Czech Republic

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Introduction

1 What are the national laws and measures providing for enforcement of Articles 81 and 82?

Article 84 of the EC Treaty provides that national authorities may in the absence of other rules apply Articles 81 and 82 of the EC Treaty. Most EU Member States have accordingly entitled their competition authorities to apply these EC competition provisions. The Czech Republic has not so far adopted explicit rules empowering the Office for the Protection of Economic Competition (the Office/the Competition Office) to apply Articles 81 and 82.

However, the Competition Office has prepared an amendment to the current Czech competition legislation (the Amendment) which is expected to come into force on the day of the accession of the Czech Republic to the EU. One important change envisaged by the Amendment is that the Competition Office will have the power to apply Articles 81 and 82. As a consequence, the Competition Office will be entitled to handle cases which affect trade between EU Member States and will no longer be restricted to purely domestic matters, though the European Commission's competence in such cases will still prevail.

The Czech Republic has explicit rules for awarding damages for breaches of national competition rules, but these rules have not been adjusted so as to cover breaches of Articles 81 and 82. Nevertheless, Czech tort law is considered to cover such claims and, therefore, the Czech government has not worked out any such amendment for the time being.

2 What additional national competition rules exist?

In the Czech Republic, national competition rules are set out in Act No. 143/2001 Coll, on the Protection of Economic Competition (the Act/the Competition Act), which entered into force on 1 July 2001. The Act replaced the former Act on the Protection of Economic Competition (Act No. 63/1991 Coll, as amended). The principle rationale behind the new Act was to bring its text fully into line with existing EC competition law. Towards this end, the Act prohibits agreements restricting competition and abuse of a dominant position and lays down rules in relation to the control of concentrations. The Act is based on the effects doctrine, ie it applies to all undertakings provided their conduct (including conduct which took place abroad) distorts or may distort competition in the Czech Republic.

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

Pursuant to the proposed Amendment to the Competition Act, enforcement of Articles 81 and 82 will be carried out by the Competition Office located in Brno. The Office is fully independent in its decision-making. The Office is headed by a chairman who is appointed by the President upon the proposal of the government. The chairman's term of office is six years and it can be renewed once. The chairman may not be a member of any political party or political movement. In addition to its competition agenda, the Office is responsible for monitoring public procurement and as a monitoring authority in relation to state aid.

4 Which courts will hear cases and appeals concerning Articles 81 and 82?

After the accession of the Czech Republic to the EU, under fundamental principles of EC law, Articles 81 and 82 will have direct effect in the Czech Republic and could thus be applied by Czech courts in cases concerning, for instance, invalidity of contracts. As mentioned in 1 above, the Czech Republic has not yet adopted any special rules for designation of the appropriate court 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 Coll, the Civil Procedure Code, as amended (the Civil Procedure Code). Accordingly, such cases will be heard by appropriate regional courts. The High Courts will rule on appeals against decisions of the regional courts.

5 Does national law include rules on abuse of market power which 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, mere existence of a dominant position on the relevant market is unobjectionable under the Act. The Act 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 essential facility doctrine. As regards the latter, there is no compulsory access to facilities in all circumstances. Access may be denied if the applicant does not satisfy, for instance, certain personal requirements, payment conditions, or if there is no free capacity for additional use of the essential facility.

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 Office's investigative powers are comparable to those of the

European Commission under Council Regulation 17/62. Accordingly, the powers include information requests (including requests for relevant documents) and on-the-spot investigations. To this end, the Office's officials are empowered to enter any premises, land and means of transport of undertakings being subject to investigation, examine the books and other business records, take copies or extracts from such books or records, and ask for oral explanation on the spot.

Additionally, under the Amendment to the Competition Act, new investigative powers will be given to the Competition Office's officials, including the possibility to inspect private homes (if a reasonable suspicion exists that the relevant books or records are kept in those premises) and to seal business premises, books and records. However, the Office's decision ordering the inspection in the private premises may not be executed without the prior authorisation of the competent court.

The Office may impose disciplinary fines up to the amount of CZK300,000 (approximately €8,400) on anyone who intentionally or negligently fails to provide the Office with the requested information within the stipulated period of time, or provides incomplete, false or inaccurate information, fails to provide the requested books and other business records or fails to submit to the on-the-spot investigation. This fine may be imposed by the Office repeatedly.

