The New Competition Act in the Czech Republic

*Tomáš Fiala, Ph.D.**

The Europe Agreements[1] that the European Union and its Member States concluded with the States of Central and Eastern Europe over the past decade provide that the approximation of national legislation to that of the Community is a major precondition for the candidate countries' economic integration into the Community. In this context, approximation (harmonisation) of national competition rules to the basic competition law principles applicable in the Community has been considered as one of the priorities in the overall process of approximation of legislation and, inherently, as crucial from the point of view of the requirements for eventual accession.

The re-birth of the market economy in the Czech Republic in the wake of the political changes that started in November 1989, brought about the need for an early adoption of an effective competition legislation. Thus, as early as in 1991, and following some 40 years of centrally planned economy during which a notion of competition was virtually erased from the business vocabulary, the Czech Parliament signed a new/modern Competition Law.[2] This Law was construed on the basic E.C. competition law concepts, but it was also designed to address problems of a highly monopolised economy that the new Czech democracy inherited. On July 1, 2001, the above competition law was replaced by a new competition legislation, in the form of Act No. 143/2001 Coll. of April 4, 2001 on the Protection of Competition ("the Act" or "the Competition Act").[3] The principal rationale behind the new Act is to bring its text fully into line with the existing E.C. competition law.

The purpose of this article is to introduce the main principles of the new competition regime, including in relation to both its substantive and procedural provisions, as well as to provide some examples demonstrating the application of E.C. (antitrust) practice and experience in the decision-making of the Czech Competition Authority.

Purpose and scope of the Act

Although the provisions of the Act do not expressly state the purpose of the Act, given its underlying concepts, the primary objective is to secure free competition for all undertakings operating on the Czech market. 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 principle, *i.e.* it applies to all undertakings, provided their conduct (including conduct which took place abroad) distorts or may distort competition in the Czech Republic.

Under the Act, the term "undertaking" means any natural or legal persons, their associations and other groupings, including where such associations and groupings are not legal persons, to the extent that they take part in competition or may affect competition through their activities.[4] Clearly, the term is broad enough to cover any kind of entities and their associations—a sole trader as well as a group of companies are considered an undertaking.

In principle, the Act applies to all sectors of the economy. The Act equally applies to private and public undertakings. The Act newly regulates the application of competition rules with respect to undertakings entrusted with the operation of services of general economic interest by virtue of a law (*e.g.* Postal Services Act) or an administrative decision adopted in compliance with such law.[5] In harmony with Article 86(2) of the E.C. Treaty, the Act is applied to these undertakings in so far as such application does not render the performance of these services impossible. Services of general economic interest are those "universally" provided services which need to be provided on a regular

* *Freshfields Bruckhaus Deringer, Prague.* The author is grateful to Zdenek Foit for his help and comments on an earlier draft of this article.

1 The Europe Agreements provide the legal basis for bilateral co-operation between the European Union and states of Central and Eastern Europe. The E.C. signed the Europe Agreements with Bulgaria (1993), Czech Republic (1993), Estonia (1995), Hungary (1991), Latvia (1995), Lithuania (1995), Poland (1991), Romania (1993), Slovakia (1993), Slovenia (1996). In the past, the E.C. concluded similar agreements (Association Agreements) with Turkey (1963), Malta (1970) and Cyprus (1995).

