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

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1. Standard of proof

1. The GVH is subject to the standard of proof laid down in the General Administrative Code[1], which applies to the evidencing standards of all administrative authorities in Hungary. The Hungarian judicial case law made it clear that the GVH is not required to stringent evidentiary standards applicable in criminal procedures when it comes to establishing the liability of an undertaking for a competition law infringement. Although in competition cases, the judicial practice does not require the degree of certainty required in criminal proceedings, the criminal procedural character of the competition authority's proceedings means that a higher degree of proof is required than the general burden of proof imposed on public authorities.[2]

2. Based on the general rules of evidencing, the GVH has discretion to define the means and scope of the evidentiary procedure and can assess the evidence available at its own discretion. In administrative proceedings all evidence is admissible that is suitable for ascertaining the relevant facts of the case. Evidence obtained illegally by the authority is inadmissible.

3. *Lex specialis* provisions of the Hungarian Competition Act provide for special rules regarding recordings: in competition procedures, all evidence deemed capable of ascertaining the relevant facts of the case are admissible. Covert recordings made by natural or legal persons are admissible only if such recordings are not the sole source of evidence of the infringement. Any evidence illegally obtained by the GVH, or any other authority is inadmissible.[3]

4. According to the European Union case law, which is also relied upon by the Hungarian judicial case law, it is the duty of the authority to prove the infringement and, in case of any doubt, to take it into account in favor of the undertaking. The standard of proof beyond reasonable doubt does not preclude the use of chains of circumstantial evidence, nor does it preclude the use of legal presumptions, provided that these presumptions remain within reasonable limits.[4]

5. The standard of proof is that the authority must provide accurate and consistent evidence to prove that an infringement took place, but not every piece of evidence needs to satisfy these conditions for all elements of the competition law infringement. It is sufficient if the evidence used by the authority, taken as a whole, satisfies the requirement of accuracy and consistency.[5]

6. If the authority relies solely on the market conduct of the undertakings concerned to prove the existence of an infringement, it is for the undertakings to show that there is a

[1] Act CL of 2016 on General Public Administration Procedures

[2] Paragraph 82 of Judgement No. Kfv. 37.739/2021/12 of the Curia

[3] Act LVII of 1996 - on the Prohibition of Unfair Trading Practices and Unfair Competition

[4] Paragraph 140 of Judgement No. Kfv.III.37.582/2016/16. of the Curia

[5] Paragraph 132 of Judgement No. 30.K.704.004/2022/10.sz. of the Budapest-Capital Regional Court

plausible, reasonable explanation for their conduct other than the infringement. However, a different explanation by the undertakings holds relevance only if the authority relies exclusively on the conduct of the undertakings in the market, meaning such an explanation becomes irrelevant if the existence of an infringement is not only presumed but also supported by evidence.[6]

7. All relevant facts giving rise to competition liability must be proven by the GVH and facts that remain uncertain shall be taken into account in favor of the undertaking concerned.[7] The GVH must demonstrate compliance with the burden of proof in its decision on the finding of the infringement and the application of the fine by specifying in the grounds of its decision the established facts and the evidence upon which they are based, the evidence offered but omitted by the undertaking subject to the proceedings and the reasons for the omission and also the role of discretion in setting aspects such as the fine level. In presenting evidence, the authority may also use circumstantial evidence, such as data on market structure, calculations and economic models, even if these sometimes contain uncertain elements or certain degree of probability proof adapted to the state of scientific knowledge, typical of expert opinions. The companies subject to the proceedings must have the opportunity to present their observations in response to the findings of the GVH, present their evidence in compliance with the principles of good faith and relevance, and to refute the conclusions of the GVH.[8]

8. Regarding indirect evidence, the Supreme Court of Hungary (hereinafter referred to as the Curia) established that the authority may use indirect evidence to prove the illegal conduct, however, the facts established by the authority must not be based on mere speculation and conjecture, but on uncontradicted evidence.[9]

2. By object and by effect restrictions

9. In recent years, there have been a few cases[10] where the GVH found a *by object* infringement, but the courts concluded that the GVH could not demonstrate in a convincing manner that the requirements to qualify the infringement as *by object* were met.

