Czech Republic

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Regulatory framework

The existence of post-communist competition law in the Czech Republic dates from 1 March 1991, when the Act on the Protection of Competition No. 63/1991 became effective. This Act had its origin in the competition law of the European Communities and also took some principles from other national Competition laws, in particular from the German one. This Act included three basic provisions: the prohibition of cartels; the prohibition of the abuse of a dominant position; and the duty to notify mergers and have them cleared.

In order to reach full compatibility with European legislation, especially in terms of merger control (the Czech Republic was bound by articles 69 and 70 of the European Agreement, establishing an association between the European Communities and the Czech Republic, to gradually harmonise its regulations with EC law), a new Act on the Protection of Competition No. 143/2001 (the Competition Act), effective as of 1 July 2001, was enacted – 10 years after the adoption of the first Act. On the same day, eight decrees of the Antitrust Office for the Protection of Competition granting general (block) exemptions from the prohibition of agreements distorting competition also became effective for specific type of (vertical) agreements. With a few exceptions, the Competition Act already conformed to EC competition law at the time it was adopted. Therefore, it is still the main source of Czech competition law.

With regard to the new EC Regulation 1/2003 on the implementation of the rules laid down in articles 81 and 82 of the Treaty establishing the European Community (now articles 101 and 102 TFEU) and its decentralisation approach, an important amendment was enacted, No. 340/2004, effective as of 2 June 2004. The Act first of all repealed, in accordance with the change of the notification system to the legal exemption system on the European level, sections 8 and 9 of the Competition Act, which provided for the legal possibility for the undertakings to let the Competition Authority assess their proposed agreement and whether or not this might be considered an illegal and void cartel agreement. The Act further modified the process of the adoption of block exemptions and authorised the Competition Authority to adopt other block exemptions.

Furthermore, following the Czech Republic's accession to the EU on 1 May 2004, EC competition law must also be considered and is applicable in cases with a community dimension. In this respect, EC Regulation No. 139/2004 on the control of concentration between undertakings (the EC Merger Regulation) applies, together with its system of referrals to the authorities of the member states.

Another amendment to the Competition Act, relating to the EC Merger Regulation, was enacted in 2005 (Act No. 361/2005). It replaced the dominance test with the SIEC test (significant impediment to effective competition), inserted new provisions on cooperation between the Antitrust Office and the European Commission in merger cases (case referrals) and amended a provision on ancillary restraints. The amendment further repealed the regulations on block exemptions and inserted a receptive clause, on the basis of which application of community block exemption regulations are possible, even to competitive actions not affecting trade between member states. Thus, the Antitrust Office no longer issues regulations on block exemptions, through which particular European regulations would be implemented, but applies the respective regulations directly to competitive actions without a community element. This ensures a conform application of the same block exemptions both on the European and national level. Finally, the latest exhaustive amendment was performed by Act No. 155/2009 introducing among other things a simplified merger filing, rewording the regulations on commitments and many procedural rules – including on dawn raids – and expressly fixing the burden of proof on the participants of cartels that the exceptions to the prohibition apply to them. This amendment came into force on 1 September 2009. Another amendment expected to become law in late 2012 will, besides smaller changes, introduce the leniency policy into the Act.

Cartels

The Competition Act contains a general prohibition on agreements between undertakings, which have as their object or effect the prevention, restriction or distortion of competition. In fact, section 3 paragraph 1 is almost identical to part of article 101 TFEU. Therefore, the abundant case law of the General Court and Court of Justice may be used for the solution of legal problems arising under the Czech competition law. This prohibition refers to agreements relating to products and services. It applies regardless of the stage in the production and distribution chain where competition is restrained, or whether the parties' relationship is of a vertical or a horizontal nature (with a special provision relating to agriculture). Prohibited anti-competitive agreements include:

- direct or indirect price fixing (including resale price maintenance);
- direct or indirect fixing of other terms and conditions;
- restrictions or control of production, sale, purchase, research, development or investment;
- division of markets or sources of supply;
- application of dissimilar conditions to identical or equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- tying clauses; and
- group boycotts.