2 Act No. 63/1991 Coll., on the Protection of Economic Competition, as amended.

3 An English version of the new Competition Act is available on the Office's Internet page (www.compet.cz).

4 See Art. 2 para. 1 of the Act.

5 See Art. 1 para. 2 of the Act.

basis, in the entire territory, and for reasonable prices (*e.g.* basic postal service, operation of the public telephone network, etc.).[6]

Anti-competitive agreements

Similar to Article 81(1) of the E.C. Treaty, the Act includes a general prohibition against agreements restricting competition, decisions and concerted practices.[7] It contains a non-exhaustive list of prohibited practices which is almost identical to the list included in Article 81(1) of the E.C. Treaty. In addition, the Act now specifically lists group boycotts as an example of possible infringement, a principle that has also evolved in the Commission's decision-making practice.[8]

The *de minimis* rule

The Act contains a *de minimis* rule according to which the general prohibition does not apply to certain agreements of minor importance. Agreements are considered *de minimis* if:

— a combined market share of the parties to the horizontal or mixed agreement[9] does not exceed 5 per cent on the relevant market; or
— a combined market share of the parties to the vertical agreement does not exceed 10 per cent on the relevant market.

Similar to the E.C. approach, the *de minimis* rule does not apply to hard-core anti-competitive practices such as price fixing, market sharing, resale price maintenance, or bans on parallel trade. Further, the *de minimis* rule does not apply where competition is restricted by the cumulative effect of parallel networks of similar agreements.[10]

6 See footnote 1 of the Act.
7 See Art. 3 para. 1 of the Act.
8 See, *e.g. SMM & T Exhibition Agreement*, D. Comm. December 5, 1983, [1983] O.J. L376/1.
9 A mixed agreement means an agreement concluded between undertakings operating at the same horizontal level as well as at different vertical levels.
10 It is worth noting that the Act does not contain a threshold for situations involving the cumulative effect of parallel networks of similar agreements similar to the new Commission's *de minimis* Notice [2001] O.J. C368 In practice, this could mean that the undertakings operating in the sectors characterised by the existence of distribution networks, such as beer and petrol distribution, will not benefit from the *de minimis* rule.

Exemptions

It is generally accepted that in certain circumstances, some restrictive practices falling within the general prohibition of agreements restricting competition may have beneficial effects and be exempted from the prohibition. Following the system under Article 81(3) of the E.C. Treaty, the Act provides for individual and block exemptions.

Individual exemptions

The criteria for obtaining individual exemption are almost identical to those set out in Article 81(3) of the E.C. Treaty. Article 8 of the Act requires two positive and two negative conditions to be fulfilled for an agreement to be exempted from the prohibition stated in Article 3 of the Act.

For an agreement to be exempted, it must contribute to improving production or distribution of goods or to the promotion of technical or economic progress. A further condition is that the agreement allows consumers a fair share of the resulting benefits. At the same time the agreement must not impose restrictions on undertakings that are not indispensable for the attainment of the positive objectives; and finally it must not lead to elimination of competition on the relevant market. These conditions are cumulative, *i.e.* all must be satisfied in order for an agreement to qualify for an exemption.

Block exemptions

Under Article 26(1) of the Act, the Competition Office is obliged to adopt by virtue of a decree general (block) exemptions for certain categories of agreements that correspond with the block exemptions now in force in the E.C. These block exemptions have already been adopted and cover the following categories of agreements[11]:

— vertical agreements;
— technology transfer agreements;
— motor vehicle distribution and servicing agreements;
— research and development agreements;
— specialisation agreements;

11 The block exemptions on vertical agreements, research and development agreements and specialisation agreements are based on a more economic approach which reduces the regulatory burden for companies and allows more effective control of agreements entered into by the companies with significant market power.

— agreements in the field of railway, road and inland waterway transport;
— agreements concerning consultations on prices in passenger air transport and allocation of airport slots;
— agreements in insurance sector.

The Competition Office may adopt additional block exemptions other than those listed if it finds that the restriction of competition would be outweighed by benefits to other participants in the market, in particular consumers.

Exemption procedure

The Act does not require anti-competitive agreements to be notified. However, individual exemptions cannot be obtained without notification of an agreement to the Competition Office.

Under Article 9 of the Act, undertakings may apply for an individual exemption and must provide the Competition Office with all the necessary documentation to demonstrate that the agreement qualifies for an individual exemption. The Competition Office has to take a decision within two months of the initiation of the proceedings. Failure to take a decision within this period shall be regarded as a positive decision. The introduction of this tight time-limit constitutes an improvement in comparison with the E.C. competition law and should be welcomed by the industry.

