

**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE**

Annual Report on Competition Policy Developments in Czech Republic

-- 2018 --

This report is submitted by Czech Republic to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 5-7 June 2019.

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1. Changes to Competition law and policy

1.1. Legislative Developments

1. In 2018, no substantial changes to the Czech competition law have been made. In the field of soft law issued by the Office for the Protection of Competition (hereinafter referred to as “the Office”), the guidelines on the procedure of setting fines have been substantially amended.¹ This change should contribute to better transparency and predictability of the Office’s decision-making.

2. On the European level, the *Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market* (hereinafter referred to as “the ECN+ Directive”) went through the EU legislative process and on 14 January 2019, it was published in the Official Journal of the European Union. The ECN+ Directive should ensure that the competition authorities of the EU Member States are equipped with proper enforcement tools in order to enforce the competition law under the same standards across the EU. The Office participated actively in the legislative process, and now, it is the body responsible for the transposition of the Directive to the Czech legal system.

3. The Office also took part in the legislative work on the proposal of so called Whistleblower Directive with the intention to maintain an effective and functional leniency programme after the adoption of the Directive. The Office also together with other European competition authorities advocated for incorporating option to use external/public channels for whistleblowing, without losing protection of whistleblower. The Office shares serious concerns of some other competition agencies regarding whistleblowing internal procedure. In the Office’s opinion the proposed form of internal procedure could lead to destroying evidence and thereby would be without the desired effect. The Whistleblower Directive is expected to be adopted in 2019.

2. Enforcement of competition law and policy

4. In 2018, the Office issued a total of 73 first-instance decisions in the field of competition, and fines in the total amount of CZK 197 763 000 (Czech koruna) were imposed for the proven anticompetitive offences. During 2018, the Office initiated 57 administrative proceedings. Apart from that, five cases were solved in terms of competition advocacy without opening administrative proceedings. For the purposes of detecting anticompetitive conduct and ensuring evidence at undertakings’ premises, the Office conducted 23 dawn raids. Besides this, the Office dealt with almost 200 complaints, 3 of that were leniency requests.

¹ See *Procedure of Setting Fines Imposed pursuant to the Act on the Protection of Competition*. Available from <https://www.uohs.cz/en/legislation.html>

Table 1.

Number of Complaints Received by Area	
Concentration of Undertakings	1
Prohibited Agreements	99
Supervision of Public Authorities (Article 19a)	19
Abuse of dominant position	57
Other	7
Leniency	3
Total	186
Number of Proceedings Initiated by Area	
Concentration of Undertakings	57
Prohibited Agreements	10
Abuse of Dominant Position	2
Supervision of Public Authorities (Article 19a)	7
Total	76
Number of Decisions Issued by Area	
Concentration of Undertakings	55
Prohibited Agreements	15
Abuse of Dominant Position	1
Supervision of Public Authorities (Article 19a)	2
Total	73
Total Amount of Fines Imposed by Area (CZK)	
Concentration of Undertakings	-
Prohibited Agreements	181,715,000
Abuse of Dominant Position	15,648,000
Supervision of Public Authorities (Article 19a)	400,000
Total	197,763,000

2.1. Prohibited agreements

5. Within the field of prohibited agreements between undertakings, a total of 15 decisions were issued in 2018 and fines in the total amount of CZK 181 715 000 were imposed.

6. Fighting bid rigging as a prohibited agreement concluded between bidders have been considered to be clear priority of the Office's activity – in 5 cases, a total of 25 undertakings have been sanctioned for this type of anticompetitive behaviour, mostly in the construction sector.

7. Considering prohibited agreements, the Office initiated 10 new administrative proceedings and at the end of 2018, the Office was conducting 18 ongoing administrative proceedings in this area. It is also worth mentioning that the Office received three leniency applications in 2018.

2.1.1. Significant cases

Prohibited agreement in the area of rail freight and freight forwarding in connection to the railway project Italia

- Parties to the proceedings: Rail Cargo Austria AG, AWT Čechofracht a.s., České dráhy, a.s.
- File number: S0633/2016/KD
- First instance fine: CZK 51 674 000
- Date of coming into force: 10 October 2018

8. The administrative proceeding was initiated on 1 November 2016 on basis of the leniency application made by the company Rail Cargo Austria, informing about secret cartel agreement between abovementioned undertakings, by which they allocated customers and contracts on freight forwarding in the area of the supply of rail freight service in connection to the railway project *Italia*. A dawn raids in the business premises of the undertakings were conducted as well. During the proceeding, the company České dráhy also applied for leniency.

