Czech Republic

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Introduction

1 Which national laws and measures provide for enforcement of articles 81 and 82 of the EC Treaty?

The law providing for the enforcement of articles 81 and 82 is Act No. 143/2001 on Protection of Economic Competition as amended (the Competition Act or the Act). The procedures governing the application of articles 81 and 82 to agreements and practices having an effect on trade between EU member states have been introduced by an amendment to the Competition Act No. 340/2004, effective from 2 June 2004.

2 What additional national competition rules exist?

National competition rules are contained in the Competition Act, which entered into force on 1 July 2001. The Act replaced the Act on Protection of Economic Competition (Act No. 63/1991 as amended). The principal rationale behind the Competition Act was to bring its text fully into line with EC competition rules. Accordingly the Act is based on the principles of articles 81 and 82, as well as EC merger rules.

3 Which national authorities are responsible for enforcing articles 81 and 82?

Based on the amendment to the Competition Act (see question 1 above), the Office for Protection of Economic Competition (the Competition Office) has been given the power to apply articles 81 and 82. As a consequence, the Competition Office may now handle cases that affect trade between EU member states and is no longer restricted to domestic matters, though the European Commission's competence in such cases will still prevail. The Office is fully independent in its decision-making; it is headed by a chairman, who is appointed by the president of the Czech Republic upon the proposal of the government. The chairman's term at the Office lasts six years and can be renewed once. In addition to its competition agenda, the Office is responsible for oversight of public procurement and performs the function of a state-aid monitoring authority.

4 Which courts hear cases and appeals concerning articles 81 and 82?

The Czech Republic has not adopted special rules for designating appropriate courts in proceedings involving articles 81 and 82. Therefore, the jurisdiction of a court to hear a case involving EC competition rules will be determined by the general rules of jurisdiction laid down in Act No. 99/1963, the Civil Procedure Code as amended (the Civil Procedure Code). Section 9, paragraph 3, letter (k) of the Civil Procedure Code provides that regional courts act as courts of first instance in commercial matters concerning the protection of competition. Accordingly, regional courts may hear cases concerning protection of competition, under Czech or EC competition rules. The high courts will rule on appeals against decisions of the regional courts.

5 Does national law include rules on abuse of market power that are stricter than article 82?

No, the concept of a dominant position corresponds with the jurisprudence of the European Court of Justice (ECJ). Consequently the Competition Act prohibits abuse by one or more undertakings; however, the mere existence of a dominant position in the relevant market is unobjectionable under the Act, which also provides for a non-exhaustive list of examples of abusive conduct. In addition to the examples laid down in article 82, the Competition Act also lists predatory pricing and the essential facility doctrine.

National authorities – complaints and enforcement based on articles 81 and 82

6 What are the principal ways in which national powers of investigation and enforcement, and penalties for procedural non-compliance, differ from those of the European Commission?

The Competition Office's investigative powers are comparable to those of the European Commission under Regulation 1/2003. Accordingly the powers include mainly information requests and on-the-spot investigations. To this end, the Office's officials may enter any premises, land and means of transport of undertakings subject to investigation; examine and take copies or extracts from the books and other business records; seal any business premises, cupboards and books and records for the period and to the extent necessary for the inspection; and ask for an oral explanation on the spot. Moreover the officials may suppress opposition from the undertakings when conducting on-the-spot inspections. The Competition Act enables them to force entry or break into cupboards. Accordingly, the inspectors may without the cooperation of the undertakings search for any information necessary for the investigation.

The Office is also empowered to inspect, apart from the business premises of undertakings, other premises, including the homes of members of the statutory bodies and other members of staff of the undertaking concerned. No limit is placed on the premises that constitute 'other premises'. However, to conduct an inspection of other premises the Office must have a 'reasonable suspicion' that books and other business records of the company concerned are kept in those premises. Additionally, the Office is

entitled to carry out the inspection only with an authorisation from the respective judicial authority.

Unlike the European Commission under Regulation 1/2003, the Office is not explicitly empowered to conduct inquiry into a particular sector of the economy or into a particular type of agreements; however, it is assumed that the Office is entitled to carry out sector enquiries on the basis of its general powers of investigation.

The Office may impose disciplinary fines up to the amount of 300,000 korunas (around €8,400) or up to 1 per cent of net turnover aggregated in the preceding accounting period on anyone who intentionally or negligently fails to provide the Office with the requested information within the stipulated period; provides incomplete, false or inaccurate information; fails to provide the requested books and other business records; breaks the affixed seals or fails to submit to the on-the-spot investigation. This fine may be imposed by the Office repeatedly.