Prohibited anti-competitive agreements do not include:

- agreements that contribute to an improvement in the production or distribution of goods, technical support or economic development and allot an adequate part of the advantages resulting from it to consumers or agreements, and that do not impose restrictions on competitors that are not necessary for achieving the goals mentioned in this provision; or
- product supply or purchase agreements that prevent competitors from eliminating competition in an essential part of a product market.

The prohibition also applies to 'concerted practices' and decisions by associations of undertakings that result or might result in the distortion of competition.

Until the latest amendment, the Competition Act included its own de minimis rule. Vertical agreements did not fall under the prohibition if the market share of each of the participants of the agreement did not exceed 15 per cent. In the case of a horizontal or a mixed horizontal and vertical agreement, or where it was difficult to classify the agreement as either horizontal or vertical, a 10 per cent market share threshold applied. This de minimis rule did not apply to 'hard-core' restrictions, such as agreements, that had as their object direct or indirect price fixing or market sharing. Several agreements were exempt if they complied with the conditions laid down by the block exemption regulation issued by the Council of the European Union or by the European Commission. Czech law did not follow the practice of the European Commission, which adopts the de minimis thresholds in the form of soft law, usually called guidelines, and therefore eventual changes did not need to be implemented via an amendment of EC Regulation 1/2003. Hence, any changes of the de minimis thresholds had to be implemented by adopting a law. According to the latest amendment of the Competition Act effective from 1 September 2009, this de minimis rule was repealed and de minimis thresholds in the form of soft law will apply.

According to section 4 of the Competition Act, these Regulations also apply to cartel agreements that do not have a community dimension. The Competition Act further authorises the Antitrust Office to exempt, under the block exemption regulations, a group of similar restrictive agreements whose distortion of competition is outweighed by advantages for other participants on the market, especially consumers. This authorisation is meant to regulate some specific types of agreements typical for the local Czech markets. So far, the Antitrust Office does not plan any new block exemption regulation and continues to rely on those adopted on the European level. The old block exemption regulations issued by the Antitrust Office under the old regime were repealed by amendment as from 2005. The Antitrust Office may also withdraw the exception in individual cases if, as a result of market development, the exemption subject to a block exemption does not fulfil requirements laid down in section 3 paragraph 4 of the Competition Act (contribution to an improvement in production of goods or distribution, no restrictions for customers and no possibility of exclusion of competition for the competitors).

Notification and clearance

As at the European level, agreements can no longer be referred to the Antitrust Office for clearance as to whether they are in accordance with the law. The respective sections (8 and 9) of the Competition Act were repealed. The system of individual exceptions has been abolished as well.

Cartel proceedings

The Antitrust Office will usually launch official proceedings by sending a statement of objections upon receiving relevant information on a cartel agreement. It may, of course, start proceedings based on information obtained through its own activities. The latest amendment of the Act enables the Antitrust Office not to persecute if the effects on the markets are very limited (ie, introduces a factual 'general de minimis rule" depending on assessing of the situation by the Antitrust Office). The right to investigate premises other than business premises (see 'Enforcement' below) has been granted to the Antitrust Office, particularly with respect to the need for gathering information and evidence about restrictive agreements.

The Antitrust Office has a strong tendency to solve cases amicably by accepting commitments (see below), even in cases of hard-core cartel behaviour. In particular when strategic companies are involved, it uses 'competition advocacy', in which the informal offering of commitments and bargaining with the undertakings goes far beyond the formal procedure rules as stated in the Competition Act. The Antitrust Office seems to be more open to informal bargaining with undertakings.

In the recent years the leniency policy has also become an important part of Czech antitrust law and Czech cartel proceedings.

