance, based on contractual documents) was not available, the *Conseil* and the *Autorité* traditionally relied on a method of proof known as the "three-pronged body of evidence" test based on three cumulative criteria (i) the communication of resale prices by the supplier, (ii) the implementation of a price monitoring mechanism and (iii) the significant implementation of the communicated prices by the distributor (this criterion was established by mean of price collection).

However, this test gradually proved less and less relevant for the *Autorité*, and sometimes challenging to implement in practice, especially with respect to the probative value of the collected prices and, *inter alia*, on the representativity of the price samples and the rate of compliance with the recommended prices by the distributor.

As a result of this development, the *Autorité* considered another probative test better suited to new economic realities, based on a two-stage demonstration and increased use of documentary evidence.

The *Autorité* clearly distanced itself for the first time from the three-pronged body of evidence in Decision 20-D-04 on the distribution of Apple products and was confirmed by the Paris of appeal on this particular issue.

In its subsequent Decision 21-D-20 of 22 July 2021 regarding practices in the glasses and glasses frames sector, the *Autorité* fined an anticompetitive vertical agreement, relying only partially on quantitative elements to assess the distributors' adherence to its price control policy. Proof of this came first from the signing of contractual documents, and second from other documentary evidence (including emails and statements) stating that the distributors applied the price guidelines communicated by Luxottica.

In conclusion, on several occasions in recent years the *Autorité* has departed from the three-pronged body of evidence that had thus far characterised its decision-making practice. The use of different and complementary methods of evidence, in accordance with case law, enables the *Autorité* to guarantee the effectiveness of its action against vertical agreements without infringing the rights of the defence.

Greece

In this Note, we elaborate on the standard and burden of proof in competition law proceedings under Greek law.

In this regard, we outline the relevant rules, provisions and legal basis. Even though the Greek national Law does not contain a specific detailed provisions regulating the standard and burden of proof in competition cases, case-law rules have been developed, which generally reflect the relevant rules developed under the jurisprudence of the European Courts. These rules take into account the provisions of national law on free competition (L. 3959/2011), Regulation 1/2003, the national Code of Administrative Procedure as well as the principle of effectiveness of European law.

We also present an indicative series of presumptions on which the HCC may rely to discharge its burden of proof, as recognized by national Courts in line with EU case law.

Furthermore, we describe the status of the law regarding the assessment of evidence with an emphasis on the use of economic evidence as well as the role and extent of judicial review.

In particular, we briefly describe the challenges faced by the HCC, especially as regards the integration of economic analysis in the assessment of competition cases. The shift towards a more effects-based approach, especially in abuse of dominance cases, has led to the rise of economic evidence, which in turn has increased the evidentiary standard and the difficulty of meeting the standard of proof. Even though the national Courts have recognized a significant margin of discretion, the HCC has had to incur additional costs and dedicate significant resources.

Finally, we highlight the importance of striking a balance between effective competition law enforcement and the undertakings' rights of defence.

Hungary

The GVH is subject to a higher burden of proof than typical administrative cases but less stringent than criminal law standards. Relying on EU case law, Hungarian courts require that the GVH provides accurate and consistent evidence, allowing circumstantial evidence and legal presumptions within reasonable limits. Courts require that uncertain facts favor the undertakings concerned, and the GVH must explicitly justify its findings in its decisions, including evidence evaluation. While indirect evidence is acceptable, it cannot be speculative and must be corroborated. Covert recordings made by natural or legal persons are admissible only if such recordings are not the sole source of evidence of the infringement. The use of settlement statements as evidence against cartel members has also been clarified in judicial case-law, broadening their probative scope.

Judicial interpretation of "by object" restrictions is mixed: while the courts have not accepted in some cases the GVH's reasoning of a given practice as "by object" infringement, they have also expanded the scope of practices that can be classified under this category.

A critical issue is the GVH's burden to demonstrate that agreements affect trade between Member States to apply EU law, which is a jurisdictional rather than substantive question. Courts have required detailed, quantified proof of market impacts, even for procedural matters like establishing the applicability of Article 101 TFEU. Consequently, Hungarian courts have effectively raised jurisdictional analysis to the level of proving substantive violations, imposing rigorous evidentiary demands on the GVH.

