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The Czech Supreme Administrative Court rules that the NCA was entitled to sanction a cartel activity a part of which had already been sanctioned by the European Commission (Toshiba)

Czech Republic, Procedures, ECHR, Ne bis in idem, Cartel, Sanctions/Fines/Penalties, Heavy industry

I. Introduction

On 10 April 2009, the Supreme Administrative Court of the Czech Republic (the «SAC») overturned a judgment of the Regional Court in Brno of 25 June 2008 that had annulled a decision of the Chairman of the Office for Protection of Competition (the «Office») of 26 April 2007 whereby a fine of CZK 941.881.000 had been imposed on major world-wide producers of gas insulated switchgears (among others Toshiba, Areva, Mitsubishi, ALSTOM, Fuji Electric Systems, Siemens, and Hitachi) which participated from 1988 until 2004 in a cartel for GIS projects in violation of Section 3(1) of the Czech Competition Act (Act n° 63/1991 Coll. until 30 June 2001 and Act n° 143/2001 Coll. since 1 July 2001). At the same time, the SAC referred the case back to the Regional Court for further proceedings.

In its judgment, the SAC rejected the Regional Court's opinion according to which the Office lacked the power to sanction under Czech law that part of the world-wide cartel activity which had been realized in the territory of the Czech Republic prior to its accession to the EC on the purported ground that the cartel activity was a single, non-divisible offence for which, though only in its part concerning the European Union prior to its enlargement, the cartel members had already been sanctioned by the European Commission. [1] According to the SAC, the Office was empowered to impose an additional sanction, which was justified by sound pragmatic grounds.

II. The reasoning of the Regional Court

The essential parts of the Regional Court's reasoning may be summarized as follows. As the Regional Court pointed out, the cartel activity in question had been terminated after the accession of the Czech Republic to the European Communities, i.e. after 1 May 2004. Therefore, it was necessary to apply EC competition rules, namely Regulation 1/2003 [2] to the whole cartel which, as the Regional Court held, constituted a single continuous offence. Referring to Article 11(6) of this Regulation, the Regional Court held that the proceedings initiated by the Commission in the matter after 1 May 2004 had deprived the Office of its competence to apply Article 81 of the EC Treaty to the cartel activity realized after 1 May 2004. Likewise, the Regional Court continued, the Office had been prevented from applying the Czech Competition Act to that part of the cartel activity which had occurred prior to 1 May 2004.

As the Regional Court explained, given the fact that the Office had lost its competence to apply Article 81 of the EC Treaty to the cartel activity in question, it would be contrary to the idea of the uniform application of competition law, brought about by Regulation No. 1/2003, if the Office were to possess after 1 May 2004 the competence for an application of Section 3(1) of the Czech Competition Act to that part of the cartel activity which had been realized before 1 May 2004. As the Regional Court emphasized, the cartel represented a single continuous offence which, as a whole, was to be subjected to EC competition law. This was the case, as the cartel members had already been sanctioned by the EC

Commission under Article 81 of the EC Treaty (though only for that part of the cartel activity which had been realized in the territory of the European Union prior to its enlargement on 1 May 2004). Therefore, the Regional Court concluded, given the fact that the ban on cartels codified in the Czech Competition Act embodies materially the same prohibition which is expressed in the Article 81 of the EC Treaty, the sanction imposed by the Office under Section 3(1) of the Czech Competition Act violated the ne bis in idem principle and denied the «basic meaning» of the current uniform application of competition law in the European-wide space which, according to the Regional Court, is characterised as a single market with a single competition subjected to a single jurisdiction.

III. The judgment of the Supreme Administrative Court

The SAC concurred with the Regional Court that the cartel activity was to be regarded as a continuous offence. This conclusion was logically sound and supported by the case law of the Court of First Instance [3] and the Court of Justice of the European Communities. [4] In addition, the SAC recalled the RWE Transgas judgment [5] in which it spelled out the essential preconditions for the application of the ne bis in idem principle in competition cases. However, as the SAC rightly pointed out, the present affair differed from the RWE Transgas case in that in the latter the offence (abuse of a dominant position) had been committed wholly after the Czech accession to the EC and, in addition, there were only single proceedings, conducted by the NCA (and no proceedings conducted by the EC Commission).

Having distinguished the RWE Transgas judgment from the present case, the SAC emphasized that a decisive part of the anti-competitive conduct under consideration had been realized prior to 1 May 2004. As the SAC explained, the part of the offence committed before the enlargement of the European Union did not represent a conduct which, upon the accession of the Czech Republic to the EC, would have become retroactively subjected to EC competition law. Instead, the SAC held, the EC jurisdiction had become applicable in relation to the territory of the Czech Republic only upon its accession to the EC. Accordingly, prior to that day, the conduct had been subjected to Czech law and to the exclusive jurisdiction of the Office which was fully empowered to sanction the cartel activity under the Czech Competition Act. A decision to the contrary would lead to absurd consequences, since in the absence of the competence of the European Commission to sanction the anti-competitive behaviour realized prior to 1 May 2004 in the territory of the Czech Republic, a decisive part of the cartel activity pertaining to the national territory would have remained unpunished.

IV. Conclusion

The judgment of the SAC elaborates upon its recent decisions rendered in the context of the parallel application of EC and national competition rules, namely the Transgas RWE [6] and Tupperware [7] judgments. It affirms that the EC competition law became applicable in the new EC Member State only upon their accession to the EC, whereas prior to that day they were entitled to sanction anticompetitive activities in their territory pursuant to their national laws, even though the respective proceedings might have been initiated after the accession date. Based on a clear and convincing analysis of this intricate area of competition law, the SAC's judgment significantly contributes to a better understanding of the mutual relationship between the powers of the European Commission and the national competition authorities.

[1] Decision of the EC Commission, COMP/F/38.899, of 24 January 2007.

[2] Council Regulation (EC) n° 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJEU L 1, 4 January 2003, p. 1-25).

[3] CFI, April 6th, 1995, Tréfileurope Sales SARL v. Commission, Case T-141/89, [1995] ECR II-791, § 85.

[4] ECJ, November 16th, 2000, Sarrió SA v. Commission, Case C-291/98 P, [2000] ECR I-9991, § 50.

[5] Judgment of the Supreme Administrative Court, 31 October 2008, Case n° 5 Afs 9/2008 - 328. For comments on the Transgas RWE judgment see Roman Barinka, The Czech Supreme Administrative Court rules that a concurrent application of EC law and national law by the NCA to one anticompetitive conduct does not violate the ne bis in idem principle (RWE Transgas), e-Competitions, n° 22673.

[6] See fn. 5.

[7] Judgment of the Supreme Administrative Court of 3 December 2008, Case n° 7 Afs 7/2008 - 200.

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