Commitments

A commitment system has been introduced that is identical to the rules of the European Commission. It should enable competitors to offer to meet certain commitments that – provided that such commitments are sufficient for the protection of competition, the harmful situation is eliminated by their fulfilment and the distortion of competition has yet to occur – will avoid intervention by the Antitrust Office. However, the Antitrust Office may reopen the proceedings, where there has been a substantial change in the circumstances on which the decision on non-intervention was based, the undertakings act contrary to their declared commitments, or the decision was issued on the basis of incorrect or incomplete documents, data or information.

Leniency

The Czech Republic already has several years of experience with a leniency policy under which any person or undertaking with a legal or economic interest can within the 'leniency programme' can inform the Antitrust Office of restrictive agreements and practices. A leniency programme for parties to a cartel agreement was as a soft law (ie, without being legally defined and regulated in the Competition Act) introduced in 2001, with the first reported case occurring in May 2004 and substantial changes in June 2007 (the leniency programme as of June 2007 should apply only to hard-core horizontal agreements). Before the EU accession in 2004, as demonstrated in the gas insulated switchgear cartel, even if an international cartel was already sanctioned on the European level, it was possible to apply under the leniency programme for the time before EU accession and receive full indemnity from Czech prosecution.

From the very beginning of the Leniency policy application, the Antitrust Office has so far kept its self-commitment in all known cases. Since then, it has been put into application in various cases, even though sceptics point to the fact that most (maybe even all) applications were related to antitrust proceedings going on at EU level (relating to cartels before EU accession in 2004) or other international cartel investigations with potential Czech applications and basically saved some cartelists some money and the Antitrust Office some work but did not bring completely unknown cartels to light.

One of the major problems for wider use of leniency programmes in a purely Czech context was that certain (hard-core) horizontal cartels were criminalised in 2010, meaning using the leniency programme would expose the cartelist's management or employees to criminal proceedings. The state prosecutor had stated already in 2007 that he would consider participation of the employer in a leniency application as a mitigating fact, nevertheless this has no real influence on the final court decision and certainly held off several

cartelists from filing – unless the persons agreeing on the cartels were foreigners without major fear of criminal prosecution by Czech authorities as in the cases known.

Moreover, the fact that the position of leniency proceedings has shifted from soft to hard law was used for changing several provisions, including the introduction of a new section 22ba into the Act. Now the first application can receive up to full leniency, the second up to 50 per cent reduction of fines if he provides proof with substantial evidential importance. Other cartelists may receive a reduction by 20 per cent only if they admit the cartel and such sanction is considered by the Antitrust Office to be sufficient.

Another important element and motivation for cartelists in practice is that any successful leniency applicant or entity with claim to reduction of fines shall not be automatically excluded from public tenders as would be the case for any sanctioned cartelist.

Abuse of a dominant position

A dominant position is defined as a position in a relevant market that enables an undertaking or an association of undertakings to prevent effective competition by giving it the power to behave, to an appreciable extent, independently of its competitors. A dominant position is presumed if the undertaking reaches or exceeds a market share of 40 per cent of the relevant market. The analysis of the relevant market is based on the judgment of the Antitrust Office. Generally, the Antitrust Office will refer to decisions of the European Commission or western competition authorities in order to define a relevant market. There is a tendency to extend the relevant geographic market beyond the borders of the Czech Republic.

A dominant position is not prohibited per se by the Competition Act. The undertaking has no obligation to inform the Antitrust Office of such a position. Only conduct that may be classified as exploitative, exclusionary, predatory or structurally abusive infringes the Competition Act and is therefore prohibited. All agreements fulfilling this classification are null and void. The Competition Act implements the 'essential facilities' doctrine, which has recently been applied mainly to intellectual property cases.

In evaluating whether a dominant position exists, the Antitrust Office examines whether there are legal or other barriers to enter the market, the market structure and the size of the market shares of the undertakings' immediate competitors. Article 11 of the Competition Act contains examples of abusive conduct, such as the enforcement of unfair conditions in certain infrastructure networks. There are no explicit exemptions. It is up to the Antitrust Office to decide whether certain behaviour constitutes the abuse of a dominant position. However, there may be conflicts with the regulatory authorities, such as the Czech Telecommunication Office or Energy Regulation Authority, who have partly overlapping competence. Unclear scope of competence of the state regulatory bodies may make the defence of the undertakings against monopoly undertakings on the markets to be liberalised (electricity, gas, postal services, railroad services, etc) more difficult. In addition, the financial authorities in recent years exercised price control in various cases and levelled high penalties in cases where the Antitrust Office refused to act.

