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The Czech Competition Authority publishes guidelines on alternative resolution of certain competition issues

Czech Republic, Anticompetitive practices, Commitments, All business sectors

I. Introduction

In 2004, the first amendment to the Czech Competition Act was adopted which introduced into the national competition law a new mechanism designed for alternative resolution of certain competition disputes. By virtue of this amendment, the Office for the Protection of Competition (the "Office") was vested with the competence to terminate proceedings conducted against competitors for a conclusion of a prohibited agreement or abuse of their dominant position. A decision to this effect is conditioned upon the adoption of commitments aimed at a prompt restoration of effective competition.

Given the high level of generality of the statutory framework, the Office published in February 2008, on the basis of its four-year experience with "commitments proceedings", A notice on alternative resolution of certain competition issues (the "Notice"). The Notice outlines in more detail the circumstances under which the Office will not sanction the undertakings suspected of a prohibited conduct, but will first offer them a possibility to remove the anticompetitive problem on their own initiative.

II. Alternative resolution prior to the administrative proceedings

In principle, alternative resolution may assume two different forms. First, it may consist in the elimination of the anticompetitive practice prior to the initiation of administrative proceedings by the Office.

The Office takes the view that in cases of certain less significant offences it is not inconsistent with the preventive function of its enforcement policy to refrain from initiating administrative proceedings and from sanctioning the undertakings concerned. The major condition for this solution is that the competitors will effectively eliminate the whole problem in a short period of time.

Thus, if the Office establishes on the basis of a preliminary examination the existence of an anticompetitive practice which is less serious in nature and which has had only a limited impact on the market, it will notify the undertakings concerned about its findings. If the competitors inform the Office in writing within ten days that they are prepared to remove the problem, the Office will invite them to propose, within one month, concrete measures to this effect along with specific time limits within which the measures must be implemented.

The Office will approve the proposed measures if it comes to the conclusion that they are sufficient for a prompt and complete removal of the anticompetitive problem in question. This approach, however, is dependent on the fact that the infraction must be of a relatively insignificant character and the interest in a prompt restoration of effective competition outweighs the interest in sanctioning the wrongdoers.

By contrast, the Office will not accept the proposed measures if they are judged as capable of removing the problem only partially, in a longer perspective or if the desired result is conditioned on uncertain circumstances. In such a case, it will

initiate administrative proceedings with the undertakings concerned. Needless to say, it will open the proceedings, if the undertakings offer remedial measures but fail to implement them in practice, or if they offer no measures at all. III. Alternative resolution during the administrative proceedings

The second form of alternative resolution consists in the adoption of commitments in the course of ongoing proceedings before the Office. This solution is applicable, in principle, in three kinds of situations, namely in the case of (i) a less serious offence, (ii) a serious offence in the form of a prohibited agreement which has not yet been realized and (iii) a serious offence in the form of a prohibited agreement or abuse of dominance which has been realized but which has had only a limited impact on the market situation. The seriousness of the impact is assessed in terms of its territorial extent, the number of competitors and consumers affected, and the length of its duration. By contrast, this solution will not be utilized in cases of hardcore restrictions such as, for instance, agreements on price fixing or resale price maintenance.

If the Office establishes on the basis of a preliminary examination the existence of an anticompetitive practice falling within one of the three categories above, it will notify the undertakings concerned about its findings. The notification should, in essence, identify the anticompetitive conduct in question, specify the provisions of the Competition Act which, according to the preliminary view of the Office, have been violated and the factual evidence on which the Office based its conclusions.

Within 15 days of the notification, the parties may submit to the Office a proposal for commitments whereby the defective situation should be wholly rectified. The proposal has to be joined by all the undertakings concerned, i.e. by all parties to the prohibited agreement or by all subjects of the collective dominance in question. Since the submission of the proposal, the parties are legally bound by it and must duly fulfil all the commitments specified therein. If the parties, or even one of them, fail to do so, the submission will no longer be regarded as a proposal within the meaning of the Competition Act.

Once the Office has received the proposal, it will examine whether the commitments are adequate. They have to be of such a character and intensity as to be objectively able to remove the anticompetitive situation promptly and in full extent. If this is the case and, at the same time, the interest in an instant elimination of the problem outweighs the interest in sanctioning the offenders [1], the Office will render a decision whereby it will terminate the proceedings and impose on the parties the obligation to fulfil the proposed commitments.

The characteristic feature of this decision is that it declares no law infringement and, accordingly, imposes no sanction on the undertakings concerned. Although this may be regarded by these competitors as a major advantage of the alternative resolution, it might complicate to a certain extent the position of third parties. For instance, if they wish to advance a claim in judicial proceedings for a compensation of damage sustained as a result of the anticompetitive practice in question, they will be obliged to prove that the practice was unlawful. It bears no emphasis that, given the lack of investigative powers, it might be rather difficult for them to bear this burden of proof and to succeed with their claim.

The fulfilment of the commitments will be subject to a continuous supervision of the Office. If it ascertains that the parties do not perform the obligations defined in the decision, it will impose upon them a sanction in the form of a fine of up to CZK 10 mil. (approx. EUR 424,400) or, alternatively, a fine amounting to 10% of the net turnover for the last financial year.

The Office may institute proceedings against the parties in the case of (i) a fundamental change of circumstances that served as an essential basis for the decision on commitments, (ii) if the competitors act in disregard of the commitments imposed, or (iii) if the decision was rendered on the basis of incomplete or misleading information. In such a case, the opening of the proceedings will not be prevented by the res iudicata principle.

IV. Conclusion

The guidelines represent a significant tool for the enhancement of effective competition. They contribute to an increased

legal certainty by specifying in more detail the conditions under which the Office will approve the commitments of undertakings suspected of an anticompetitive conduct. The increased legal certainty may induce more competitors to opt for alternative solution and, in exchange for their impunity, to relinquish their unlawful practices. Seen from this perspective, the publication of the guidelines should be welcomed as a highly positive step towards the maintenance and further promotion of a pro-competitive environment in the Czech Republic.

[1] See the decision of the Office dated 15 May 2006, Case n° R 10/2005, ÈSAD Liberec.

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