The Competition Act does not deal with the question of the confidentiality of lawyer-client relations, however, in our view, it can be derived from general principles of Czech law that the Office's officials are not entitled to inspect correspondence between the undertaking and an external legal adviser. 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 Can a third party challenge a decision by the authorities either formally or informally to close the file on a complaint?

If the Competition Office considers that the complaint is not justified or does not require its intervention and decides to reject it, it is required to inform the complainant of its reasons for rejecting the complaint. Such a decision of the Competition Office is not appealable to the court. Nevertheless, the complainant could file a new complaint in the same matter, particularly if it is supported by new information and facts on the alleged infringements of the competition rules which shall be considered again by the Competition 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 Competition Office was not aware when it took its decision to close the file.

9 To what extent can a complainant keep its identity confidential from the undertaking(s) being complained about?

The Competition Office is obliged to conceal the identity of a complainant from the firm complained about, if confidentiality is requested. Furthermore, it should be mentioned in this context that the Competition Office may use also information supplied informally or even anonymously by firms or individuals who do not wish to be identified as a complainant.

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

Yes, the Competition Office is empowered to start an investigation on its own initiative, where it wishes to investigate an alleged infringement which has come to its attention. The Competition Office may obtain the information to initiate proceedings from a variety of sources including the press and complaints. The aim of the investigation is to enable the Competition Office to acquire 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 and fee payable for making a complaint?

In general, complaints can be made to the Competition Office about alleged infringements of the competition rules by any natural or legal persons. This would include the parties to the agreement, third parties who suffered from the effects of an agreement or an anti-competitive practice, as well as bodies representing such persons (eg consumer groups).

The deadlines for handling the complaint are laid down in the Governmental Decree No. 150/1958 Coll, on handling of complaints, notices and instigations of employees (the Decree). Under the Decree, the competent state bodies (ie the Competition Office in cases relating to the complaints on infringements of the competition rules) are obliged to settle the complaints in an orderly and timely manner. Simple cases should be decided within 10 days, and complex cases within 30 days of the day they were delivered to the competent authority. These time limits can be prolonged; in this case the complainant must be informed about the prolongation, including the reasons for the deadline extension. The complaints are not subject to any filing fees.

National authorities – remedies based on Articles 81 and 82

12 What are the maximum fines/sanctions national authorities may impose on undertakings for infringement of Articles 81 and 82?

When the Office discovers an infringement of the obligations stipulated by the Act, it can impose fines of up to CZK10 million (approximately €281,000) or up to 10 per cent of net turnover on the undertakings that breached the prohibitions set out by the Act. Pursuant to the proposed Amendment to the Act, the Competition Office will be empowered to impose the above fines also for infringements of Articles 81 and 82.

13 Will fines be imposed on foreign undertakings?

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

14 Which factors are relevant to the assessment of the fine?

Fines imposed by the Competition Office for infringements of the competition rules must be in proportion to the gravity and duration of the infringement. The Competition Office does not apply a scale of fines for particular infringements, but decides each case on its merits. The Office's discretion includes the power not to fine and to raise the level of fines in order to increase their deter-

rent effect. Neither the Competition Act nor the Amendment deals with the question of double sanctions. However, if parallel proceedings would lead to double sanctions, then the principle of equity would require that the earlier sanctions should be taken into account in determining the level of the later sanctions to be imposed.

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

Pursuant to the proposed Amendment to the Competition Act, the Competition Office will be entitled to issue a new type of decision – decision accepting commitments. It is expected that these decisions should allow the Competition Office to handle efficiently and swiftly cases where companies offer commitments sufficient to solve the competition problem identified. Commitment decisions would close the Office's proceedings without making a finding of infringement and without stating the compatibility of the agreements and/or practices with the domestic competition rules or Articles 81 and 82. The commitment decisions would make the commitments legally binding on the parties so as to ensure that they will be effectively complied with.

Substantial fines of up to CZK10 million (approximately €281,000) or up to 10 per cent of a net turnover on the undertakings concerned are foreseen by the Amendment to the Act where companies are found to be in breach of the commitments. Furthermore, damages for the non-execution of the commitments could be claimed by aggrieved persons before the competent regional courts.