The ability to notify for clearance has been abolished and, as in the case of cartels, an obligation system has been introduced. In recent years, the Antitrust Office has increasingly focused on such abuse.

As with other agreements, the Antitrust Office will initiate proceedings by requiring competitors, clients, suppliers and public administrators to provide the necessary information. Some spectacular fines have been imposed in 2007; based on the Act on Prices 526/1990, where tax offices levelled high penalties against companies in the coal and steel sector for abuse of market position leading to unjustified profit.

Mergers

The merger rules set out in the Competition Act are supplemented by regulations issued by the Antitrust Office. Any merger transacted as described below may not be implemented unless cleared by the Antitrust Office.

There are several forms of concentrations under the Competition Act:

- two or more formerly independent undertakings merge into one entity;
- acquisition of enterprise of another undertaking;
- one or more undertakings take direct or indirect control of the whole or part of another undertaking; and
- establishment of an undertaking jointly controlled by several undertakings,

whereby two and more concentrations subject to each other and interrelated in terms of matter of fact, time and personnel shall be assessed as one concentration.

Merger control rules do not apply to situations where a bank or other financial institution acquires shares for a maximum of one year, for the purpose of financially restructuring a company. Further exemptions are set out for stockbrokers.

Notification

Merger notification is mandatory if either of the following thresholds are met:

- the net turnover of the undertaking being acquired or being taken control of in the Czech Republic is at least 1.5 billion koruna and the net worldwide turnover of another merging competitor is at least 1.5 billion koruna; or
- the combined net turnover in the Czech Republic of all parties is 1.5 billion koruna and at least two of the parties have a net turnover that exceeded 250 million koruna in the previous year.

By way of simplification, the net turnover in the territory of the Czech Republic may be used, as a rough guide, as the principal criterion for determining the maximum permissible level; if it is below 1.5 billion koruna then the merger will not require notification.

Transactions not reaching the turnover thresholds are not subject to the approval of the Antitrust Office. Since the Czech Republic's accession to the EU, EU merger control must also be taken into account. Whereas in former years merger control was the dominant part of Czech antitrust practice and widespread filing obligations existed, the significance of national merger control has decreased considerably since 1 May 2004, when the Czech Republic acceded to the European Union, and changes were made to the European merger control regime. The number of merger control cases has decreased from 239 in 2003 to 55 in 2005 and about 40 in 2009 and 2010. Cases decided by the European Commission instead of the Antitrust Office explain only a small part of this decrease. Much more important are the changed national thresholds.

Merger proceedings

No transaction for which notification is mandatory can be put into effect until it is cleared by the Antitrust Office. Transactions carried out in breach of the duty to notify are not null and void, but the Antitrust Office can order various measures to restore competition (including a demerger order). In order to facilitate completion of the notification

form and supporting information, pre-notification contacts between the notifying parties and the Antitrust Office are recommended. The present policy of the Antitrust Office's merger section, however, only allows for a limited degree of informal guidance and informal contacts. The amendment to the Competition Act from 2004 also formally enabled a pre-notification; guidelines were published in January 2008.

The notification must be complete in order to be effective (a 'blanket notification' is not deemed to be a notification). If the notification is incomplete, proceedings will not be initiated and the Antitrust Office will inform the notifying parties as to whether the merger is subject to its approval and whether it is necessary to amend the notification. In such cases, a notification becomes effective when the Antitrust Office receives the complete information. It is highly recommended to ask the respective official after the notification has been filed whether it is complete or what further information shall be submitted. By means of informal telephone contact, the notification could be completed very fast, which can speed up the issue of the clearance decision. A fee of 100,000 koruna must be paid with the filing.