Indonesia

In proving violations of anti-competition cases, competition authorities are charged with proving the alleged occurrence of allegations. The Indonesian Competition Commission (ICC or KPPU) in proving alleged violations of articles in the Law Number 5/1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition and Law (Indonesian Competition Law), must even face more than one piece of evidence. Both direct and indirect evidence have different challenges that the KPPU must meet. The "rule of reason" approach is a critical aspect of Indonesian Competition Law, as it allows for a contextual analysis of business practices. This involves a detailed assessment of market conditions, the nature of the agreements or practices, and their actual impact on competition. In the context of competition law enforcement in Indonesia, particularly from the perspective of the KPPU, several legal and practical challenges arise when proving violations and meeting the standard of proof. Flexibility in Standards of Proof is needed as it allows the KPPU to adapt its methodologies to the unique characteristics of each case.

Ireland

Ireland has parallel criminal and administrative enforcement regimes for breaches of competition law. Ireland is a common law jurisdiction, which impacts both the standard and burden of proof that apply in competition cases. Irish competition law is set out in the Competition Act 2002, as amended (the “2002 Act”).

The primary role of the Competition and Consumer Protection Commission (the “CCPC”) in competition cases is as an investigator. The CCPC can decide at any point in its investigation whether to: (i) bring a summary criminal prosecution itself (this occurs in less serious cases); (ii) refer a file to the Director of Public Prosecutions (“DPP”) for criminal prosecution on indictment (i.e. in more serious cases); or (iii) refer the matter to an independent adjudication officer for decision under the administrative enforcement regime.

The relevant standard of proof imposed on the prosecutor in all criminal cases in Ireland is “beyond a reasonable doubt”. In other words, the guilt of the accused must be proved beyond a reasonable doubt.

By contrast, the standard of proof under the administrative competition enforcement regime is the conventional civil standard of proof i.e. on the balance of probabilities. This means that the adjudication officer must decide whether “on the balance of probabilities” the relevant undertaking has breached competition law. If the adjudication officer makes a finding of infringement and imposes a fine, the undertaking can appeal to the High Court. On appeal, the High Court can annul the adjudication officer’s decision where it is satisfied that “a serious and significant error of law or fact” was made in making the decision, or that the decision was made without complying with fair procedures. This effectively means that the appeal court must treat the adjudication officer’s decision with a degree of deference, and can annul it only in specific circumstances.

The “mental state” of the accused/defendant that must be proved (i.e. the mens rea) differs in competition cases in Ireland depending on whether the case is being dealt with under the criminal or administrative enforcement regime. In criminal cases, the prosecutor must show that the accused acted “intentionally or recklessly” to prevent, restrict or distort competition. In administrative cases, the adjudication officer must be satisfied that the defendant acted “intentionally, recklessly or negligently”.

Under both the criminal and administrative competition enforcement regimes in Ireland, the burden of proof generally falls on the party bringing the case. This means that in criminal cases the burden of proof is on the CCPC (for less serious cases prosecuted summarily), or the DPP (for more serious cases prosecuted on indictment). In administrative cases, the burden of proof is on the CCPC.

In some instances, the 2002 Act reverses the burden of proof in respect of certain matters in criminal and administrative cases i.e. the burden shifts to the defendant. In cases where the burden of proof shifts to the defendant to prove a particular matter, the defendant must prove that matter on the balance of probabilities i.e. the civil standard of proof applies to the defendant (even in the context of criminal enforcement proceedings).

The 2002 Act contains some specific presumptions in relation to documents. These presumptions apply in all criminal or administrative enforcement proceedings for breaches of competition law in Ireland. The presumptions are aimed at easing the burden of proof on the prosecutor. The Act also contains certain presumptions relating to personal criminal liability of company executives for corporate acts that breach competition law.

In merger cases, the CCPC considers that the relevant standard of proof is the ordinary civil standard, i.e. on the balance of probabilities. In other words, in order to decide that the result of the merger will be a substantial lessening of competition (“SLC”), the CCPC must decide that an SLC is more likely than not to occur.

In cases where a merging party decides to appeal against the CCPC’s decision to block a merger, the burden of proof is on the appellant to show that the CCPC’s decision should be annulled. As regards the standard of proof in such an appeal, the appellant must establish as a matter of probability that, taking the CCPC’s adjudicative process as a whole, the CCPC’s decision was “vitiating by a serious and significant error or a series of such errors”.