9. The Office concluded that the undertakings *Rail Cargo Austria*, *České dráhy* and *AWT Čechofracht* had infringed not only Czech competition law, but the Article 101 of the TFEU as well, because the possible distortion of cross-border trade between EU Member states. All the parties applied for the settlement procedure. As a result, the Office imposed fines in the total amount of CZK 51 674 000.

Anti-competitive vertical agreements between Booking.com and accommodation facilities

- Party to the proceedings: Booking.com B.V
- File number: S0664/2015/KD
- First instance fine: CZK 8,336,000
- Date of coming into force:: Appeal filed

10. By its first-instance decision, the Office imposed a fine of CZK 8,336,000 on the company Booking.com for prohibited anti-competitive conduct in the field of online bookings of short-term accommodation. The Office found out that within the period from 1 May 2009 to 30 June 2015, the Booking.com concluded prohibited vertical agreements with providers of short-term accommodation services in the territory of Czech Republic, and thereby distorted competition on the relevant market of providing services of online reservation of short-term accommodation within the Czech Republic and on the relevant market of providing short-term accommodation within the Czech Republic. At the same time, the trade between EU Member States in the field of providing services of online reservation of short-term accommodation was potentially affected by illegal conduct of Booking.com.

11. Based on these agreements, the Booking.com's contractual partners were obliged to comply with the so-called wide parity clauses on price and availability. Therefore, the Booking.com should has been granted the same or better conditions regarding the price of accommodation and the number of rooms available for booking in comparison to prices

published on the web sites of the accommodation facility or via other on-line or off-line distribution channel of contractual accommodation facility.

12. The administrative proceeding also dealt with a revision of the agreements concluded by Booking.com during the period from 1 July 2015 with the providers of accommodation services, on the basis of which the providers were obliged to comply with the narrow parity clauses on price. It means that a potential customer would be offered better or at least the same price for accommodation when using the Booking.com platform in comparison to prices published on the website of particular accommodation facilities. Such conduct has not been proven. Also there has not been concluded the existence of anti-competitive agreements concerning availability of minimal number of rooms or issuing recommendations for providers of accommodation to ensure for Booking.com availability of all types of rooms offered by them.

13. The decision is not yet final, because Booking.com filed an appeal against it.

2.2. Abuse of Dominant Position

14. In the area of abuse of dominant position, the Office issued one decision in 2018, by which it fined the railway company České dráhy. Besides that, the Office examined 57 complaints regarding the potential abuse of a dominance position and initiated 2 administrative proceeding. At the end of 2018, a total of 5 administrative proceedings in this area were being conducted by the Office.

2.2.1. Significant case

Applying dissimilar conditions towards customers - forwarding companies by the company České dráhy, a.s

- Party to the proceedings: České dráhy, a.s.
- File number: S0220/2006/DP
- First instance fine: CZK 15,648,000
- Date of coming into force: 10 December 2018

15. The Office fined by its first-instance decision of 26 June 2018 the railway company České dráhy for abusing its dominant position on the market of rail freight of substrates in large volumes within the territory of the Czech Republic by applying dissimilar conditions with comparable performances towards forwarding companies. By this anticompetitive conduct, which took place between 1 January 2006 and 16 September 2017, the company České dráhy disadvantaged two forwarding companies (SPEDIT-TRANS, and ŠPED-TRANS Levice).

16. This first-instance decision was issued after several judicial reviews, which had cancelled the original decision of the Office and remanded the case for new proceedings. An appeal has been filed against the decision. By its decision of 10 December 2018, the Head of the Office confirmed the decision, which therefore became final.

2.3. Anticompetitive Conduct of Public Authorities

17. The Office issued two first instance decisions punishing the infringement of Article 19a of the Competition Act, both concerning the general local authorities' regulations

governing gambling, lotteries and similar games. Furthermore, seven new administrative proceedings regarding the same provision were initiated by the Office.