During the proceeding, the Antitrust Office may ask the parties to supply supplementary information or evidence. The decision period does not commence until such information or evidence is supplied. The Antitrust Office can also revoke a decision based on incorrect information. As a vast number of documents have to be submitted, the filing should be prepared in advance of the execution of the agreement. The notification must be drafted in Czech and all financial information must be expressed in Czech koruna. Supporting documents should be submitted in the original version (a declaration of truthfulness and completeness may help if the original versions are not submitted) and with a Czech translation (which does not have to be official in all cases; in the case of commonly used languages, such as English, German or French, the Antitrust Office usually requires no translation, and sometimes it requires only translation of a significant part of an agreement).

Until a decision is reached, no control of the acquired enterprise may be exercised and, in particular, no voting rights may be exercised. A merger may only be entered on the Commercial Register once the Antitrust Office has granted its approval. This is particularly relevant for limited liability companies, which must register a change in their shareholders or in case of a merger of two or more entities into one. The Antitrust Office must make a first-phase decision on the transaction within 30 daysof the date of notification; otherwise the transaction is deemed to have been approved.

A simplified merger control proceeding with less requirements as to the content was introduced in September 2009 if the parties are not active on the same relevant market or their joint market share is below 15 per cent or in the event of vertical integration below 25 per cent or joint control shifts to single control. The phase 1 term is shortened to 20 days after the filing, should the Antitrust Office not inform the applicant that it requests the complete application, the merger will be deemed to have been approved.

The Antitrust Office considers both the notification itself and any publicly available information, including information that is available on the internet. It may also require information from other public authorities or contact interested third parties, such as customers, suppliers and competitors. There are penalties for supplying false or misleading information to the Antitrust Office. Notification of a merger will be published in the Commercial Gazette calling upon any interested parties to respond within a certain time (usually less than one week).

Informal guidance from the practice of the European Commission is recommended. In particular, parties can rely on the definition of markets provided by the European Commission to the Antitrust Office. Cooperation with the European Commission on merger control cases, including sharing of information, was normal, even before EU accession.

If serious doubts exist about whether a transaction is compatible with the law, the Antitrust Office may initiate a second phase investigation. Its decision must be made within five months of the date of notification. If it has not made a decision within this time limit, the transaction is deemed to have been cleared. Practice has shown that in order to stop the term from running, the Antitrust Office sends requests for more information to the filing party, thus suspending the terms, nevertheless of the 40-50 mergers per year, the Office decides on, most are cleared in the first phase.

Any person or undertaking with a legal or economic interest can file a complaint against the notified merger until the deadline set by the Antitrust Office. It is the sole competence of the Antitrust Office whether to accept, reject or refer the complaint to the competent institutions and to inform the complainant in writing about this.

Concerning the decisive test, the Antitrust Office applies the SIEC test. The Antitrust Office will thus consider whether a merger will not result in a significant impediment to effective competition, in particular by resulting in or strengthening a dominant position of one or more of the undertakings concerned. Thus the achievement of a dominant position or its strengthening are only some of the examples of when a concentration shall not be cleared. This will avoid application problems regarding an approval of mergers on the oligopoly markets. While deciding on the merger at stake, the Authority shall consider certain information about the parties, including:

- market shares;
- market structure;
- necessity of preservation and further development of effective competition;
- legal and other barriers to entry;
- needs and interests of consumers;
- no obstacles market structure;
- the parties' economic and financial power;
- demand substitutability;
- supply substitutability; and
- potential competition.

Should the aggregated market share of the merging undertakings on the relevant market not exceed 25 per cent, the concentration is deemed not to result in a significant impediment to effective competition, unless proven to the contrary. In compliance with practice of the European Commission, the Antitrust Office uses for assessment of the market concentration the Herfindahl-Hirschman Index of Concentration (the HHI test).

The Antitrust Office may make its approval conditional on fulfilment of commitments that the parties have entered into. The parties must propose their commitments within 15 days of the information for second phase proceedings being delivered to the last party.