10. For example, in a recent case, the Curia articulated that in case of a *bid rigging* cartel, the traditional *by object* infringement of market division does not necessarily include 'indirect' price fixing.[11] The Curia highlighted that with regard to the finding of indirect price fixing as an infringement, the GVH is required to carry out an analysis independent of the legal basis of market division, assessing the content of the agreements and the economic and legal background to determine the degree of harm required to establish a restriction of competition *by object* in relation to price fixing.[12]

[6] Judgement No. Kfv.37.646/2015/14. of the Curia.

[7] Paragraph 44 of Judgement Kfv.VII.38.167/2021/15. of the Curia

[8] Paragraph 112 of Judgement Kfv. 37.288/2022/13. of the Curia.

[9] Paragraph 44 of Judgement Kfv.VII.38.167/2021/15. of the Curia

[10] See Judgement No. Kfv. 37.110/2017/13 or Judgement No. Kfv.II.37.762/2022/24. of the Curia.

[11] Judgement No. Kfv.I.37.452/2023/3 of the Curia.

[12] Paragraph 195 of Judgement No. Kfv.I.37.452/2023/3 of the Curia.

11. However, we have also seen the judicial case law broadening the category of *by object* infringements recently by concluding that *no-poach agreement* can be classified as a *by object* infringement under the umbrella of restriction of the freedom to choose from different sources of supply.[13]

12. It has also been established by the Hungarian judicial case law that it recognizes the dual plea of a cartel *by object* and *by effect* (see Judgement No. Kfv.II.37.385/2020/17 of the Curia), in which case however the assessment of the effect is also necessary to establish a cartel by effect.[14]

3. Probative value of settlement statements

13. In a recent decision the Budapest-Capital Regional Court (first instance court in competition law cases) established that the acknowledgement of the infringement from the parties submitting settlement submissions may be taken into account solely in relation to the party from which it originates. The acknowledgement, however, is not admissible as evidence against the undertakings under investigation not taking part in the settlement procedure. The Curia nonetheless disagreed with the first instance court and underlined that it is settled case law that settlement statements acknowledging the infringement is credible evidence of the infringement and thus it can be taken into account in relation to every member of the cartel.[15]

4. Effect on Trade Between Member States

14. The careful assessment of whether an agreement, a decision by an association of undertakings or a concerted practice that restricts or may have the effect to restrict competition also affects the trade between Member States in an appreciable manner is a crucial part of antitrust competition supervision proceedings.

15. It is important to note however, that the effect on trade between Member States is a preliminary question aimed to determine the applicable law. *„It only indicates that [the agreement] could fall within the scope of application of EU competition law and could thus be the subject of an investigation on their merits."* [16] Deciding whether the trade between Member States is affected is a jurisdictional criterion.[17] If a national competition authority finds that the trade between Member States is affected, it shall also apply EU competition law.[18] Its existence does not automatically result in the finding of a substantial violation of law by the authority. In the context of Article 101 TFEU, the obligation to apply EU competition law to agreements affecting the trade between Member States does not mean

[13] Paragraph 302 of Judgement Kfv. II. 37.762/2022/24. of the Curia.

[14] See also paragarph 192 of Judgement No. Kfv.I.37.452/2023/3.

[15] Paragraph 78-80 of Judgement Kfv.VII.38.167/2021/15. of the Curia

[16] Pieter Van Cleynenbreugel, 'Article 101 TFEU and the EU Courts: Adapting Legal Form to the Realities of Modernization?' (2014) 51 Common Market Law Review 1394.

[17] Marco Botta, Alexandr Svetlicinii and Maciej Bernatt, 'The Assessment of the Effect on Trade by the National Competition Authorities of the „New" Member States: Another Legal Partition of the Internal Market?' (2015) 52 Common Market Law Review 1248.

