CZECH REPUBLIC

First large fine under the Act on Significant Market Power for the Sale of Food confirmed (Kaufland)

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The Czech Act on Significant Market Power for the Sale of Agricultural and Food Products and the Abuse thereof (No 359/2009 Coll – the 'Act') entered into force on 1 February 2010. The aim of the Act (which was introduced following strong lobbying by food producers) was to create better conditions for the Czech food suppliers in markets where there are no dominant players or oligopolistic conditions under the provisions of the Antitrust Act, as for these markets the classic provisions of Czech antitrust law could not apply to protect Czech food suppliers in cases of alleged abuses.

By way of background, it should be underlined that according to the turnover-based definition of retail chains that have significant market power (ie, retail chains achieving turnover that exceeds €185m), only foreign-owned retail chains would be caught by the Act.

Further, the Act[1] contains in its annexes a very detailed list of practices and clauses amounting to an abuse of market power. Among those there is a prohibition to agree on a payment period of more than 30 days (despite the transposition of the EU Directive 2011/7/EU on late payments that generally allows for a maximum payment period of 60 days).

We note that there are many arguments against the provisions of the Act. For example supplier agreements in other industries, in particular the automotive industry, often contain far more severe terms for the suppliers than in the food industry. Further, there is the argument that the Czech food industry is much more concentrated in many areas than the retail chains.[2] One could argue politically that the Czech farmers whom the agricultural lobby wanted to protect actually do not profit from the Act.

We note further that since 1 January 2014 (ie, since the entry into force of the new Czech Civil Code), additional protection for the weaker contractual party is provided for under civil law, so the 'raison d'etre' of the Act is even less comprehensible. Nevertheless, the Act is here to stay and the last conservative/liberal government (that stepped down in summer 2013) did not make any efforts to abolish it.

After some initial unwillingness by the Czech Antitrust Office (the 'Office') to enforce the Act to any great extent and following a sector investigation in 2011, the first considerable fine of CZK13m was imposed on Kaufland, only to be amended later in the internal review proceedings by the president of the Office. In the first degree proceedings, additional aspects were taken into account and an addendum to the original statement of objection was sent out. The fine was almost doubled (CZK22.6m). The revised decision in late 2013[3] confirmed this significant fine of CZK22.6m (above €850,000) under the Act against Kaufland in the internal review procedures within the Office.

The Office found that Kaufland, one of the two largest food retailers in the country, had agreed on payment periods of more than 30 days with more than half of its suppliers. In its very detailed reasoning, the Office found also that Kaufland imposed on almost all its suppliers a handling fee of four per cent in case a supplier assigned their receivables to a third party. Quite surprising was the third violation established by the Office which consisted in a bonus (skonto) of 0.5 per cent for each week that Kaufland paid its invoices before the due date, as this is a standard practice in many sectors.

The maximum fine under the Act is ten per cent of the undertaking's annual turnover. The fine imposed on Kaufland for its first violation of the Act, and despite Kaufland offering commitments, was 0.45 per cent of its

annual turnover. Taking into account the low profit margin of the retail chains, it becomes clear that in the future a violation of the Act may have a serious impact on their business.

Any major retailer in the Czech food business will therefore have to review in detail the 260 paragraphs of the decision in which the Office refuted an extensive list of arguments against the Act and its interpretation by the Office. There is, inter alia, an interesting argument according to which there is a violation of the convergence criteria of the EU Accession Treaty as the Act would, for instance, abolish behaviour that is permitted under Article 101 paragraph 3 TFEU.

The decision and the court judgments that are expected to follow in the future will be extremely important for the understanding of the Act and its application by the Czech Antitrust Office in the future.

Notes

1 An English translation of the Act can be downloaded from the website of the Czech Antitrust Office, at www.uohs.cz/en/legislation.html.

2 We note that the owner of the by far largest conglomerate is now the Czech Minister of Finance.

3 Decision R 146/2013 of 23 October 2013 available only in Czech, at www.uohs.cz/cs/hospodarska-soutez/sbirky-rozhodnuti/detail-10943.html.

DENMARK

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Upcoming guidance on the assessment of rebate schemes under Article 102 TFEU

For some time it has been evident that the application of Article 102 of the Treaty on the Functioning of the European Union (TFEU) to rebate schemes and discount practices of dominant undertakings could benefit from some 'tidying up'. The case law includes a variety of legal tests, which are in large part based on the differing verbal descriptions of pricing behaviour that may be almost indistinguishable from an economic viewpoint.

In 2009, the European Commission issued its Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings. With its coherent, economic, effects-based approach to the analysis of different types of exclusionary conduct, the Commission paper offers a significant contribution to the future development in this area of law.

The question then arose whether (or to what extent) the suggested approach would find its way into the jurisprudence of the EU courts.

In respect of individual pricing decisions, this question was answered by the European Court of Justice (ECJ) in its judgment of 27 March 2012 in case C-209/10, *Post Danmark*.

As to the application of Article 102 TFEU to general rebate schemes, the water remains murky. However, some clarification may be on the way.

On 7 February 2014, the Danish Maritime and Commercial Court of Copenhagen decided to pose a number of preliminary questions to the ECJ regarding the interpretation of Article 102 TFEU in a case concerning a volume based rebate scheme of a dominant undertaking; once again *Post Danmark* A/S.

Case C-209/10, *Post Danmark*

On 27 March 2012, the ECJ (Grand Chamber) handed down its preliminary judgment in *Post Danmark* (case C-209/10). The Danish Supreme Court had submitted a request for a preliminary ruling on the interpretation of Article 102 TFEU in a case between the incumbent Danish postal carrier Post Danmark A/S and the Danish Competition Council ('the Council').[1]

In 2003–2004, Post Danmark held a dominant position on the liberalised market for the distribution of unaddressed mail in Denmark. Post Danmark offered selectively low but non-predatory prices to three