The Act does not deal with the question of the confidentiality of lawyer–client relations; however, the Regional Court in Brno held in the *Billa/Julius Meinl* case of 2006 that correspondence between the undertaking and an external legal counsel is protected by legal privilege. Accordingly, information disclosed to the company's external legal counsel cannot be used as incriminating evidence against the undertaking itself. This privilege, however, does not cover communication with the company's in-house lawyer.

7 May a third party challenge a decision by the authorities to close the file on a complaint?

If the Competition Office considers that a complaint is not justified or does not require its intervention and decides to reject the complaint, it must inform the complainant of its reasons. Such an administrative letter of the Office is not subject to appeal, however, the petitioner has the right under Act 500/2004 as amended (the Administrative Code) to file a complaint with the Office against its handling of the original complaint. The Office must decide on the complaint within 60 days of its delivery. Moreover, the complainant can file a new complaint in the same matter, particularly if the complaint is supported by new information and facts on the alleged infringements, which shall be considered again by the Office.

8 In what other circumstances may the authorities reopen a file?

In principle the Competition Office may reopen a case when new factors emerge of which the Office was not aware when it took its decision to close the file.

9 To what extent can a complainant remain anonymous to the undertaking being complained about?

The identity of a complainant may initially remain undisclosed to the undertaking that is the object of the complaint, if confidentiality is requested. However, if administrative proceedings are commenced, the Competition Office must allow the firm being investigated access to the file and thereby to the identity of the complainant. There is no legal provision in the Act or in the Administrative Code that would allow a complainant to keep its identity confidential in these circumstances. Nonetheless, the Office may also use information supplied informally or even anonymously by firms or individuals that do not wish to be identified as a complainant.

10 Can the authorities start an investigation on their own initiative?

The Competition Office is empowered to start an investigation on its own initiative. The Office may obtain the information to initiate proceedings from a variety of sources, including the media and complaints. The aim of the investigation is to enable the Office to acquire the additional information it will need if it is to decide on the legality of the agreement or practices in question.

11 What is the procedure for making a complaint and how is the complaint dealt with?

In general, complaints can be filed with the Competition Office by any natural or legal person. This would include the parties to the agreement, third parties that suffered from the effects of an agreement or an anti-competitive practice, as well as bodies representing such persons (eg, consumer groups). As a rule, the complainant should provide its own identification data, identify the undertaking or undertakings whose conduct the complaint relates to and provide comprehensive information on the alleged infringements of the competition rules.

Although there are no binding deadlines for handling the complaints, the Office should decide on complaints within a reasonable time, depending on the circumstances of each case and, in particular, its complexity. The complaints are not subject to any filing fees.

Upon receiving a complaint the Office is obliged to examine carefully the factual and legal statements. The Office will then decide whether to initiate a formal administrative proceeding or to reject the complaint. The Office is entitled to establish its own enforcement priorities, including the right to decide which agreements and conduct to investigate. As regards the allocation of cases between the Office and other EU national competition authorities, it can be stated that the Office will be in principle well placed to act if it receives a complaint about anti-competitive conduct substantially affecting competition in the Czech Republic, and the Office will have the power to end the infringement. However, pursuant to section 21a(3) of the Act the Office must suspend proceedings or reject a complaint where the same conduct is investigated by the Commission or another national competition authority.

12 How frequently do the authorities consult the Commission about their article 81 or 82 cases, or transmit information about such cases to other national authorities?

In general, the Competition Office may exchange with the Commission and other national competition authorities within the EU documents and other information pertaining to a particular case considered under EC competition rules, including confidential information. So far as we know, the Office has so far commenced only a few administrative proceedings pursuant to articles 81 and 82 in which it has been obliged to consult the Commission and provide it with a summary of the case, including the anticipated course of action.

13 Have the authorities been able to take proceedings and impose sanctions as a result of information received from the Commission or other national authorities? Have they made use of the possibility to ask authorities in other member states to carry out inspections on their behalf?

To our knowledge the Competition Office has not yet adopted any decision based on the information received from the Commis-

sion or other national competition authorities. Likewise, we are not aware of any case where the Office has asked other national competition authorities to carry out inspections on its behalf.

National authorities – remedies

14 What are the fines and other sanctions national authorities may impose on undertakings and individuals for infringement of articles 81 and 82?

When the Office discovers an infringement of the obligations stipulated by the Act or articles 81 and 82, it can impose fines up to 10 million krona (approximately €300,000) or up to 10 per cent of net turnover achieved in the last accounting period by the undertakings that breached the prohibitions set out by the Act. In addition to that, the Office may impose remedies on an infringing undertaking (see question 18 below).