16 What is the test to be satisfied for the ordering of interim measures?

The Competition Office has the power to adopt interim measures in order to prevent serious harm to competition. The basic requirements which must be met if an interim measure is to be adopted by the Competition 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.

17 What are the consequences of a breach of interim measures?

Unlike the European Commission under Regulation 1/2003, the Competition Office is not empowered to impose fines and/or periodic penalty payments on undertakings for infringements of interim measures ordered by the Office. Moreover, the Amendment to the Competition Act does not foresee any fines being imposed to ensure compliance with the interim measures. Thus it is doubtful whether the Office will be able to enforce effectively its decisions ordering interim measures under the Competition Act. On the other hand, third parties that believe that they have been aggrieved by a breach of the interim measure ordered by the decision of the Competition Office are entitled to file an action with the competent regional court requesting that the activity breaching interim measure is brought to an end and the appropriate damages are paid.

18 What limitation periods apply to substantive and procedural infringements?

The Competition Office may impose fines for substantive and/or procedural infringements of the Competition Act no later than three years following the day on which the Office learned of the infringement of the Act and, however, no later than 10 years after the infringement occurred.

National authorities – informal guidance

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

One of the main priorities of the Competition Office is to make its activities more transparent and accessible to the public. Among other things, all final decisions adopted by the Competition Office after 1 January 1999 are now available on the Office's website (*www.compet.cz*). This should enable companies to be aware of the Office's enforcement policy, thereby facilitating compliance with competition law. Likewise, issuing opinions in specific cases is not excluded by the Competition Act. It is, however, clear that the Competition Act and particularly the Amendment gives priority to enforcement tasks. Consequently, it can be expected that the Competition Office will limit opinions only to such situations which would raise unresolved questions.

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

The Competition Act currently enables the Competition Office to declare the general prohibition of agreements restricting competition inapplicable if the benefits of the agreement concerned outweigh the harm to competition caused by it. The criteria for obtaining an individual exemption are identical to those set out in Article 81(3). Under the Competition Act, there is no obligation to notify an anti-competitive agreement. However, in order to be eligible for an individual exemption and in order to eliminate the risk of becoming subject to fines in relation to a particular agreement, the agreement needs to be notified to the Competition Office.

However, the proposed Amendment to the Competition Act foresees the introduction of the legal exception system. Consequently, undertakings will no longer need an Office decision exempting an agreement, but will decide by themselves whether the conditions for an individual exemption laid down by the Competition Act are fulfilled on the basis of existing cases and previous decisions of the Competition Office.

National courts – remedies based on Articles 81 and 82

21 Can a national court order anti-competitive conduct to cease, and can it order specific performance, eg grant of access to a network?

The Competition Office, which is an administrative authority for competition issues, holds exclusive power to issue decisions on the legality of an anti-competitive agreement or practice and also has the right to order the undertakings in question to terminate the infringement and to impose fines for infringements of the competition rules. On the other hand, the civil courts are only entitled to 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 the course of a case before a competent regional court, the court must be in a position to ensure the 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 to await the decision of the Competition Office,

or may ask the Office to advise the court as amicus curiae. The assistance of the Competition Office (or the European Commission) should be invoked 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 Commission. Moreover, the courts may have more difficulty than the Competition Office in establishing facts and obtaining evidence.

22 Who can sue for damages or other remedies?

See 23 below.

23 What criteria will courts apply in awarding and calculating damages for infringement of Articles 81 and 82?

First and foremost it should be mentioned that the right of action for damages for harm caused by breach of Articles 81 or 82 has not been explicitly recognised by the Czech courts yet. Nevertheless, Czech tort law is supposed to cover such claims. Accordingly, an undertaking violating Article 81 and/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 damages 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 claiming party must have been damaged by the agreement or practice which violates Article 81 and/or 82. Moreover, the damage must have sufficient 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 them. The plaintiff is obliged to present its case and submit all facts supporting the action. In response, the defendant is obliged to make objections and pleas to its defence. Accordingly, the party claiming a violation of the competition rules would carry the burden of proving an infringement of Article 81 or Article 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. However, it could be assumed that in price-fixing cartels the calculation of damage can only 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.