[18] Regulation 1/2003, Article 3(1).

that the case is to be decided pursuant to stricter rules than national competition law provisions. Regulation 1/2003 declares that national competition law cannot include stricter rules on anti-competitive agreements than Article 101 TFEU.[19] By contrast, if the effect on trade between Member States cannot be established, it does not necessarily mean that a substantial infringement of competition law cannot be found; it only means that the competition law of the EU shall not apply. Considering that it does not decide any substantial violation of law, courts should not place an extremely heavy burden on competition authorities to prove it.

16. In relation to this burden, two standards of proof can be considered: one is characteristic of civil law, while the other of criminal law. The former is called *'balance of probabilities'*; the latter is the standard *'beyond a reasonable doubt'*. These two standards can be perceived as two end points of the same scale that has different shades between them.[20] The higher the evidentiary standard is, the more difficult for the competition authority to prove a violation and the easier for undertakings to build up their defence against it.

17. In connection with the proving of a substantial infringement of law the Curia does not require the standard *'beyond any reasonable doubt'* in a criminal law sense, but it is close to it. Dispelling the doubts of decision-makers is easier in competition cases than during criminal law enforcement, and the competition authority has to prove its findings to a lesser extent than criminal prosecutors. However, doubts cannot remain.

18. As regards proof and evidence, a preliminary assessment aimed to establish the (non) application of EU law should not be on the same level as the merits of the case. It would be reasonable, if the concept were attached to the *'balance of probabilities'* standard of proof. Although the standard of proof looks similar in the antitrust case law of EU courts and that of the Curia, there is a significant difference, as a result of a controversial decision[21] of the Curia, which set the same standard for proving the merits of the case, and the facts that establish the applicable law.

19. In the case serving as the basis[22] of the Judgment, the Hungarian Competition Authority (hereinafter referred to as the GVH) imposed an overall fine of HUF 549 million on three undertakings – two Hungarian importers and the global distributor of alarm devices of a prominent brand – that were party to a vertical anti-competitive agreement by object. The GVH launched its investigation in 2016 after detecting that the Hungarian importers used contractual terms for their partners (resellers, retailers and installers) that might have restricted them from which geographical area they could purchase and sell the alarm devices, as well as the price at which the affected products could be sold or advertised to their partners and end consumers. The GVH also noticed that the global distributor used contractual terms in the contracts concluded with the Hungarian importers, which might have limited them and their partners in terms of the geographical area from which they could purchase the alarm devices, and in which geographic area they could sell them. Later, the investigation was extended to another conduct, according to which the undertakings

[19] Regulation 1/2003, Article 3(2).

[20] Per Hellström, 'A Uniform Standard of Proof in EU Competition Proceedings', in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2010).

[21] Judgment *Kfv.IV.37.739/2021/12* of the Curia (hereinafter referred to as the Judgment).

[22] Decision *VJ/97-282/2016* of the Hungarian Competition Authority (hereinafter referred to as the Decision).

prohibited the indication of prices, as well as direct and indirect sales (via webshops) to end users on the Internet. Dawn raids were also carried out at the premises of the importers.

20. Based on the email evidence and contracts seized by the case handlers and other data collected regarding the market, the GVH established, among others, that both the export and the parallel import were prohibited by the distributor, furthermore, the parties restricted the cross-border passive sales of a certain type of branded products as well as the online indication of consumer prices, thus the online sales, and they determined the resale price. A limitation of language settings of the alarm devices per country was also introduced by the global distributor, which also contributed to the reduction of cross-border sales, both in their active and passive forms. The relevant market was defined as the market for house alarm systems in Hungary.

21. In connection with the standard of proof, however, this case became relevant not because of the lack of evidence concerning the conducts but because of the alleged lack of evidence and exact data confirming that the trade between EU Member States was affected.

