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# 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)

**Czech Republic, Procedures, ECHR, Ne bis in idem, Energy**

I. Introduction

On 31 October 2008 the Supreme Administrative Court of the Czech Republic quashed a judgment of the Regional Court in Brno of 22 October 2007 which had annulled a decision of the NCA whereby a fine of CZK 240 mil. (approx. EUR 8,5 mil.) had been imposed on RWE Transgas for an abuse of dominant position in the wholesale market of gas supplies in violation of Article 82 of the EC Treaty and Section 11(1) of the Czech Competition Act then in force [1]. The case was remanded to the Regional Court for further procedure.

In essence, the Supreme Administrative Court held that the Regional Court erred in its conclusion that the declaration by the NCA of the unlawfulness of the conduct at issue under both the EC and national competition law had violated the *ne bis in idem* principle. As the Supreme Administrative Court explained, EC law admits in principle a parallel application of the Communitarian and national competition rules to one anticompetitive conduct on the ground that both legal regimes are not fully identical but, albeit closely related, pursue different objectives.

II. The reasoning of the Regional Court

The RWE Transgas judgment was the first decision in which the Regional Court started to cancel decisions of the Office for an alleged violation of the *ne bis in idem* principle [2]. The main arguments of the Regional Court may be summarised as follows.

According to the Regional Court, the *ne bis in idem* principle comes into play in situations where a threefold condition is fulfilled : the identity of the facts, the identity of the offender and the identity of the conduct manifested in a violation of an identical legal interest. As the first and second part of the test was undoubtedly met in the case at hand, the Regional Court focused its analysis predominantly on the third part of the test.

The Regional Court acknowledged the *Walt Wilhelm* judgment of 13 February 1969 [3] in which the European Court of Justice (the "ECJ") held that one anticompetitive conduct may be the object of two parallel proceedings (conducted under the Communitarian and under the national competition laws) because both legal regimes safeguard different objectives: whereas the former aims at the elimination of trade barriers among the EU Member States, the latter protects solely the interests of the State concerned.

However, the Regional Court believed that the holding of the ECJ in the *Walt Wilhelm* judgment became obsolete after the adoption of Council Regulation (EC) n° 1/2003 [4] which was designed to meet the challenges of an integrated market and which, accordingly, calls for a unified, coordinated and decentralised application of competition law.

Echoing the opinion of the Advocate General Tizzano in the *Archer Daniels* case before the ECJ [5], the Regional Court opined that the current degree of integration of the competition law on the EC level and on the national level has significantly increased. As a result, it is no longer possible to assert the existence of a "double" competition on the Communitarian level and on the national level and the existence of a "double" territory where the competition takes place. Instead, a new system, represented by a single jurisdiction, has been brought into existence which safeguards one objective, namely the effective protection of competition on the common European market.

In conclusion, the Regional Court held that in keeping with the *ne bis in idem* principle it is not possible for the NCA to declare a violation of a Communitarian norm and, at the same time, of a national norm of competition law containing materially same prohibitions and impose a sanction for a cumulative violation of these provisions. Instead, the NCA should have declared either a violation of Article 82 of the EC Treaty, if the conduct was capable of affecting trade between States, or a violation of Section 11(1) of the Czech Competition Act, if the conduct was not capable of having such an effect.

III. The judgment of the Supreme Administrative Court

The Supreme Administrative Court began its analysis by examination of the permissibility of a concurrent application of EC and national competition laws under the Communitarian law. It held that although EC law, as it stands now, does not mandate a concurrent application of both legal regimes, it definitely does not exclude it. This follows unequivocally from the text of Article 3(1) of Regulation n° 1/2003 which provides inter alia that "[w]here the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall *also* apply Article 82 of the Treaty." (Emphasis added.)

This conclusion is supported by the *travaux préparatoires* which reveal that the original proposal of the text of Regulation n° 1/2003 providing for the exclusive application of EC law (where the conduct was capable of affecting trade between Member States) was eventually abandoned because some States wished to retain their competence to decide upon prohibited agreements and abuse of dominant position also according to their laws in order to be able to protect their own interests. A concurrent application of Communitarian and national competition law was therefore allowed under the so-called convergence rules set out in Article 3(2) of the Regulation.

According to the Court, the aforementioned observations are supported also by a constant case-law of the Court of First Instance and the European Court of Justice stretching from the above cited *Walt Wilhelm* judgment to the *Manfredi* judgment of 13 July 2006 [6]. As the Court pointed out, the *Manfredi* judgment was rendered more than two years after Regulation n° 1/2003 had entered into force and, yet, the ECJ did not feel it necessary to hold that the adoption of the Regulation had in any way modified the principles governing the concurrent application of the EC and national competition rules.