An individual exemption is granted for a limited period of time only (up to five years), although the period may be extended provided that both the positive and negative conditions for granting the exemptions continue to be satisfied. The Competition Office may attach conditions and obligations to its exemption decision.[12]

The Competition Office can withdraw a previously granted individual exemption on any of the following grounds: material change in the circumstances, breach of the attached condition or obligation, false (information) statements on the basis of which the exemption was obtained, or abuse of the exemption.[13]

Negative clearance

Under Article 7(2) of the Act, the undertakings are entitled to request the Competition Office to issue a decision declaring that an agreement in question does not infringe the relevant provisions of the Act. The filing formalities are the same as in the case of notifications in relation to the individual exemptions.

Abuse of a dominant position

Articles 10 and 11 of the Act deal with abuse of a dominant position. The Act prohibits abuse by one or more undertakings; mere existence of a dominant position on the relevant market is unobjectionable under the Act. There is no exemption from abuse of a dominant position. The concept of a "dominant position" is based on market power and corresponds with jurisprudence of the European Court of Justice.[14] According to Article 10(1), a dominant position is deemed to exist where the market power that an undertaking (or more undertakings) has allows it "to behave to a significant extent independently of other undertakings or consumers". In practice, the market share of the undertaking in question is regarded as a first, the most important, indicator of the existence of a dominant position. In this respect, the Act contains a rebuttable presumption according to which a firm with a market share below 40 per cent will not be considered to be dominant. However, when defining a dominant position the Office has to take into account also other criteria such as the structure of the relevant market, barriers to entry or economic and financial strength of the undertakings concerned.

Article 11 of the Act provides a non-exhaustive list of examples of abusive conduct. In addition to examples laid down in Article 82 of the E.C. Treaty, 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, *e.g.* certain personal requirements, payment conditions, or if there is no free capacity for additional use of the essential facility. It remains to be seen how the Competition Office will approach the essential facility cases. In any case, one would hope that the Office will exercise caution in handling this issue avoiding situations where a forced access is clearly unjustifiable both on legal and economic grounds.

The undertakings are entitled to file applications with the Office in order for it to assess whether certain conduct does or does not constitute an abuse of dominance (negative clearance).

12 See Art. 9 para. 2 of the Act.
13 See Art. 9 para. 5 of the Act.

14 See, *e.g.* Case C–85/76, *Hoffmann-La Roche v. Commission* [1979] E.C.R. 461; [1979] 3 C.M.L.R. 211 or Case 322/81, *Michelin v. Commission* [1983] E.C.R. 3461.

Control of concentrations

Substantive issues

Article 12 of the Act specifies which transactions are deemed to constitute mergers and acquisitions for the purposes of the Act. Concentrations comprise two main categories of transactions. First, the Act applies to transactions whereby two companies legally merge into one. Secondly, it covers transactions whereby one company acquires sole control of the whole or substantial part of another or whereby two or more companies acquire joint control of another firm (joint venture) which performs on a lasting basis all the functions of an autonomous economic entity and does not co-ordinate competitive behaviour of the parties. The Act also states that the temporary holdings of banks and control by office holders in bankruptcy and liquidation proceedings are not considered as concentrations.

As a general rule, the undertakings must notify the Competition Office concentrations when one of the following two thresholds is met[15]:

> (i) the aggregate world-wide net turnover of all undertakings concerned for the last accounting period exceeds CZK 5 billion (approx. EUR 140 million), or
> (ii) the aggregate net turnover of all undertakings concerned achieved on the market of the Czech Republic during the last accounting period exceeds CZK 550 million (approx. EUR 15.5 million) and each of at least two of the undertakings concerned achieved a net turnover of the minimum of CZK 200 million (approx. EUR 5.6 million) during the last accounting period.