In appeals against CCPC merger decisions, the Irish High Court exercises a degree of curial deference towards the findings of the CCPC. The 2002 Act specifically provides that the High Court on hearing such an appeal “shall presume, unless it considers it unreasonable to do so, that any matters accepted or found to be fact by the [CCPC] in exercising the relevant powers [...] were correctly so accepted or found”. Further, in the Rye Investments judgment, the Irish High Court held that the High Court when hearing an appeal against a CCPC merger decision will also exercise some deference towards the CCPC as regards the CCPC’s inferences/conclusions from primary facts.

Israel

This contribution examines the standard and burden of proof in Israeli competition law abuse of dominant position cases, and in particular on the recent Ashdod Port Supreme Court ruling, which provides valuable insights into the current landscape, challenges, and ongoing debates surrounding the evidentiary standards in Israeli antitrust enforcement.

Section 29a of the Israeli Economic Competition Law prohibits monopolies from abusing their market position in a way that reduces competition or harms the public. The law outlines specific practices (like unfair pricing or discriminatory contract terms) that constitute a presumption of abuse. Practices falling outside these presumptions can still be considered abuse if proven potential to harm competition.

The Ashdod Port case highlights ongoing debate surrounding the level of evidence required to prove potential harm to competition, particularly regarding target discounts offered by dominant firms. Ashdod Port held a dominant position in the Israeli vehicle import market, enjoying a monopoly over vehicle that was imported by certain shipping lines. The port implemented a target discount scheme for large car importers, offering significant discounts on handling and storage fees if importers met specific unloading targets. These discounts were individualized, retroactive, and confidential, raising concerns about their impact on competition with Haifa Port.

The Director General and the Competition Tribunal found that Ashdod Port's discount system created a significant barrier to entry for Haifa Port. The retroactive nature of the discounts and the high unloading targets left a limited competitive arena for Haifa Port.

The Israeli Supreme Court upheld the Competition Tribunal and Director General's decision, finding that Ashdod Port abused its dominant position. The Supreme Court demonstrates a willingness to adopt a flexible approach to the standard of proof, taking into account the discount scheme characteristics that create an inherent concern for significant harm to competition, due to their probable effect on importers' incentives to unload at Ashdod Port and not at Haifa Port.

Justice Grosskopf argued for a lower evidentiary threshold in cases involving concentrated markets like Israel, especially when intent to exclude competitors is evident. Justices Amit and Baron, while concurring with the overall judgment, cautioned against significantly easing the standard of proof, emphasizing the need to prove all elements of the violation.

Italy

Italian competition law does not expressly define the standard of proof required to establish the existence of an anti-competitive infringement. However, in the experience of the Italian Competition Authority, this standard is generally in line with EU case law.

The standard of proof required for the assessment of a competition infringement is strongly influenced by the intensity of judicial control. In Italy, judicial review is not limited in terms of the grounds on which an appeal may be lodged, although within the range of legal flaws. Judges can therefore carry out a broad and thorough scrutiny of the Competition Authority's assessment. It is also for this reason that, in its enforcement practice, the Authority seeks to apply a rigorous standard of proof to establish an infringement.

This paper illustrates the standard and the consequent burden of proof applied to different categories of cases (secret horizontal agreements, abuses of dominant position, interim measures and mergers). In all cases, the evidence relied upon must be accurate, reliable and consistent, and all the characteristics of the sector must be considered in order to support the conclusions drawn and to build a convincing "story". A key factor valued by the Courts is what is known as 'narrative consistency', which means that the allegations identified by the authority, supported by a number of coherent lines of evidence, should be the only one capable of explaining the facts or, in any event, clearly preferable to any abstract alternative hypothesis.

In the enforcement practice of the Italian Competition Authority, decisions are assisted by a rigorous and comprehensive analysis of the market structure and competitive conditions with a view to ascertaining the intensity of potential competition concerns. Recent developments show that economic arguments are increasingly used in all competition cases to support or refute the evidence and arguments in a given case. The relevance of economic evidence may vary from case to case. It may have a decisive impact on the analysis of a merger or the finding of an abuse of dominant position, while it may be less relevant in cartels resulting from leniency applications.