22. During the proceedings, case handlers requested data from several distributors and competitors to determine the role of the products concerned in the relevant market. Thirty-three market players were obliged to provide information. There was great variation in the statistics. Buyers estimated the market shares of the undertakings subject to the proceeding between 30% and 75%, and competitors typically over 50%. One of the undertakings investigated itself estimated that the market share of the brand – and thereby that of the concerned undertakings – was between 25-30%, although later submitted that this was not true. In addition to the estimates, the GVH additionally made a calculation based on turnover data of competitors which, however, was not specifically evaluated by the courts, because the exact methodology and explanation of the calculation were not detailed, only the results. Based on the turnover data of competitors, the GVH postulated that between 2010 and 2016 the market shares of the concerned undertakings continuously increased from over 20% to over 50%. The undertakings subject to the proceeding were of the opinion that these data do not reflect the reality.

23. In spite of this, the GVH established the applicability of Article 101 TFEU by using the negative rebuttable presumption of non-appreciability and declared that although the parties' turnover does not reach EUR 40 million, their aggregate market share in the relevant market exceeds 5%. In its legal assessment the GVH conducted a detailed analysis on the inter-state trade clause, touching upon all three elements of it: *„trade between Member States"*,[23] *„may affect"*[24] and *„appreciability"*[25]. It established its findings on the undertakings' previous submissions and in light of the additional evidence obtained during the proceedings. The Competition Council found that the scope of the negative NAAT-rule does not cover the agreement.

24. The appeal by one of the undertakings against the decision of the GVH questioned whether the vertical conduct had an appreciable effect on trade between Member States, if the parties' combined market share in a single relevant market within the European Union does not exceed 5% in any of the Member States affected by the agreement and the supplier's total annual Community turnover in the products covered by the agreement does not exceed EUR 40 million. The other undertaking also argued that Article 101 TFEU was

[23] Decision, points [134]-[135].

[24] Decision, points [136]-[140].

[25] Decision, points [141]-[146].

not applicable in the present proceedings, given that the applicants' conduct at issue did not appreciably affect trade between Member States.

25. During the judicial review of the Decision the Court of First Instance and the Curia ruled in favour of the undertakings, despite that the GVH found that Hungary's whole territory is affected by the agreement, the GVH defined the relevant product market as the market for house alarms and requested information from more than thirty market players to determine the market share of the concerned products. The Court of First Instance and the Curia did not even take into account that the conducts restricting import, export as well as the online trade of the products concerned were capable of affecting trade between Member States by their very nature – i.e. regardless of the market share of the undertakings – as explicitly stated also by the relevant Commission Notice.[26]

26. The courts found that in order to establish that the market share exceeded 5%, the GVH would have had to provide more detailed and complete evidence. It should have substantiated its position with quantified data, setting out in detail in its decision which data, which evidence and which information it considered to establish beyond reasonable doubt that the share of the undertakings in the relevant market exceeded 5%. In the absence of such fact finding and detailed evidence to that effect, it is not possible to determine whether the GVH correctly decided that the negative NAAT rule does not apply in the present case and whether the undertakings' conduct fell within the scope of the TFEU. Logical reasoning cannot – in the absence of the relevant obligation to provide evidence and clarify the facts – justify a finding that the 5% threshold has been exceeded and that the provisions of the TFEU are therefore applicable. Though relying on the principle of *in dubio pro reo* in an implicit manner, the Curia added that in competition cases, its case law does not require the degree of certainty required in criminal proceedings. However, it is expected that the facts are not based on mere speculation and conjecture but on uncontradicted evidence.[27]

27. The Curia's holding means that GVH is required to prove its assessment on market definition and market shares for the presenting of effect on trade between Member States to the same extent (and depth) as when it aims to prove a substantial infringement of law. That is to say, the Curia has created a substantial provision from a choice-of-law criterion that exclusively aims to establish whether EU competition law shall apply. This position may pose an unexpected obstacle to the competition agency when enforcing violations on a dual or EU legal basis and when defining markets.

28. In the Curia's decision, the issue of applicable law was *„lifted up"* to the same level as the actual infringement, which might be too stringent of a requirement for a choice of law criterion.

[26] Commission Notice on Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07).

[27] Judgment, point [90].