Next, the Supreme Administrative Court turned to the analysis of the applicability of the *ne bis in idem* principle under the European Convention on Human Rights. The said principle is enshrined in Article 4 of Protocol n° 7 which states that "no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been acquitted or convicted in accordance with the law and penal procedure of that State." As the Court pointed out, the text of the said provision makes it clear that the application of the principle presupposes two distinct proceedings, i.e. one in which the person is finally acquitted or convicted which then prevents the organs of the given State to prosecute or punish that person for the same offence in other proceedings.

However, given the fact that in the case at issue the sanction was imposed by the NCA in the course of single proceedings, Article 4 of Protocol n° 7 was inapplicable (irrespective of the fact that the fine was imposed for a violation of

two provisions, Article 82 of the EC Treaty and Section 11(1) of the Czech Competition Act). Essentially for the same reason was inapplicable also the *ne bis in idem* principle enshrined in Article 40(5) of the Czech Charter of Fundamental Rights which, according to the case-law of the Constitutional Court, also presupposes two distinct proceedings.

Having excluded the applicability of the *ne bis in idem* principle to the case at hand, the Supreme Administrative Court then turned to the question of whether RWE had committed by its conduct more than one delict (the so-called single-act concurrence; in Czech : jednoèinný soubìh).). For this to happen, it is necessary that the given conduct affects different interests safeguarded by law and thus brings about different legally relevant consequences.

In this respect, the Court held that the interests protected by the Czech Competition Act are different from those protected by the EC competition law. As the Court observed, the purpose of the Czech regime is the protection of effective competition on the domestic market. On the other hand, the aim of the Communitarian competition regime is not only the protection of economic competition but, through it, the protection of effective functioning of the common market against, in particular, activities sealing off national markets or affecting the structure of competition within the common market (*cf*. the *Manfredi* judgment of 13 July 2006, § 41).

Given the different objectives of the EC and Czech competition law, the Supreme Administrative Court concluded that one and the same conduct may constitute an abuse of dominant position within the meaning of Article 82 of the EC Treaty and, at the same time, an abuse of dominance within the meaning of the Czech Competition Act.

Finally, the Supreme Administrative Court held that if this is the case, the NCA may not impose a sanction for each committed offence. Rather, the NCA shall impose a sanction for the offence which attracts the heaviest penalty and, in determining its actual height, it shall take into account the fact that the offender has committed several offences (the so-called absorption principle).

IV. Conclusion

The RWE Transgas judgment is one of the most important precedents in the area of competition law handed down by the Supreme Administrative Court. It provides a deep, thorough and well argued analysis of the question of admissibility of a concurrent application of both EC and national competition law to one conduct.

Its main jurisprudential value lies, first, in the affirmation that the *ne bis in idem principle* presupposes two distinct proceedings and that this principle is not at stake in cases of a parallel application of EC and national competition rules in single proceedings. Second, and even more importantly, the judgment sends out a message that the reports of the death of distinct jurisdictional levels in European competition law have been greatly exaggerated: so far, there exists no single (in the sense of being exclusive) competition law system in Europe pursuing one single objective. On the contrary, the objectives pursued by the EC and national competition laws remain distinct and, accordingly, a concurrent application of these rules to one conduct may not necessarily violate the *ne bis in idem* principle.

[1] For comments on the decision of the Office, see Jana Jichova, *The Czech Office for the Protection of Competition confirms in appeal the abuse of dominant position of the natural gas incumbent although reducing the fine imposed to € 8.5 M (RWE Transgas)*, e-Competitions, n° 13612.

[2] Apart from the RWE Transgas case, the Regional Court in Brno employed a very similar argumentation in the Tupperware judgment of 1 November 2007; for comments see Jiri Kindl, *A Czech Regional Court rules that it is not possible to declare a concurrent breach of Czech and Community competition laws (Tupperware),*e-Competitions, n° 19961. The third case was the judgment of the Regional Court of 25 June 2008 in the so-called GIS cartel case which is now pending before the Supreme Administrative Court.

[3] ECJ, February 13th, 1969, Walt Wilhelm a. o., Case 14/68, [1969] ECR 1.

[4] 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*).

[5] ECJ, May 18th, 2006, Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission, Case C-397/03 P, [2006] ECR I-4429

[6] ECJ, July 13th, 2006, Manfredi, Joined Cases C-295/04 C-295/04, C-296/04, C-297/04 and C-298/04, [2006] ECR I-6619.

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