2.3.1. Significant cases

Cities fined for distorting competition by its Decrees on Lotteries

- Party to the proceedings: Municipality of Nučice
- File number: S0024/2017
- First instance fine: CZK 73 000
- Date of coming into force: 20 December 2018
- Party to the proceedings: Municipality of Varnsdorf
- File number: S0014/2017
- First instance fine: CZK 327 000
- Date of coming into force: Appeal filed

18. The Office imposed by its first-instance decision the fine of CZK 73 000 on Municipality of Nučice and the fine of CZK 327 000 on Municipality of Varnsdorf for the infringement of Article 19a of the Competition Act, pursuant to which public authorities shall not prefer certain undertakings and thereby discriminate the others in competition matters.

19. The abovementioned municipalities authorised the operating of gambling, lotteries and other similar games within their territories at certain locations, which were not selected on the basis of objective, non-discriminatory and transparent criteria. By this conduct, they distorted without objectively justifiable reasons the competition on the market of the operating gambling, lotteries and other similar games and on the market of the operating facilities in which gambling, lotteries and other similar games might be operated.

2.4. Concentrations between undertakings

20. In this field, the Office issued a total of 55 decisions, of which 40 decisions were issued within the simplified procedure and one case was concluded by adopting a decision subject to several commitments within the second phase of the proceeding. The in-depth investigation didn't confirm Office's competition concerns, and therefore concentration was approved. A total of 57 new administrative proceedings were initiated.

2.4.1. Significant case

The company KMV BEZ CZ allowed to acquire the control over part of Pepsi business, subject to commitments

- Concentration of undertakings KMV BEV CZ s.r.o/ PEPSICO CZ s.r.o., PEPSI-COLA SR s.r.o. and a part of a business and selected properties of the company Fővárosi Ásványvíz - és Üdítőipari Zártkörűen Működő Részvénytársaság
- File number: S0152/2018/KS
- Date of coming into force: 30 October 2018

- Decision: approval subject to commitments

21. On 30 October 2018 the Office issued a decision approving the concentration between soft drinks producers, subject to fulfilment of several structural commitments. The concentration consisted of an acquisition of control over companies PEPSICO CZ, PEPSI-COLA SR and a part of the business of the company Fővárosi Ásványvíz - és Üdítőipari Zártkörűen Működő Részvénytársaság by acquiring undertaking KMV BEV CZ.

22. The company KMV BEV CZ is a part of a business group headed by the company Karlovarské minerální vody (KMV group), which is active mainly in the fields of production and wholesale of non-alcoholic beverages. The acquired companies PEPSICO produce and/or sale non-alcoholic beverages and certain foodstuff.

23. On the basis of preliminary analysis, the Office found out that a competition on the relevant markets could be distorted, and thus moved the proceeding to the phase two. After carrying out in-depth investigation, it became evident that there are some concerns about serious distortion of competition on the market of production and wholesale of branded flavoured and unflavoured bottled water and on the market of production and wholesale of unflavoured bottled water and branded RTD tea drinks.

24. In order to eliminate the Office's competition concerns, the company KMV BEV CZ accepted certain structural commitments. As a result of the commitments, activities of the merging parties will not overlap with regard to the production and wholesale of branded flavoured and unflavoured bottled water. On the market of the production and wholesale of the branded RTD tea drinks, the concentration will lead to relatively small increase of market share, whilst the KMV group will offer exactly the same number of brands of such products as it did before.

2.5. Second instance proceedings

25. In 2018, total amount of 18 appeals was brought against first instance decisions relating to competition, six of those concerning certain case of a cartel in the construction sector. The Office issued 8 decisions on the substance and 3 decisions on procedural issues. Regarding the issued decisions, the first instance decision was confirmed in 4 cases; once it was changed, and it was cancelled in three cases. At the end of the year, there were 15 ongoing second-instance proceedings.

2.6. Judicial Review

26. A total of six actions against the Office's decisions were brought before the Regional Court in Brno in 2018. Further, a total of nine cassation complaints against decision of the Regional Court in Brno were filed before the Supreme Administrative Court. The judicial proceedings before courts were completed in seven cases, and in all of those cases, courts decided in favour of the Office. In three of those, the Office was successful in proceedings before the Constitutional Court – particularly, in two cases of prohibited agreements (AGRO Jevišovice and DELTA Pekárny) and in one case when the undertaking ČD Cargo alleged the Office of an unlawful interference.

