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

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## *Kazakhstan*

### 1. Introduction

1. 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.
2. 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.
3. 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.
4. In comparison, within common law jurisdictions, the most widely applied standard is beyond a reasonable doubt, predominantly used in criminal cases. This is the highest standard of proof, requiring evidence that eliminates all reasonable doubt to satisfy the court of the defendant's guilt.
5. The adjustments introduced by the Code aim to align Kazakhstan's legal framework with principles of fairness, thoroughness, and effective rights protection.

### 2. The Standard and Burden of Proof in Competition Cases: Key Features

6. In accordance with the Administrative Procedural Code, acts issued by the antimonopoly authority at the start of an investigation, as well as upon its conclusion, are classified as burdensome administrative acts.
7. When challenging a burdensome administrative act, the burden of proof lies with the defendant (as stipulated in paragraph 2 of Article 129 of the Code), which, in this context, is the antimonopoly authority of the Republic of Kazakhstan.
8. Kazakh legal proceedings increasingly require evidence that conclusively establishes the facts of the case. This standard of proof aligns closely with the "beyond reasonable doubt" standard used in English legal jurisdictions, reflecting a high degree of certainty in the court's determination of the case.
9. An important innovation in administrative justice is the formal recognition of the consequences of failing to meet the required standard of proof:
  - If, after evaluating all evidence, any fact crucial to the resolution of the administrative case remains unproven, the negative consequences of this failure are borne by the party responsible for proving that fact.
10. This principle ensures accountability and reinforces the importance of thorough and substantiated arguments in administrative cases, particularly those involving the actions of regulatory authorities.

### 3. The Practice of Applying Indirect Evidence to the Standard of Proof in Cartel Agreements at Auctions

11. 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.

12. Previously, the antimonopoly authority adhered to the position that it was unnecessary to examine the subject matter of a horizontal anti-competitive agreement. Cartel agreements were treated as prohibited *per se*, meaning their illegality did not require proof of negative consequences.

13. This approach was exemplified in cases involving cartels in the pharmaceutical sector. In a 2023 decision by the Judicial Board of the Supreme Court, it was stated that cartel agreements are absolutely prohibited by law, making it sufficient to prove the existence of an anti-competitive agreement between entities. The presence or absence of consequences stemming from the agreement was deemed irrelevant.

14. However, subsequent cases — specifically those involving cartels in the road repair and construction industries—have reshaped judicial practice and sparked debates over the *per se/object* versus *rule of reason/consequences* approaches to proving cartels.

#### 3.1. Case: Road Repair Companies Cartel (2023)

15. In this case, the Judicial Board for Administrative Cases of the Supreme Court of Kazakhstan emphasized that the statutory prohibition against horizontal agreements between competitors does not exempt the antimonopoly authority from the obligation to collect evidence confirming or refuting a violation (cartel) under Article 216 of the Entrepreneurial Code of the Republic of Kazakhstan.

16. The Court further clarified that the interpretation of Article 169 of the Entrepreneurial Code presupposes a formal violation when market participants mutually aim to restrict competition, even if such consequences have not materialized. However, because agreements between competitors may not always constitute cartels, it is necessary to analyse the specific subject matter of the agreement to apply the correct legal provision.

#### 3.2. Case: Construction Companies Cartel (2024)

17. In this investigation by the regional antimonopoly authority, there was no direct evidence linking the companies to a cartel agreement. The findings were based solely on an analysis of company behavior (indirect evidence).

18. The Court ruled that the conclusion of a cartel agreement was not proven, citing the absence of direct evidence. The Judicial Board for Administrative Cases of the Supreme Court held that a collection of indirect evidence alone was insufficient to establish the existence of a cartel agreement among competitors.

19. These cases highlight the necessity for the antimonopoly authority to meet a higher evidentiary standard when proving the existence of cartels.

20. Specifically:

- Courts now demand clear, direct evidence of the existence of a cartel agreement, rather than relying solely on behavioral analyses or indirect evidence.

- To classify anti-competitive agreements as cartels, authorities must demonstrate that all criteria defining a cartel have been met. This involves thoroughly examining the agreement's content, intent, and competitive impact.

21. The evolving judicial approach in Kazakhstan underscores a move away from treating anti-competitive agreements as prohibited per se. Instead, courts now require a deeper investigation into the substance of agreements and adherence to strict evidentiary standards. These developments reflect a more nuanced application of competition law, balancing the need to deter anti-competitive behavior with fairness and procedural rigor in enforcement actions.

#### 4. Conclusion

22. The standard of proof established through judicial practice is as follows. To prove the existence of an anti-competitive bidding agreement prohibited by the Entrepreneurial Code of the Republic of Kazakhstan, the antimonopoly authority must demonstrate the following three elements:

23. **Existence of an Agreement.** Evidence that competing entities have reached or concluded an agreement.

24. **Presence of Consequences.** Proof of outcomes such as price increases, decreases, or maintenance at auctions, or distortion of the bidding process.

25. **Causal Relationship.** Demonstration of a direct link between the specific actions of the parties to the agreement and the resulting negative consequences for the market, or the potential for such consequences to occur.

26. 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.

27. This issue is highly significant and relevant not only in the Republic of Kazakhstan but also in other countries with similar legal frameworks. For objective administrative proceedings, it is essential to rely not only on indirect evidence but also on demonstrating the economic objectives or benefits of the alleged cartel.

28. To enhance the existing legal framework in the Republic of Kazakhstan, it is crucial to analyze legal gaps, inconsistencies, and the practical application of current procedures. Such analysis will contribute to fostering a fair and competitive market environment.