The world-wide turnover must be interpreted in connection with Article 1(3) of the Act which encompasses the effects doctrine.[16] Consequently, a concentration falls under the jurisdiction of the Czech Competition Office as long as it has (or may have) an effect on competition in the Czech Republic. In practice, a concentration that occurs outside the Czech Republic, and assuming the turnover thresholds are met, is to be notified if the undertakings concerned in some way operate on the Czech market, in particular through sales operations.

15 See Art. 13 of the Act.
16 Art. 1(3) states that "The Act shall also apply to action of undertakings, occured abroad, which distort or may distort competition in the territory of the Czech Republic".

It is worth mentioning in this context that the Competition Office has recently issued (on its Internet Website) an official Communication explaining how the Competition Act is to be applied to the foreign-to-foreign mergers. It follows from the Communication that such mergers *do not* have to be notified provided the combined market share of the merging companies on the relevant market in the Czech Republic is below 10 per cent. However, this quantitative threshold is not an absolute yardstick. The concentration between foreign undertakings not exceeding the above market share threshold may still be considered by the Office to fall under its jurisdiction in certain situations. In such cases, the Office will refrain from applying the above test. This could, for instance, be the case when at least two of the merging companies operate on the territory of the Czech Republic through their subsidiaries.

Article 14 of the Act lays down rules for calculation of turnover. Generally, aggregate turnover of each undertaking concerned must include subsidiaries, parents companies, sister companies and jointly controlled firms. Intra-group sales are excluded. The Act also contains special provision for calculating turnover of banks and insurance companies.

By way of derogation from the general principle that turnover should be calculated on a consolidated group basis, Article 14(4) of the Act provides that where the concentration consists in the acquisition of part of an undertaking, only the turnover achieved by such part shall be taken into account with regard to the seller.

Under Article 17, the Act prohibits concentrations which create or strengthen a dominant position as a result of which effective competition would be significantly impeded. This "competition test" requires an assessment of several issues listed in Article 17(1) of the Act. The list is similar to that contained in Article 2 of the E.C. Merger Regulation and includes in particular the market shares of the merging companies, the financial and economic strength of the companies concerned, barriers to entry and the possibility of choice for the consumers. The Office may attach conditions and obligations to its clearance decisions.

Procedural issues

The notification of a concentration must be submitted to the Competition Office within one week of the conclusion of the contract establishing the concentration or another way of acquisition of control over another

undertaking.[17] In case of public bids, undertakings are obliged to file the notification before its publication.[18]

Notifications of concentrations must be made on the notification form contained in the Annex of the Office's Decree No. 368/2001 Coll. The form itself is long and complex; the amount and type of information required closely resembles Form CO under the E.C. Merger Regulation. Companies are advised to begin gathering information and actual drafting well in advance. The notification will only be valid once the fee of CZK 10,000 (approx. EUR 280) has been paid in full to the Competition Office's bank account.

The Act requires suspension of concentrations prior to their clearance. Specifically, undertakings must not determine or influence competitive behaviour of the (acquired) controlled undertaking before the Office's final clearance decision, in particular by the execution of voting rights. However, the Competition Office may, on request, grant a derogation from the suspension of concentration, subject to certain conditions or obligations, and only after it has considered the concentration's effects on competition.[19] Within one month after the notification, the Competition Office must decide to[20]:

(i) declare that the concentration falls outside the scope of the Act;
(ii) approve the concentration; or
(iii) investigate the matter further.

When the Competition Office fails to issue any of these decisions within one month after the notification, the concentration is deemed to have been approved. In cases where the initial phase (phase I) of the investigation will raise serious concerns as to the significant impediment to competition, an in-depth investigation (phase II) will be started. When the phase II is opened, the Office is obliged to issue its decision within further four months (*i.e.* within five months from the date of notification). In case of concentration in the form of a public bid, the decision must be adopted within two months of the initiation of proceedings. If the Competition Office fails to take decision within these deadlines, the concentration is deemed to have been approved. The Office may attach conditions and obligations to its clearance decision to ensure that the parties comply with commitments they have given to the Office in order to modify the original merger plan.