Japan

The Japan Fair Trade Commission (JFTC) has been addressing anticompetitive conducts of digital platform operators within the framework of the Antimonopoly Act (AMA). However, there have been serious challenges in the enforcement of the AMA, such as taking significant time for evidence-gathering activities, especially to prove legal requirements regarding effects on market competition, that come as prerequisites to issue legal measures, including cease and desist orders against those anticompetitive conducts in violation of the AMA.

The JFTC has therefore decided to pursue a legislative solution for the smartphone software market which is particularly required to ensure a competitive environment, in order to overcome these challenges and to effectively address anticompetitive conduct in the market.

This contribution paper describes the evidence-gathering activities under the AMA against anticompetitive conducts of digital platform operators, and then introduces the overview of the new law, the Act on Promotion of Competition for Specified Smartphone Software (also known as the Mobile Software Competition Act, or MSCA).

The MSCA provides categorical prohibited actions and compliance measures. The JFTC therefore is only required to determine whether a conduct falls into the category of such prohibited acts or compliance measures, while not having to determine whether the conduct has resulted in anticompetitive effects for the market.

Kazakhstan

To enhance mechanisms for protecting citizens' rights in legal disputes and establish guarantees for individuals whose rights have been violated, the Republic of Kazakhstan adopted the Administrative Procedural Code (hereinafter referred to as the Code) in 2021.

The Code empowers judges to go beyond the evidence presented by the parties, allowing them to investigate all circumstances necessary for the proper resolution of a case and to collect evidence on their own initiative. This provision ensures a more comprehensive and fair consideration of legal disputes.

The introduction of the Code has also led to changes in the standard of proof for violations in Kazakhstan. The standard of proof refers to the minimum level of subjective confidence a judge must have in the truth of a disputed fact. Once this standard is met, the court can recognise the burden of proof imposed on the antimonopoly authority or other parties as fulfilled.

With the introduction of the Administrative Procedural Code, judicial decisions in the Republic of Kazakhstan have led to significant changes in the approach taken by the antimonopoly authority in proving cases involving anti-competitive agreements. A new standard of proof has been established, particularly impacting the handling of horizontal agreements, which have become the most frequent subject of court disputes.

For an anti-competitive agreement to be classified as a cartel, there must be clear confirmation that the agreement possesses the characteristics of a cartel. This includes investigating the nature of the horizontal anti-competitive agreement, with a particular focus on identifying a reasonable objective for the collusion and its underlying causes.

Latvia

The contribution presents legal analysis of standard and burden of proof in merger cases in Latvia, with a specific focus on the challenges that the Competition Council of the Republic of Latvia (the CC) faces in defining the relevant market and evaluating the effect of merger. The latest cases described in the contribution shows key takeaways regarding the standard of proof, the scope of judicial review and economical methods, and type and quality of evidence used to draw conclusions in merger cases, including when defining the relevant geographical market in sector regulated market.

The forward-looking nature of economic analysis that the CC must carry out in merger cases confirms that the standard of proof cannot be set unreasonably high. The CC should have a margin of discretion regarding its economic expertise and analysis, yet there still is no legal certainty in national case law if the judicial review regarding complex economic matters should be clearly limited only to examination whether the evidence presented by the CC is sufficient and supports the conclusions drawn from it, and there have been errors in the CC's exercise of discretion – exceeding it, failing to exercise it, incorrect use of their discretion or failure to comply with procedural requirements. If it is necessary to obtain experts opinion on the economic analysis, it is fundamental that the experts have sufficient knowledge and professional experience in specific expertise, appropriate expertise methods are applied, and analysis is transparent, consistent, reliable, and clearly presented.

The use of applicable economic methods depends on various criteria and evidence available in each specific case. While the use of isochrone method is confirmed as suitable to serve as a framework for market analysis, there are disagreements regarding data (and its interpretation) used to map out customer behaviour and competitive conditions in the relevant market, as well as ambiguity about the significance of the legislation which determine the placement of pharmacies in populated areas when and its impact on the definition on geographical market in the relevant case.

Lithuania

The evaluation of evidence and the burden of proof in competition law cases present significant challenges for courts and regulatory authorities. In Lithuania, the Supreme Administrative Court plays a central role in shaping the legal standards applied since there is no legal regulation concerning standard of proof or burden of proof. As in many continental law jurisdictions, the principle of free evaluation of evidence guides the administrative process and questions regarding the sufficiency, coherence, and reliability of evidence in competition disputes remain central to judicial review.