2.7. Alternative Solutions of Competition-relates Issues

27. In cases where the anticompetitive conduct has not been implemented so far and therefore there is no negative effect on the relevant market, the Office may assess

the case within alternative solution rather than to initiate administrative proceedings and to impose a sanctions on undertakings concerned. In these cases, the undertaking concerned shall eliminate a potential problem by adopting certain corrective measures, and if the Office finds them to be sufficient, than the case can be closed without the initiation of administrative proceedings.

2.7.1. Significant case

Czech Chamber of Authorized Construction Engineers and Technicians – the Recognition Directive

28. In the second half of 2017, the Office started to investigate the procedures of the Czech Chamber of Authorized Construction Engineers and Technicians (hereinafter referred to as “the Chamber”) for possible infringement of the Article 19a of the Competition Act in relation to the procedure of recognition and verification of foreign applicants for authorisation to exercise professionals activities in the field of construction within the territory of the Czech Republic. The Office examined the conditions and procedures set by the Chamber regarding possible preference of certain undertakings or group of undertakings, elimination of undertakings or group of undertakings from a market, or elimination of the competition on a relevant market.

29. The Office found out that so far, the procedures of the Chamber had not yet led to a distortion of competition, and thus it solved the case through competition advocacy without initiation of an administrative proceeding. On the basis of a request from the Office, the Chamber changed its Recognition Directive, which is now in compliance with competition rules and it contributes to the transparency of the procedure of recognition and verification, because the relevant conditions are now clearly defined in the Directive.

3. The role of competition authority in the formulation and implementation of other policies

3.1. Significant market power

30. The Office has been supervising the practice of unfair commercial practices within the retail chains since 2010 on the basis of the Act. No. 395/2009 Coll., on significant market power in the sale of agricultural and food products and its misuse (hereinafter referred as to “Act on Significant Market Power”). Recently, the European Union became very active with regard to this issue as well. The effort to establish a harmonized network of enforcement authorities and to create a level playing field on the common market in this field was completed by drafting a new Directive on unfair trading practices.

Table 2.

Activity statistics at first instance	
Number of complaints received	15
Number of complaints investigated from Office's proper initiative	10
Number of queries relating to interpretation of the law	5
Number of initiated administrative proceedings	3
Number of concluded administrative proceedings	2
Number of cases solved by competition advocacy	1
Number of fines imposed at the first instance	1
Total amount of fines imposed at the first instance	CZK 300,000

3.1.1. Significant case

Successful application of commitments to eliminate harmful situation: the accounting services provided by the company Markant to the suppliers of Kaufland

- Party to the proceedings: Kaufland Česká republika v.o.s.
- File number: S0139/2017/TS
- Result: Decision with commitments
- Date of coming into force: 3 August 2018

31. On 31 July 2018, the Office issued a decision on an infringement of the Act on Significant Market Power by the company Kaufland Česká republika. The Office found out that the retail chain Kaufland made the mutual business conditional upon concluding a contract for pecuniary interest with the company Markant between 2016 and 2017. This conduct was assessed by the Office as an illegal listing fee. Furthermore, the Office found out that the suppliers, which took part in the Markant system, paid for the party to the proceedings the costs connected to his participation in the system, which was assessed as obtaining performance from suppliers without any consideration.

32. In light of the fact that only a small group of suppliers took part in the accounting system Markant, which moreover received at least partial consideration for the payments made, and in light for relatively low impact of this conduct, the Office decided to use the alternative solution of the case.

33. The company Kaufland proposed certain commitments in order to eliminate the harmful situation. Specifically, it should announce to its suppliers taking part in the Markant system that the participation in the system is not a condition of supplies to its establishments, and that the suppliers might terminate their participation without any effect on current or future mutual relations. Kaufland also promised to refund the money already paid and to refrain from a conduct which could lead suppliers to believe that the participation in the Markant system creates a condition for supplying the party to the proceedings.

34. The Office found the proposed commitments as an effort to a shift towards more equal business conduct. The Office concluded that the commitments will result in the elimination of the harmful situation, and therefore, it stayed the proceedings.