During merger clearance procedures, the Antitrust Office may comment on any restrictive provisions that are directly related to and necessary for the implementation of the merger for the purpose of obtaining a complete picture and evaluating the effects of the merger.

The EC Merger Regulation (Regulation 139/2004) is directly applicable in the Czech Republic. In addition to the European

Commission's jurisdiction, it might be that in certain circumstances the Antitrust Office will also take decisions on mergers that were originally considered to have a community dimension.

Joint ventures

Joint ventures are subject to Czech competition law and are assessed according to their structure. The provisions on mergers apply to full-function joint ventures only. These are joint ventures as a result of which two or more undertakings take sole control of another undertaking. Partial-function joint ventures are joint ventures that perform only a few specific functions and are evaluated under the rules governing other forms of anti-competitive behaviour.

Enforcement

The regulatory authorities

The only regulatory body is the Czech Office for the Protection of Economic Competition, the Antitrust Office, seated in Brno, which has sections for competition, public procurement and state aid. The Antitrust Office is also the only national regulatory body in terms of Regulation 1/2003. Cooperation with the European Commission and sharing of information was already common in the past. The Antitrust Office may request competitors and administrative authorities to provide documentation and information. Employees of the Antitrust Office have the power to enter premises, inspect commercial documentation, make copies and request all information that is required for its investigation (particularly with respect to potentially restrictive agreements or practices). Dawn raids have already taken place.

The Antitrust Office may also summon witnesses to participate in hearings. A fine may be imposed for providing misleading information. The Antitrust Office may also now conduct (with the prior approval of the court) investigations in premises other than business premises, namely in the homes of statutory bodies, their members or employees, provided there is a well-founded suspicion that business books or other documents are located there.

There is a right of appeal against decisions of the Antitrust Office, the outcome of which is decided by the president of the Antitrust Office. An appeal must be lodged with the Antitrust Office within 15 days of the delivery of the decision. Under the current chairman of the Antitrust Office, the Antitrust Office is more willing to bargain with and decrease the fines imposed on the undertakings. There is also a possibility of judicial review of the Antitrust Office's decisions by the district court in Brno, and the Antitrust Office's formerly very high success rate in judicial review has been decreasing. The reason for this is that the district court in Brno has become more confident and professional with the complex and complicated economic analysis of the antitrust cases, and has effectively become an opponent to the Antitrust Office.

Based on Regulation 1/2003, the Antitrust Office shall have the power to apply articles 101 and 102 TFEU in individual cases. It may take the following decisions: require that an infringement is stopped; order interim measures; accept commitments; and impose fines, periodic penalty payments or any other penalty provided for in the Competition Act. The Antitrust Office is also, as already mentioned, empowered to withdraw the benefit of a block exemption regulation within the territory of the Czech Republic under certain conditions.

Regulation 1/2003 also stipulates the rights and duties of the Antitrust Office relating to the European Competition Network (ECN). The Antitrust Office may submit its standpoint to the courts relating to the application of articles 101 and 102 TFEU. The conduct and decisions of the Antitrust Office in applying articles 101 and 102 are subject to the same procedural rules as those that cover the application of the Competition Act.

Penalties

A breach of the Competition Act may result in the imposition of fines of up to 10 million koruna or up to 10 per cent of the net turnover in the Czech Republic recorded in the last complete accounting period. These fines may be imposed for violations such as:

- abuse of a dominant position, which applies even when the conduct has already been terminated; he Antitrust Office may issue an interim order to preserve the status quo in order to prevent a violation causing irreparable injury to the victim;
- breach of the prohibition on restrictive agreements; in recent years, penalties for breaches of the rules on restrictive agreements have increased;
- breach of the obligation to suspend a merger unless a final decision of the Antitrust Office is issued;
- breach of the commitments; and
- non-fulfilment of imposed reparatory measures.

