Czech Republic

Josef Vejmelka and Tomás Fiala
Vejmelka & Wünsch

Introduction

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

The national law providing for the enforcement of Articles 81 and 82 of the EC Treaty is Act No. 143/2001 Coll. on Protection of Economic Competition as amended (the Competition Act or the Act). The procedures that govern 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 Coll., effective as from 2 June 2004.

2 What additional national competition rules exist?

National competition rules are contained in the cited Competition Act, which entered into force on 1 July 2001. The Act replaced the former Act on Protection of Economic Competition (Act No. 63/1991 Coll. as amended). The principle 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 1 above), the Office for Protection of Economic Competition (the Competition Office or the Office) has been given the power to apply Articles 81 and 82. As a consequence, the Competition Office is nowadays entitled to handle cases which affect trade between EU Member States and is no longer restricted to purely domestic matters, though the European Commission's competence in such cases will still prevail. The Office is fully independent in its decision-making. The Office 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 in the Office last six years and can be renewed once. In addition to its competition agenda, the Office is responsible for surveillance of public procurement and performs the function of a state aid monitoring authority.

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

The Czech Republic has not yet adopted any 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 Coll., the Civil Procedure Code as amended (the Civil Procedure Code). Section 9 para 3 lit (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 are competent to hear cases concerning protection of competition, whether 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 which are stricter than Article 82?

No, the concept of a dominant position corresponds with the jurisprudence of the European Court of Justice (the 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. 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.

Furthermore it should be noted that an amendment to the Competition Act (Act No. 484/2004 Coll.) introduced a new kind of abuse of a dominant position consisting in the attempts of an undertaking to obtain various listing fees. However, the amendment has not introduced the concept of an economic dependence into the Competition Act, as originally suggested.

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 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 an oral explanation on the spot. Moreover the officials are empowered to suppress the 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 co-operation 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, in order 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 empowered to seal business premises and books or records.

The Office may impose disciplinary fines up to the amount of CZK300,000 (around €8,400) on anyone who intentionally or negligently fails to provide the Office with the requested information within the stipulated period of time; 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 Office 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 counsel. 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 an administrative letter of the Office is not subject to appeal. 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 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 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 Office may also use 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 that has come to its attention. The 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 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 about alleged infringements of the competition rules can be filed with the Competition Office 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 complaints 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, 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.

Generally speaking, 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 of the Act the Office is required to 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 is empowered to exchange with the Commission and other EU national competition authorities documents and other information pertaining to the particular case considered under EC competition rules, including confidential information. So far as we know, the Office has so far commenced only one 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/or 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 Commission and/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 the inspections on its behalf.

National authorities – remedies

14 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 or Articles 81 and 82, it can impose fines up to CZK10 million (approximately €300,000) or up to 10 per cent of net turnover achieved in the last calendar year by the undertakings that breached the prohibitions set out by the Act.

15 Are fines imposed on foreign undertakings?

In principle, fines for violations of the Czech competition rules can 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?

Yes, in 2001 the Competition Office announced conditions under which undertakings in a cartel agreement that decided to co-operate with the Office may be exempted from fines or may be granted significant reductions in fines. The Office's programme builds on the experience of the EC leniency programme.

Like the EU leniency policy, the Czech leniency programme guarantees full immunity for a qualifying first applicant. However, the decision in this respect is made only at the end of the proceedings, depending on whether the company offered decisive evidence and continued to cooperate. Additionally, in contrast to the EC Leniency Notice, the applicable leniency programme in the Czech Republic does not provide for written confirmation of conditional immunity early in the amnesty process. Accordingly, we are inclined to say that the above facts inject some element of uncertainty and subjectivity into the application of the leniency programme in the Czech Republic.

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, if these are committed intentionally or negligently. In fixing the amount of fine, the Office has to have regard to the gravity, possible recurrence and duration of the infringement. Additionally, in 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 in question 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.

The Competition Act does not address the question of double sanctions. However, if parallel proceedings would lead to double sanctions then the principle of equity (*ne bis in idem* principle) 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, eg, to stop a certain conduct and/or perform a 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 so as to close a file?

The so-called 'commitment decisions' are a novel instrument in Czech competition law introduced by the amendment to the Competition Act (see 1 above), and no case law has yet been evolved by the Competition Office in this area. Nevertheless, it can be assumed that the commitment decision should be adopted if:

- the companies under investigation offer commitments which 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, 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 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 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 empowered to impose fines and/or periodic penalty payments on undertakings for infringements of interim measures ordered by the Office. On the other hand, third parties which believe that they have been aggrieved by a breach of the interim measure ordered by the decision of the 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.

21 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 no later than 10 years after the infringement occurred.

National authorities – informal guidance

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 Coll.) 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 and/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 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 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 from 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 European Commission. Moreover, the courts may have more difficulty than the Competition Office in establishing facts and obtaining evidence.

25 Who can sue for damages or other remedies?

In general, any natural or legal person who has the capacity to assume legal rights and obligations has the capacity to 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 and/or any other bodies. However, it should be mentioned that under Section 91 para 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 who 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, para 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 will courts apply in awarding and calculating damages for infringement of Articles 81 and 82?

In general, 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 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 claiming party must have been damaged by the agreement or practice which violates Article 81 and/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 is obliged to present his/her case and submit all facts supporting the action. In response, the defendant is obliged to make objections and pleas to his/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 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.

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 is entitled to submit statements to the courts concerning the application of the 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 acted as *amicus curiae* 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 in the field of application of arguments based on Article 81(3) by the Czech courts, the question cannot be answered for the moment.

National courts – contract litigation

31 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 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, 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 a case involving issues of EC competition rules:

- In a case 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.
- 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. In order 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 case law in the field of application of Article 81(3) by the Czech courts, it is difficult to assess the manner in which Czech courts might deal with this issue. Additionally, it is questionable whether the courts in the Czech Republic are at this stage 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 and/or the Competition Office for their support in application of Article 81(3).

Future developments

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

No changes in the Czech competition law are currently expected in relation to the enforcement of Articles 81 and 82. Nonetheless, the government is considering a draft amendment to the Competition Act. The draft amendment seeks to reflect the changes brought about by Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings. For this purpose the draft amendment should set up a framework for cooperation between the Competition Office and DG Competition for the allocation of jurisdiction in merger cases. Further, the substantive test for the assessment of mergers should be modified in such a way that the creation or strengthening of a dominant position will not be the sole criterion to assess the compatibility of a concentration with the competition rules. Finally, the draft amendment presupposes the abolition of a system of national block exemptions, which are currently applied in parallel with EC block exemptions.

Vejmelka & Wünsch

Contacts: Josef Vejmelka and Tomás Fiala

Italská 27
120 00 Prague 2
Czech Republic

Tel: +420 222 25 30 50
Fax: +420 222 25 30 90
e-mail: prague@vejwun.cz
Website: www.vejmelkawuensch.cz