3.2. Public Procurement and Concessions

35. The Office has exercised its supervision over this area since January 1995, currently, according to the Act No. 134/2016 Coll., On Public Procurement (hereinafter referred to as "Public Procurement Act"). The Office's objective is to achieve, mainly through its decision-making activities, a free and open competition between the suppliers, along with a selection of the best proposal in a transparent manner devoid of any discrimination. The ultimate goal is the preservation of public funds. The parties should treat the individual tenders responsibly and suppress especially the cases that circumvent the public procurement law. If the Office detects a breach of the law, it may opt for what is called remedial measures, such as reinstating the unjustly excluded bidder to the process, or cancelling the entire tender. Should the contract be completed by the time the Office finds indications that the law had been broken, it cannot impose remedial measures, only penalties.

36. In 2018, most frequent sectors in which the Office examined public contracts were construction, IT and healthcare sector, followed by supplies of transportation vehicles and by the area of providing transport services. As regards the categories of contracting authorities, most commonly are examined public contracts of municipalities and cities, health facilities, ministries, or stakeholders active in the transport sector and in the construction of transport infrastructure.

Table 3.

Decision-making activity in the field of public procurement in 2018	
Administrative proceedings	
Total number of initiated administrative proceedings	383
On a proposal	269
Ex officio	114
Decisions	
Total number of the decisions issued in first instance	357
Substantive decisions	242
Remedies	100
Fining decisions	89
Infringement was not proved	2
Procedural grounds	115
Preliminary injunction	87
Dismissal of the preliminary injunction	53
Annulment of decision concerning preliminary injunction	9
Fines	
Total number of fines imposed	89
Total amount of fines imposed	CZK 7,764,500
Costs of proceedings	
Number of imposed costs of proceedings	139
Total amount of imposed costs of proceedings	CZK 3,045,000
Deposit	
Amount of deposit posted	CZK 152,974,825
Deposit forfeited to the state budget	CZK10,677,576.10
Complaints	
Number of complaints received with the fee payed	98

3.3. State Aid

38. The Office is active in the area of State Aid as a coordinating body performing central coordinating, advisory, consulting and monitoring activities in all areas, with the exception of agriculture and fishery which the Ministry of Agriculture is competent for. The exclusive role of the Office in the field of State Aid is mainly cooperation with State Aid providers in terms of preparation of notification of State Aid measures to the European Commission, than the Office cooperates with the European Commission and the providers in the proceedings before the Commission, both in proceedings concerning notification of State Aid, unlawful State Aid, misuse of State Aid, existing State Aid schemes, or where the Commission carries out an on-spot investigation within the Czech Republic. In the area of legislation, the Office represents the Czech Republic in consultation and preparation of European Union legislation on State Aid. The Office is also responsible for the administration of Central Register of Small-scale Aid. As part of so-called ex-post monitoring, the European Commission, through the Office, regularly checks compliance with the State aid rules under the notified aid programs.

39. As regards the Office's activities in this area in 2018, it is worth mentioning that two-day Conference on State Aid Law was held at the premises of the Office, as well as

two workshops on the topic of *de minimis* aid. The Office also issued a regular report on the implementation of Commission decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State Aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest. It also cooperated with State Aid providers on the issues of monitoring carried out by the Commission, and it took part in drafting the mid-term report on the evaluation regime of investment incentives, which was submitted to the Commission in December 2018.

4. Resources of competition authority in 2018

40. **Annual budget of the Office:** CZK 237,411,071 CZK (approx. EUR 9,228,425)

Table 4.

Total number of employees	234
Economists	71
Lawyers	129
Both economists and lawyers	11
Other professionals	46
Support staff	42
Human resources in the field of	
Enforcement against anticompetitive practices	38
Merger review and enforcement	7
Advocacy efforts	-

5. Summaries of or references to news reports and studies on competition policy issues

5.1. Information Bulletin 1/2018 – State Aid

41. The Bulletin informs about new provision and obligations introduced by the amendments to the General Block Exemption Regulation and about the revisions of the Best Practices Code for State aid control. The information systems containing data on provided state aid and *de minimis* are introduced as well. The last part of the Bulletin deals with new interesting decisions of the Commission and the Court of Justice of the European Union, and basic statistical data are included.

5.2. Information Bulletin 2/2018 – Effective Supervision over the Public Procurement and Competition Enforcement

42. This Bulletin addresses two widest areas of competence of the Office – supervision over the public procurement and protection of competition. The Office may use synergy from these related competences, e.g. in more efficient detection of cartel agreements.