15 Are fines imposed on foreign undertakings?

In principle, fines for violations of the Czech competition rules may also be imposed by the Competition Office on foreign undertakings. However, the Office would have only limited means, if any, at its disposal to enforce sanctions imposed on companies located outside its territorial competence.

16 Is there a national leniency policy?

In 2001 the Competition Office announced conditions under which undertakings in a cartel agreement that decide to cooperate with the Office may be exempted from, or granted significant reductions in, fines. In June 2007, the Office adopted a revised leniency programme, which replaced the 2001 programme. The revised leniency programme focuses on providing more guidance to applicants and increases transparency of the procedure in line with the ECN's model leniency programme. Improvements include clarification of the thresholds for immunity and reduction of fines and the conditions that must be fulfilled by the applicants, and amendment to the procedure, such as introduction of a discretionary marker system.

17 What other factors affect the level of fines imposed?

The Competition Office has formidable discretionary powers to impose monetary sanctions for breaches of the competition rules, whether they are committed intentionally or negligently. In fixing the amount of fine, the Office must have regard to the gravity, possible recurrence and duration of the infringement. Additionally, when assessing the gravity of an infringement the Office takes into account a large number of factors, the nature and importance of which may vary according to the type of infringement and the circumstances of the case. These factors include, in particular, the knowledge of the parties, the nature of the restrictions of competition, the conduct of each of the undertakings, the role played by each of them, the importance of the product, etc.

It is notable in this context that in May 2007 the Office published guidelines on the calculation of fines to increase transparency of its fines policy. Under the fining guidelines, the Office first establishes a 'basic amount' of fine that will be determined depending on the value of the infringing company's sales in the relevant market, to which the infringement relates; the gravity of the infringement (the guidelines distinguish between very serious, serious and minor infringements); and the duration of the infringement. The basic amount will then be adjusted – increased or decreased by up to 50 per cent – by the Office, taking into account aggravating and mitigating circumstances.

Neither the Competition Act nor the fining guidelines address the question of double sanctions. However, if parallel proceedings would lead to double sanctions then the principle of equity (ne bis in idem) would require that the earlier sanctions should be taken into account in determining the level of the later sanctions to be imposed.

18 Can behavioural or structural remedies be imposed?

Section 23 of the Competition Act provides that the Competition Office can impose remedies on an infringing undertaking. No limit is placed on the nature of these remedies, ie these can be of behavioural or structural nature. In the case of behavioural remedies, the Office can require an undertaking, for example, to stop or perform certain conduct, such as the supply of a product to third parties on a non-discriminatory basis. In the case of structural remedies, for example, it can order an undertaking to divest a particular asset or business. However, remedies must be proportionate to the competitive harm created.

19 In what circumstances will national authorities formally or informally accept commitments to close a file?

So-called 'commitment decisions' are being adopted by the Office if:

- the companies under investigation offer commitments that remove the Office's competition concerns; and
- the case is not one where competition is significantly impeded (this would exclude commitment decisions mainly in hard core cartel cases).

Further, it should be noted that the Office may not merely accept offered commitments, but it must critically analyse the offered commitment, the competitive problem at issue and the relationship between the two. As a matter of course, the company to which the decision is addressed must respect the commitments. Otherwise, the Office can impose on it a fine of up to 10 per cent of its turnover. Moreover, damages for the non-execution of the commitments could be claimed by aggrieved persons before the competent regional courts.

20 When will interim measures be ordered?

The Competition Office may adopt interim measures to prevent serious harm to competition. The basic requirements that must be met if an interim measure is to be adopted by the Office are:

- urgency (ie to prevent serious or irreparable harm to competition); and
- provisionality (ie, the Office may not address the substance of the issue).

Interim measures may not prejudge the main proceedings and they only preserve the status quo pending the final determination of the issue.

Unlike the Commission under Regulation 1/2003, the Office is not explicitly empowered to impose fines or periodic penalty payments on undertakings for infringements of interim measures ordered by the Office. However, it is supposed that the Office would be entitled in such case to enforce interim measures by means of a coercive fine of up to 1 million korunas, which can be imposed on an undertaking acting contrary to the enforceable

decision of the Office. This fine may be imposed by the Office repeatedly. Moreover, third parties which believe that they have been aggrieved by a breach of the interim measure ordered by the decision of the Office may file an action with the competent regional court requesting that the activity breaching the interim measure ceases and the appropriate damages are paid.