In the past, typical fines have been between 50,000 koruna and 500,000 koruna. Over the past few years, the fines for breaches of antitrust provisions, particularly in the case of cartels, have increased dramatically (up to 940 million koruna). A fine (or series of fines) of up to 1 million koruna can be imposed in the event of a breach of a decision of the Antitrust Office. Further fines of up to 300,000 koruna or up to 100,000 koruna can be and have been imposed for:

- failure to provide the Antitrust Office with the requested information within the stipulated period of time, or the provision of incomplete, false or inaccurate information;
- failure to submit requested books and other business records or to enable their review;
- other refusals to submit to investigations under the Competition Act;
- failure to appear at a scheduled oral hearing without a serious reason;
- refusal to testify; or
- other obstruction of the proceedings.

The 2012 amendment of the Act also solved a long and court-disputed issue stating that penalties shall be applicable on legal successors.

Concerning the restrictive agreements, if an agreement or provision is deemed to be in breach of the Competition Act, the entire agreement will be invalid unless it is possible to keep the rest of the agreement in force. The parties signing the agreement containing the restrictive prohibitions may, however, be jointly and severally liable to the undertaking for damages caused by such action. The Czech Commercial Code imposes comparatively strict liability on corporate bodies, even though in practice the responsibility of corporate bodies has not been raised very often in court proceedings.

Private enforcement

Under Czech civil law, any prior agreement by a company to waive the right of third parties to claim damages from it is deemed to be invalid. There is no specific provision in the Competition Act relating to third-party claims. According to the general regulations contained in the Czech Civil and Commercial Codes, a person is liable for any damage caused by failure to comply with a legal duty, such as by breaching the Competition Act. Similar to the experience of other EU countries and at the EU level, as mentioned in the Commission's

White Paper on Damages Actions for Breach of the EC Antitrust Rules, private enforcement of the antitrust law has to face the same difficulties that still hamper the effective application of this legal statute in other European states, such as the passing-on defence and difficulties proving some facts. In the Czech Republic, a general distrust of the court system due to slowness and the low quality of judgments, particularly when it comes to stating lost profit, must also be named as reason for a lack of willingness to pursue claims at civil courts. Nevertheless, the Antitrust Office has set the goal to increase the use of private enforcement in the future.

As in many other jurisdictions, there are agreements that fall under the antitrust law but are being fulfilled by both parties. Performing under an agreement that is invalid under the Competition Act effectively gives a right to a party to claim invalidity of the illegal provision of the agreement. The illegal provision itself is, however, invalid by operation of law. Furthermore, any of the parties may, directly or indirectly, ask the Antitrust Office to investigate the agreement. If an agreement is terminated, or if the Antitrust Office declares that a prohibited agreement has been concluded (together with a prohibition of the performance of such agreement pro futuro), the performance of the parties should be reversed in such a way that no party has an undue advantage.

Although the Czech Criminal Code provided in the past for certain criminal sentences in the case of intentional unfair competition, or bid rigging, in practice criminal law played no role in antitrust law. On 1 January 2010, however, prison sentences of up to three years were introduced for anyone entering into agreements with a competitor on price fixing on market sharing, or other (horizontal) agreements with anti-competitive effects (section 248 (2) of the Czech Criminal Code). The maximum prison sentence is increased to between six months and five years if such act has been committed as part of an organised group or has been repeated, or considerable damage or profit for the guilty party was made. Such considerable damage or profit is defined by the Czech Criminal Code as being 500,000 koruna and more. Should the damage or profit made be 5 million koruna and more or such behaviour had led to insolvency of a third party, the minimum prison sentence is raised to a staggering frame of between two and eight years. Because of certain flaws – in particular, wording allowing an interpretation that only cartels between competitors as natural persons are sanctioned – the actual use of criminal sanctions will remains low, still it should have a deterrence effect and must be considered in the event of internal investigations or thought of leniency applications. Since 2012, the criminal liability of legal entities has been introduced into Czech law, covering also various antitrust infringements.

Challenges of the near future

Several issues regarding the proper application of the Czech competition law have arisen recently.