The Office can revoke its clearance decision if the decision was based on incorrect information for which one of the parties was responsible, or was obtained by deceit, or if the parties fail to comply with conditions and obligations attached to the decision.[21]

Procedural and institutional framework

The Competition Office

The application of the Act is carried out primarily by the Office for the Protection of Competition located in Brno. The Office is fully independent in its decision-making. The Office is headed by the Chairman who is appointed by the country's President upon the proposal of the Government. The Chairman's term in office is six years, which 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 further engaged in the surveillance over public procurement[22] and as a monitoring authority in relation to state aid.[23]

The investigation and decision-making procedure

The Office's decision-making procedures are governed by both the general rules laid down in the Administrative Proceedings Act[24] and by special rules contained in the Competition Act.

The proceedings are commenced either upon undertakings' request or upon the *ex officio* initiative of the Office. With the exception of the individual exemption procedure and the procedure relating to the control of concentrations, all other proceedings carried out by the Office are subject to deadlines contained in the Administrative Proceedings Act. Under the latter, simple cases should be decided without delay. Other cases should be decided within 30 days, and complex cases within 60 days from the commencement of the proceedings. These time-limits can be prolonged; in this case the participants to the proceedings must be informed about the

17 While the Act does not provide for the extension of this deadline, the Office is nevertheless willing to grant informal waivers of the deadline, as long as the parties make an initial contact during the one-week period.
18 See Art. 15 of the Act.
19 See Art. 18 of the Act.
20 See Art. 16 of the Act.
21 See Art. 19 para. 1 of the Act.
22 Act No. 199/1994 Coll., on Public Procurement, as amended.
23 Act No. 59/2000 Coll., on State Aid.
24 Act No. 71/1967 Coll., on Administrative Proceedings, as amended.

prolongation, including about the reasons for the deadline extension.

The Office's investigative powers are comparable to those attributed to the European Commission under Council Regulation 17/62. 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, and ask for an oral explanation on the spot.[25]

Proceedings carried out by the Office are two-stage. The first instance decisions are issued by the individual executive departments which are organisation units of the Office. Such decisions may be appealed to the Chairman of the Office within 15 days of its receipt. The appeal has a dilatory effect. In the appeal proceedings, the Chairman may:

— confirm the decision and turn down the appeal;
— change the first instance decision; or
— revoke the first instance decision and refer the case back to the relevant department for reconsideration and new decision.

It is possible to seek a judicial review of the legality of the Office's decisions at the High Court in Olomouc. The Court's decision is final. The Court can confirm or cancel the decision of the Office.

Sanctions

When the Office discovers an infringement of the obligations stipulated by the Act, it can decide to impose remedial measures and lay down a reasonable deadline in order to enable compliance with these measures. Moreover, the Office may by its decision impose fines of up to CZK 10,000,000 (approx. EUR 281,000) or up to 10 per cent of the net turnover on the undertakings that breach the prohibitions set out by the Act. The Office may also impose disciplinary fines up to the amount of CZK 300,000 (approx. EUR 8,400) on anyone who fails to provide the Office with necessary assistance. In the course of 2000, the Office imposed fines for anti-competitive behaviour totalling CZK 36,350,000 (approx. EUR 1 million). In this period for example, the Office imposed record fine totalling CZK 7,800,000 (approx. EUR 219,000) on participants in a cardboard cartel. The Office's fines take into account the seriousness and duration of the offence. The extent to which the companies co-operate with the Office can also affect the final level of the fine.