21 What limitation periods apply to substantive and procedural infringements?

The Competition Office may impose fines for substantive and procedural infringements of the Competition Act no later than three years after the Office learned of the infringement of the Act, and no later than 10 years after the infringement occurred.

National authorities – informal guidance and exemption

22 Is informal guidance available to businesses in specific cases and how is it given?

The Competition Act does not exclude the possibility of the Competition Office issuing opinions in specific cases. However, it is clear that the Competition Act gives priority to enforcement tasks. Consequently, the Office will likely limit opinions (guidance letters) only to such situations which would raise unresolved questions. Moreover, the Office is not bound by any time limitation in responding to a request for an informal opinion.

23 Can exemption decisions be granted to agreements under national competition law?

No, the amendment to the Competition Act (Act No. 340/2004) has eliminated the notification system and replaced it by the legal exception system. Consequently the undertakings no longer have the opportunity to notify agreements to the Competition Office and obtain individual exemptions or negative clearances. As a result, firms are obliged to decide by themselves whether the conditions for an exemption are fulfilled on the basis of the existing case law and administrative practice of the Office.

National courts – remedies

24 May a national court order anti-competitive conduct to cease, and may it order specific performance for example, grant of access to a network?

The Competition Office, an administrative authority for competition issues, has exclusive power to issue decisions on the legality of an anti-competitive agreement or practice, and can also order the undertakings in question to terminate the infringement and impose fines for infringements of the competition rules. On the other hand, the civil courts can only give a decision on the civil consequences of the above infringements.

However, when the question of the direct application of articles 81 and 82 arises in a case before a competent regional court, the court must be in a position to ensure protection of the rights of those subject to its authority (ECJ in case 127/73 *BRT v Sabam*). Accordingly we are inclined to say that the courts may have to stay the proceedings in competition cases before them and await the decision of the Competition Office, or may ask the Office to advise the court as amicus curiae. Assistance from the Competition Office (or the European Commission) should be sought particularly in cases in which there would be a real danger of the court's judgment diverging from the established case law of the ECJ or the European Commission. Moreover, the courts may have more difficulty than the Competition Office in establishing facts and obtaining evidence.

25 Who may sue for damages or other remedies?

In general, any natural or legal person that has the capacity to assume legal rights and obligations may bring an action for damages before the competent Czech courts. This follows from section 19 of the Civil Procedure Code.

Czech law does not recognise class actions or representation of a plaintiff by an association or any other bodies. However, under section 91, paragraph 1 of the Civil Procedure Code it is possible for several plaintiffs to bring an action jointly. Further, section 93 of the Civil Procedure Code enables a person that has a legal interest in the outcome of the dispute to join the plaintiff as a 'supporting participant'. In addition, for reasons of procedural economy, the court has, under section 112, paragraph 1 of the Civil Procedure Code, the right to join cases for the purpose of joint proceedings if the facts of the cases concerned are linked or if they involve the same parties.

26 What criteria do courts apply in awarding and calculating damages for infringement of articles 81 and 82?

In general, an undertaking violating article 81 or 82 will be obliged to compensate the victim for the damage arising therefrom. The assertion of damage, the evidential requirements, causation questions and the calculation of the damage will all be subject to the general principles set out in the Civil Procedure Code. The burden of proof will be based on the general rules of civil procedure.

Under these rules, the claimant must have been damaged by the agreement or practice that violates article 81 or 82. Moreover, the damage must have an adequate casual connection with the anti-competitive practice.

The court does not conduct its own investigation in civil proceedings but relies only on facts and evidence placed before it by the parties. Thus the parties decide the subject matter of the proceedings through their own submissions and the court is bound by it. The plaintiff must present his or her case and submit all facts supporting the action. In response, the defendant must make objections and pleas to his or her defence. Accordingly the party claiming a violation of the competition rules would carry the burden of proving an infringement of article 81 or 82.

Generally, damages under Czech law cover both direct damage (ie, diminution of the aggrieved party's property) and lost profit (ie, a proprietary harm consisting in the inability of the aggrieved party to achieve a proprietary benefit (profit) which would have been achieved had the relevant contract or practice been valid). On the other hand, Czech law does not recognise the concept of punitive damages. Assessing damages can become rather difficult in competition law cases. Moreover as there is no case law in the field of competition-based claims for damages, it is very difficult to assess the manner in which Czech courts might calculate the damages. However, it could be assumed that in price-fixing cartels the calculation of damage would be based on the difference between cartel and market prices. Likewise, in cases of refusal to deal, the damages would likely consist of those profits lost by the aggrieved undertaking.