This note examines key principles of evidence evaluation and burden of proof in the case law of the Supreme Administrative Court. It further explores the treatment of economic evidence, and recent developments involving resale price maintenance. By outlining the evolving standards applied by the Supreme Administrative Court and the Competition Council, this contribution aims to provide a clearer understanding of the procedural and substantive challenges faced in competition law disputes in Lithuania, while also highlighting the implications of emerging jurisprudence for future cases.

Mexico

This contribution addresses the legal framework ruling the preparation, presentation, and evaluation of evidence within the procedures of the Federal Economic Competition Commission (Cofece) in Mexico. It highlights the role that the evidence plays when it comes to the enforcement of competition law.

First, an outline of the legal standards established under Mexican competition law, including the Federal Economic Competition Law and its associated regulations, as well as relevant provisions from the Federal Civil Procedures Code is presented. Second, the evidentiary requirements imposed on economic agents and the principles that guide Cofece's evaluation process, such as the free appraisal of evidence and the reliance on indirect or circumstantial elements to prove anticompetitive conducts are discussed.

Finally, this contribution presents the challenges in gathering and assessing evidence, such as limited access to direct proof, the increasing reliance on indirect indicators, and the legal limitations surrounding private communications. These challenges are contextualized through case studies that reveal the evolving evidentiary landscape and standards applied by Cofece and the Federal Judicial Branch.

Poland

As a civil law jurisdiction (i.e., not a common law jurisdiction), we do not use any formal standard of proof with varying levels of proof. Instead, the relevant decision-maker (i.e., the administrative agency or the court) needs to have a conviction that certain facts, based on an overall assessment of evidence, have been proved enough to find an infringement. This can be based on direct or indirect evidence. In practical terms, indirect evidence has been primarily used in bid rigging cases, often concerning local markets. This is because in local markets we are less often in a position to use direct evidence, with colluding undertakings usually having close (informal) contacts. Indirect evidence in this type of cases is typically accepted by the courts, only occasionally leading to annulments. Legal presumptions are occasionally used as well.

A general drift towards a more economic approach is traceable in our jurisdiction, with economics-related findings becoming more important (either in fact, or at least nominally and in declaratory terms). In an understandable way, a drift from a more form-based approach towards the more economic approach puts more burden on the party proving the infringement (i.e., private party or the enforcer). This is not always a bad development, in particular in jurisdictions that heavily rely on private enforcement, or where complainants can force a public enforcer to open a case. Yet some of the advocated advantages of the more economic approach, such as more consistency and certainty (one economic metric as opposed to an unspecified number of metrics or ambiguous metrics), might be weaker than often believed.

Overall, what seems relevant is: (a) to have a clear idea what exactly needs to be proved; (b) by what means (what evidence and types of arguments are acceptable, and can be expected to be worth the attention and financial expenses); (c) how the burden of proof fits the general institutional landscape of a jurisdiction (e.g., more public enforcement or a strong role of private enforcement; more centralised enforcement with, for example, a single federal agency, or a more decentralised enforcement that uses the resources of a wider range of public authorities). It seems to us that in the context of a transatlantic competition dialogue, in particular the last of the factors mentioned above may be easily overlooked – and yet the logic and institutional setting of antitrust enforcement in the United States and Europe is not the same.

Romania

According to the provisions of Romania's Competition Law, the burden of proof for a competition law infringement lies with the Romanian Competition Council (RCC). The undertaking or association of undertakings that claims the benefit of exemption conditions bears the responsibility to demonstrate that the conditions set forth in the legal provisions are met.

The main challenge that the competition authorities currently face, in the context of maintaining sanctioning decisions following reviews by national and European courts, lies in the difficulty of identifying and gathering unequivocal evidence (such as documents or written correspondence) regarding the existence of anti-competitive practices, which would incriminate all undertakings involved in such anti-competitive conduct.

RCC's recent practice has highlighted the need to strengthen the evidence obtained through traditional investigative tools—such as dawn raids and requests for information—by incorporating economic analyses that support the creation of a favorable body of case law for the competition authority, validated by Romanian national courts.

In this contribution, we provide as examples two practical cases involving horizontal agreements on price-fixing and/or market-sharing between competing undertakings in the context of participation in public tenders.