After many years of intense discussions and half a dozen attempts by the agricultural lobby to enact a similar law, the Act on Significant Market Power for the Sale of Agricultural and Food Products and the Abuse thereof (No. 359/2009) has become effective on 1 February 2010. The law defines important market power as dependency of the supplier on the buyer (the retailer). Some criteria such as market structure, market entry barriers, market shares of suppliers and buyer, their financial strength, the size of the shops and locations are to give additional guidance. A refutable presumption states that such important market power is presumed with a net annual turnover above 5 billion Czech koruna which would include not only the six largest chains but many more medium-sized players.

Dozens of practices described in the appendices to the Act, either infringing provisions on invoicing, on general business terms, or infringing on obligations resulting from the contract with the supplier terms in detail, are prohibited.

The most important prohibitions concern practices such as requiring listing fees, bearing of the retailer's marketing costs, sale below the purchase price (with various exceptions), or unjustified and sudden termination of a long-term commercial relationship. Appendix 5 event tries to fix minimum termination periods for a supplier relationship if notice is given by retailer. One consequence of a violation of the Act is – besides invalidity of any contract for such practices – a damage claim by the supplier. This can be interpreted as claim for return of paid listing fees plus financing costs/interest. In addition, a fine can be levied by the Antitrust Office of the usual amount in antitrust matters, which is up to 10 per cent of turnover of the past accounting year.

The Antitrust Office has issued first penalties already. Legal insecurity is still high and it will take years to establish a reliable practice in the retail food sector.

The international developments, for instance in vertical agreements (RPM), will certainly also continue to show effects in Czech antitrust law, at present this type of vertical agreement still forms a large part of the Antitrust Office's investigations and cartel sanctions. The nomination of a chief economist confirms the intention to follow the more economic approach in the future, nevertheless, some personal turmoil had taken away some efficiency at the Office. As an agency, the Antitrust Office is undergoing considerable personal growth with new responsibilities in public procurement.

Private enforcement can be predicted to play a bigger role in the future, although its relationship with the leniency programme is

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still unsolved. With view to the fact, that the governmental proposal of the new amendment to the Competition Act does not solve the protection against private enforcement claims, it seems for the time being that the Czech legislature awaits the results of the legislative efforts on private enforcement at the European level, rather than itself introducing the necessary changes in civil and procedural law to promote private enforcement of the antitrust law. However, on the other hand, this has so far been a rather theoretical threat so that after the amendment comes into law, leniency applications might be more frequent.

Finally, the government proposal of the new amendment to the Competition Act has in addition another interesting feature, that is that the Antirust Office will not be required to prosecute cartels if their effects on the market and the consumer are small (ie, factual 'general de minimis rule' depending on assessing of the situation by the Antitrust Office). Again, a cynic may take a critical view and point out that in the past the Antitrust Office prosecuted many small resale price maintenance cartels with little practical consequence, but easy for the Antitrust Office to defend the facts at court – will there now remain any cartels at the Antitrust Office?

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Arthur Braun (admitted Germany 1995, Czech Republic 1997, Slovakia 2010) is one of the founding partners of bpv Braun Partners and head of the competition law practice group. Prior to establishing bpv Braun Partners as a part of the bpv LEGAL alliance, focusing on the CEE region and European law, he was a partner with one of the most reputable international law firms, based in Central and Eastern Europe.

Arthur Braun graduated from the University of Passau, Germany, both in law (1992) and political sciences (1993), and also studied at the Charles University in Prague, as the first Western law student after the revolution.

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Since 1999, Arthur Braun has been active as a lecturer at the Amberg-Weiden University of Applied Sciences, Germany, and also, since 2001, at the Institute for Industrial and Financial Management in Prague, Czech Republic. He has published extensively, for instance *Wirtschaftsrecht der Tschechischen Republik*, 6th ed, Prague, 2010, and functions as country rapporteur for the IBA antitrust committee. His working languages are English, German, Czech and French.

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