27 Are interim injunctions available from the courts?

Yes, the competent court may take an interim injunction necessary to arrange matters fairly in cases awaiting full settlement before courts. The court acts at the request of a party that alleges damage to individual interests. The burden of proof rests on the plaintiff, who must prove that the conditions for applying the

Update and trends

[redacted] in the competition law in the Czech Republic is connected with a reform of procedural rules, in particular, elimination of a notification system. As a consequence of the introduction of a new enforcement regime, the Competition Office was relieved of the task of processing notifications and devoting resources to agreements that have little or no impact on competition. Instead, we have witnessed a clear focus on the most serious infringements of the competition rules, such as cartel agreements or abuses of market positions. In this connection we would expect further growth in anti-cartel actions resulting from a revised leniency programme, which gives interested companies more certainty about whether they can receive leniency and what is required. [redacted]

Additionally, it is worthwhile mentioning that a bill of a new brand Criminal Code shows that the Czech Republic is moving towards criminalisation of competition law violations, which for hard-core cartels would include imprisonment. The Competition Office believes that the threat of a criminal conviction and the possibility of a prison sentence should mean that individuals would think twice before engaging in cartels. Accordingly, we would expect businesses to have a growing interest in implementing competition compliance programmes or review their existing plans.

interim injunctions are met. The measures ordered by the court are open to appeal.

28 To what extent may national authorities become involved in civil court proceedings?

The Competition Act provides for the possibility of the Competition Office to assist domestic courts in proceedings for the application of articles 81 and 82. To that end, the Office may submit statements to the courts concerning the application of Community competition rules. Additionally, the Office may request the relevant court to transmit any documents necessary for the assessment of the case. The codification of these principles should prevent the domestic courts from taking a decision that would run counter to the Office's decision in the same case.

29 Has the European Commission made written or oral observations in civil court proceedings? Do national judges make use of their option to request information or an opinion from the Commission?

As far as we know, the European Commission has not so far acted as amicus curiae before the competent Czech courts.

30 How have national courts dealt with arguments based on article 81(3)?

As there is no case law regarding arguments based on article 81(3) by the Czech courts, this question cannot be answered for the moment.

National courts – contract litigation

31 May a party to an agreement that could infringe article 81 or 82 ask a court to declare the agreement void?

In competition cases, civil law proceedings are conducted in accordance with the general rules of the Civil Procedure Code (there are no special rules on cases involving Community competition law). Pursuant to the Civil Procedure Code, a party to an agreement may ask the competent court for examination of a legal status of the agreement. There is, however, some doubt as to whether a civil court is required by the Civil Procedure Code to stay the proceedings before it and await the decision of the exclusively competent authority, the Competition Office, or whether civil courts are free to apply competition rules, including articles 81 and 82, to their full extent. It is our position that the competent court should proceed as follows when facing a case involving issues of EC competition rules:

- where the agreement would unambiguously fall under article 81(1) of the EC Treaty (and was ineligible for exemption under article 81(3)) or certain practice would constitute an abuse of a dominant position under article 82, the court should go ahead and give judgment; or

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- if, on the other hand, there would be doubt in the court's mind whether the agreement or practice was caught by article 81 or 82, the court should stay the proceedings and await the decision of the Competition Office, or ask the Office to elucidate questions of fact and law concerning the application of the EC competition rules. The Office will be obliged to provide the courts with such help.

This approach would undoubtedly contribute to the full and coherent application of EC competition rules in the Czech Republic.

32 How are national courts likely to react to 'artificial' litigation by which parties attempt to obtain a declaration of compliance with article 81(3)?

As a rule, national courts should be concerned to guarantee the direct effect of article 81(3). On the other hand, there are strict conditions for obtaining a declaratory judgment under the Civil Procedure Code. For a declaratory action to be admissible, the claimant must establish the existence of a serious and imminent threat affecting its legal rights.

As there is no national jurisprudence on article 81(3), it is difficult to assess how Czech courts might deal with this issue. Additionally, it is questionable whether the courts in the Czech Republic are sufficiently familiar with the substance of Community competition law and in particular with detailed points of ECJ case law. Accordingly and at the theoretical level only, we assume that the competent courts would likely stay the proceedings before them and ask the Commission, the Competition Office or both for their support in application of article 81(3).

33 Are changes to legislation or other measures expected that will have an impact on this area in the near future?

No changes in the Czech competition law are expected in relation to the enforcement of articles 81 and 82.