Slovak Republic

This contribution focuses on the analysis of the standard of proof, burden of proof, and the use of indirect evidence in the context of Slovak legislation, the practice of the Antimonopoly Office of the Slovak Republic (the "Office"), and the practice of Slovak courts in judicial review of the Office's decisions. In the field of competition law, proving a violation is a complex process that requires specific evidentiary procedures. The Slovak law does not contain an explicit legal provision on the standard of proof for competition law, so the Office relies on principles of administrative law, particularly the principle of material truth, while also applying European standards (balance of probabilities). Practical problems arise from inconsistent interpretations of the standard of proof by courts, which in some cases allowed the interpretation that the Office should apply the "beyond reasonable doubt" standard from criminal law, and established the premise that European standard does not apply because it is lower than the standard under national law. Some court rulings thus conflict with the need for a flexible approach in competition law, as well as the principles of effectiveness and equivalence in the application of European Union law. The contribution therefore highlights the challenges arising from court case law and indicates a possible solution in the form of explicit legislative regulation. Regarding the indirect evidence and the consideration of economic evidence, the Office points out that their use has been accepted by the courts, suggesting that economic and indirect evidence can be a powerful tool in proving anti-competitive behaviour in the future.

Sweden

The contribution notes that there is a high evidentiary standard to meet the standard of proof for competition cases in Sweden, and further states that it is incumbent on the competition authority to adapt to the standards set by the courts and develop its internal workings accordingly.

Given the increasing complexity of competition cases, it is in general beneficial for judges to be empowered to develop a good level of understanding of competition law principles. Having economic experts sitting as specially appointed members of the court can also enhance the effectiveness of the hearing of economic evidence. By providing clear judgments, precedent-setting courts can offer guidance to lower courts, competition authorities and parties about the legal framework and issues of standards of proof, particularly where case law is lacking.

Presumptions can contribute to more efficient investigations and court proceedings, but must be based on robust theory and experience to ensure legal certainty and mitigate against the risk of over-enforcement. For example, according to draft guidelines from the European Commission, EU case law has developed tools which can be broadly described and conceptualised as “presumptions” regarding certain types of abuse of dominance conduct and their capability of producing exclusionary effects.

Within the EU, the standard of proof must not be set at such a level so as to render the implementation of EU competition rules impossible or excessively difficult and, in particular, must not jeopardise the effective application of EU competition law. Whether the standard of proof in an individual case is in line with the principle of effectiveness of EU law is a question that could, in theory, be referred for interpretation by the Court of Justice of the EU, but this has not been explored in the Swedish context.

Chinese Taipei

The Chinese Taipei Fair Trade Commission (CTFTC) adopts the principle of discretionary evaluation of evidence of competition law cases, allowing legal executors to make a judgment on the truthfulness of the facts at the discretion and based on the firm confidence of the legal executors. The standard for the probative value of evidence is “clear and convincing evidence.” While the probative value of evidence does not need to reach absolute assurance of beyond a reasonable doubt of common people, it should still have a high probability of the degree of proof. When the authenticity of cases is not unclear, the CTFTC shall take into consideration the danger associated with or adverse interest in the nonoccurrence of legal effect.

It is not easy to obtain direct evidence of a mutual understanding related to a concerted action, and so the CTFTC sometimes adopts indirect evidence to infer the existence of facts for a mutual understanding related to a concerted action. Hence, disputes in competition law cases about the rules regarding evidence mostly focus on disposition cases of illegal concerted actions (especially in the case of fact-finding for a “mutual understanding” related to a concerted action).

The Administrative Court, on the one hand, affirms the rules of evidence that infer the existence of *factum probandum* with indirect evidence and, on the other hand, as to whether the indirect evidence obtained by the CTFTC is sufficient to infer the existence of a mutual understanding related to a concerted action, the review standards of the courts are different for individual cases. Even if Paragraph 3 of Article 14 were to be revised and amended in the Fair Trade Act, judicial reviews would still question the legality of relying on indirect evidence.

Therefore, the CTFTC has included a leniency policy and expanded its provisions regarding the payment of rewards for the reporting of illegal concerted actions, and shall continuously intensify the communication and advocacy of the judicial authorities and expect that competition law cases can obtain the support and affirmation of the courts for its lawsuits.