24 Is an interim injunction 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 who alleges damage to individual interests. The burden of proof rests on the plaintiff who must prove that the conditions for applying the interim injunctions are met. The measures ordered by the court are open to appeal. The court to which an application for the interim injunction is made has a wide variety of measures at his disposal. In questions of contract law, it may for example order the continued performance of contractual obligations which have been wrongfully and unilaterally suspended.

25 To what extent may the national authority become involved in civil court proceedings?

The Amendment to the Competition Act provides for the possibility of the Competition Office's assisting domestic courts in proceedings for the application of Articles 81 and 82. To that end, the Competition Office will be entitled to submit statements to the courts concerning the application of the Community competition rules. Additionally, the Competition Office may request the relevant court to transmit any documents necessary for the assessment of the case. The codification of these principles should constitute a guarantee for the coherent application of EC competition rules in the Czech Republic, as it prevents domestic courts from taking a decision which would run counter to the Office's decision in the same case.

National courts – contract litigation

26 Can a party to an agreement which may 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 has the right to ask the competent court to examine the 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 and await the decision of the exclusively competent authority, ie 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 to a case involving issues of the EC competition rules. In a case where the agreement would unambiguously fall under Article 81(1) (and is ineligible for exemption under Article 81(3)) or a practice would constitute an abuse of a dominant position under Article 82, the court should go ahead and give its judgment. If, on the other hand, there would be doubt in the court's mind whether the agreement or practice is caught by Article 81 or Article 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 Competition 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.

27 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, it is questionable whether the courts in the Czech Republic are at this stage sufficiently familiar with the substance of Community competition law and particularly detailed points of ECJ case law. Accordingly, we assume that the competent courts would be likely to stay the proceedings before them and ask the Commission and/or the Competition Office for their support in application of Article 81(3).

Future developments

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

As mentioned above, the Competition Office has prepared an Amendment to the Competition Act, which is to be discussed by the parliament of the Czech Republic in the near future. The Amendment is an expression of the Czech Competition Office's commitment to take over increased responsibility for the enforcement of Articles 81 and 82 envisaged by Regulation 1/2003. This is to be achieved through the following main changes:

- introduction of a legal exemption system, so that companies will no longer be obliged to notify agreements to the Competition Office with a view to obtaining an exemption decision;
- the new thresholds for the mandatory notification of concentrations will put more emphasis on the actual effects of the concentration on competition structures in the Czech Republic;
- the current obligation to notify a concentration within one week of signing an agreement is likely to be replaced by an obligation to file prior to the implementation of the merger, acquisition or joint venture;
- new powers to be used in competition investigations are likely to be given to the Competition Office's officials, including the possibility of inspecting private homes (if a reasonable suspicion exists that the relevant books or records are kept in those premises) and to seal business premises, books and records.

It is expected that the above Amendment to the Competition Act will enter into force on the day of the accession of the Czech Republic to the European Union.

Trends

For competition policy in the Czech Republic, the years 2002 and 2003 also witnessed the conclusion of the negotiations with the European Union. It is worth pointing out that the Czech Republic has not applied for any transitional arrangements with respect to competition law, including state aid.

On 1 May 2004 the Czech Republic will become a member of the EU. EC competition law will naturally affect how competition law is applied in the Czech Republic, particularly with respect to Council Regulation 1/2003 which is to decentralise the application of EC competition rules by involving more national competition authorities and national courts in the enforcement of Community rules.

The application of the competition rules in the Czech Republic is carried out primarily by the Office for Protection of Economic Competition. Its responsibilities at national level are comparable to those of the European Commission under Articles 81 and 82. The principles and the approach developed by the European Commission and the European Court of Justice have had considerable influence on the Competition Office's decision-making practice, since the Czech Competition Act is based on Articles 81 and 82.

On the other hand, in the past year or two we have seen only a limited number of civil law litigation cases relating to competition in the Czech Republic. However, this trend may significantly change in the future, owing to an increased awareness among companies and lawyers of the possibilities of using the competition rules 'offensively'. Obviously, the forthcoming accession of the Czech Republic to the EU should also contribute to an increased volume of competition law-related litigation. Likewise, no longer having the option of notifying agreements to the Competition Office will mean that parties will increasingly have to turn to the courts in order to resolve the issues.

It remains to be seen whether Czech courts and especially Czech judges are sufficiently prepared to apply EC competition law and to ensure full legal protection for parties involved in civil litigation in matters relating to EC competition rules.

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