Compensation for damages

Undertakings that believe that they have been affected by anti-competitive practices in the market of the Czech Republic may, in addition to lodging a complaint with the Office, bring its case before a court requesting that (i) the activity restricting competition is brought to an end; (ii) the offending situation is rectified; (iii) appropriate compensation and damages are paid and that illegal property benefits surrendered (returned). Such cases are heard by appropriate regional courts.

Application of the E.C. experience in the Office's decision-making

In the light of the harmonisation of law required by the Europe Agreement, it is of equal importance that the actual application of the law in individual cases conforms to the interpretation of competition law as set forth in the case law of the E.C. Court of Justice and Commission's decisions. Further, in order to afford legal security to undertakings being subject to competition rules on both national and E.U. levels, it is of importance that the national competition authorities do not differ in the interpretation of similar competition law concepts.

Although the judgments of the European Court of Justice and decisions of the Commission are not binding on the Office and do not constitute precedents for the decision-making in the relevant matter, such decisions serve as an important source of information and inspiration which is helpful in the application and enforcement of competition principles. This view was confirmed by the High Court judgment in the matter of *Škoda automobilová, a.s.*[26] The High Court stated the following:

> . . . the Competition Act adopted the basic ideas of the Treaty of Rome which is an absolute necessity with a view to the harmonisation of law. The defendant (*i.e.* the Office) is not at fault if it strives to apply the law in a manner compatible with the practice of the E.C. Court of Justice (or the Commission). At the same time, the defendant has to bear in mind the binding effect of the positive legal regulation of competition in the Czech Republic, *i.e.* the legal argumentation, including the procedures employed, must be in accordance with domestic legal norms.

25 See Art. 21 para. 4 of the Act.

26 Judgment of the High Court of November 14, 1996.

Škoda filed a constitutional complaint against the High Court judgment, seeking annulment of the judgment and arguing, *inter alia*, that in its interpretation of the abuse of dominance on the part of Škoda, the Office relied on Article 82 of the Treaty of Rome. According to the findings of the Constitutional Court, an interpretation drawing on the competition rules set forth by the Treaty of Rome cannot be deemed to be anti-constitutional. The Treaty of Rome is based on the same values and principles as the Constitutional Order of the Czech Republic.[27]

In its decision-making practice, the Office relies on the findings of the Commission and the European Court of Justice. For instance, in 1997 and 1998, the Office examined a number of contracts for exclusive purchase of beer concluded between major Czech breweries and a large number of restaurants. The cumulative effect of these arrangements resulted in a significant barrier to entry, in particular for small and medium sized breweries (approximately 60 per cent of the restaurants in the Czech Republic were tied by those contracts). Following an in-depth investigation of the industry, the Office adopted three decisions prohibiting the above-mentioned contracts.[28] The Office's assessment of the cumulative effect of parallel networks of similar agreements in the given case was inspired by the approach of the Commission and the E.C. Court of Justice. The text of the decision actually cites the E.C. Court of Justice concerning the issue: *decision in Stergios Delimitis, Langnese-Iglo and Schöller Lebensmittel GmbH.*

Conclusion

The new Competition Act, inspired by and principally based upon the E.C. competition law concepts, is a significant development in the Czech competition law regime. It is too early to provide an overview of the changes in the competition policy of the Czech Competition Office under the new Competition Act. Nevertheless, it is believed that the Act provides an adequate tool for the enforcement of a strong competition policy in the Czech Republic in the future, as well as a framework offering the high degree of legal certainty which should be welcomed by the business community.

27 Finding of the Constitutional Court of May 29, 1997.

28 Matter No. 11/98–240, *Plzeňský Prazdroj* (the Office's decision of March 30, 1998), No. 91/97–240, *Pivovar Radegast* (the Office's decision of March 16, 1998), No. 92/97–240, *Pivovar Krušovice* (the Office's decision of March 16, 1998). Pivovar Radegast and Pivovar Krušovice appealed the decisions to the Chairman of the Office, who materially confirmed the decisions.