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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from the Czech Republic

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction to the Czech cartel law

1. Cartel agreements rank among the most serious infringements of competition rules, having a negative impact both on competition in the market and on consumers. By raising prices and restricting supply, which are obvious consequences of collusion, goods and services are made even unavailable to some purchasers and unnecessarily expensive for the others. Competition authorities worldwide therefore impose harsh sanctions on such misconduct. The highest fines ever imposed by the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as “the Office”) took place in price-fixing cartel agreement cases, e.g. Fuel Distributing Companies case, Building savings companies case, Bakeries case etc.

2. The Czech Act on the Protection of Competition (Act No. 143/2001 Coll., as amended; hereinafter referred to as “the Act”) clearly states in its Article 3 that collusion of at least potential detrimental effect on competition in the relevant market shall be prohibited. If the Office finds that an agreement with at least potential negative impact on the market has been concluded, it declares such fact in a decision, and prohibits performance of the agreement for the future.

3. Among cartel agreements, the Act also distinguishes the so called “hard-core” cartels, similarly to the European Community legislation and case law. The Act provides legal framework recognizing three main types of the most harmful anti-competitive conduct:

4. Horizontal agreements that contain provisions on

- direct or indirect fixing of prices, rebates or other payments
- limitation or control of production or sales,
- division of market or sources of supply

5. The competition law theory usually adds to the category of hardcore agreements also the so called *bid rigging* collusive practices, occurring in the area of public procurement.

6. Hard-core cartel agreements, directly pointed out by the Act as having extremely harmful impact on the market, are explicitly deprived of *de minimis* exemption from the prohibition of collusive agreements. Such arrangements are automatically considered unlawful and therefore always forbidden. By the definition, hard-core cartel agreements shall be deemed to mean such a conduct that causes competition distortion (or threatens to cause it) by its very nature, that is detrimental effects are always inherent to the sole existence of such agreements. Mere existence of agreements complying with the characteristics attributed to hard-core collusions is sufficient so that the Office may declare their inconsistency with the rule of law.

2. Relation between the type of infringement and categories of evidence available

7. The concept of “cartel agreements” /agreements distorting competition/ used in the Czech antitrust law covers all the three basic forms or categories of anti-competitive arrangements between undertakings, which are more or less prone to producing direct or indirect evidence:

- Agreements in the narrow sense of a word - a prohibited agreement itself, constituting direct evidence, may be obtained, which then creates basis for further proceeding by the Office; in the Office’s practice, few cartel procedures were initiated when only indirect evidence on written or oral prohibited agreement was available
- Decisions by associations of undertakings, usually in the form of a code or set of rules or recommendations drawn up by such associations for their members as more or less binding, are examined upon gaining the relevant document, which then would present direct evidence on anti-competitive behaviour.
- Other arrangements between competitors that express their common interests Concerted practices - on the other hand, are usually decided by the Office on the basis of circumstantial evidence since no actual agreement exists by the nature of such competition distorting conduct (concerted practices are not based upon legal acts executed by the individual participants, which distinguishes them from agreements in the narrow sense of a word).

8. As regards approach of the Office towards the assessment of the three basic above-mentioned forms of anti-competitive arrangements, the question arises whether they may be treated as having similar or the same effect on competition in terms of the intensity of the violation of the law. As the Czech legal doctrine, similarly to the EC legislation and case law, uses the concept of a “cartel agreement” as comprising all the three mentioned forms and provides rules relevant for such anti-competitive conduct as a whole, no matter in which way it is performed, the form of such an arrangement proves irrelevant in this respect. Division of individual cartel types (price-fixing, market-dividing etc.) then rather aspires to classify collusive arrangements according to their impact on the market. However, the individual cartel forms must be approached differently as regards gathering evidence and assessment of the aspects of a case.

9. Concerning the relation of intensity of engagement in a collusive arrangement with the type of evidence that is likely to be found, two possible “scenarios” usually come to question in the Office’s practice:

- the companies in breach of competition law either don’t take their conduct for indisputably infringing the rules, and see no need to hide or destroy potential evidence
- or they do, in which case they would probably have discussed the illegal nature of it, and the need to avoid detection by competition rules enforcers

10. The situation where the undertakings do not consider their conduct unlawful would often arise in case of various “general” or “framework” business agreements, drawn up by the undertakings themselves or by their consultative bodies or associations and intended to set rules for running the business, define mutual rights and duties, and improve the services provided to customers. These agreements often contain prohibited price fixing or other provisions though, and would have probably been destroyed if the competitor held them for clearly forbidden. In such cases the evidence on the conduct is usually clear

enough for finding existence of a prohibited agreement, and possible further procedure consists in arguing whether such provisions are in compliance with the Act or not.

11. In the latter case it is most likely that any possible evidence on collusion would have been concealed or destroyed. This can be illustrated by the following sentence that was revealed during local investigation by the Office in an undertaking's correspondence (for further details see the case study below): *"PS. After I send off the e-mail, I'm going to erase it, as the Devil and the Antimonopoly Office never sleep."*

3. Occurrence of the individual types of evidence in the Office's practice

12. In this context it should be mentioned that almost all the Office's decisions based on direct evidence fall within the first category, as it is shown by the following statistics:

- Between 2001 and 2004, practically 100 % of all cartel proceedings relating to cartel agreements in the narrow sense of a word (i.e. written agreements), or decisions by associations of undertakings, were revealed upon obtaining such an agreement, usually publicly available (above-mentioned "general" or "framework" agreement, code or set of rules drawn up by associations of undertakings etc.).
- In the same period of time, more than 80 % of cartel proceedings closed by a second instance decision were initiated by the Office on the basis of such an agreement, only few then were conducted when only indirect evidence was in the hands of the officers. And only in one case of this amount a cartel agreement in the narrow sense of a word was proved by circumstantial evidence. However, it must be emphasized that in the practice of the Office most cases winning the highest sanctions and attracting the biggest attention of the public were just the ones, where only indirect evidence was acquired (e.g. The Fuel Distributors, The Building Savings Companies...).

4. Classification of evidence in the Office's practice

13. The Czech Antitrust Office applies the classical concepts of direct and non direct (circumstantial) evidence in a case. Both of the individual types of evidence are usually found in one or more of the following forms:

- Documentary /paper or electronic version:
 - business correspondence (top management);
 - minutes of business dealings, consultations etc. ;
 - preparatory documents for
- Verbal (testimony of a witness)

4.1 *Direct evidence*

14. Direct or so-called best evidence to prove a cartel agreement is typically a document containing written anti-competitive arrangement, actually the agreement itself or a memorandum written to report on business dealings or consultations during which an agreement had been concluded between competitors. In the case that the Office acquires a document that would beyond all questions prove that forbidden type of contract had been concluded, there's no need to supply other (circumstantial) evidence.

15. Testimony of a witness - participant in business dealings or consultations during which collusion had been agreed may be considered a direct evidence as well; such proof has to be supported by another evidence though (e.g. testimony of the other participants in business dealings/consultations or minutes of the dealings).

16. Confirmed testimony of a witness representing an undertaking that had been contacted by their competitor/competitors in order to join cartel agreement may also be used as direct evidence.

17. Other types of evidence on collusion are considered non-direct in the practice of the Office.

4.2 *Non direct (circumstantial) evidence*

18. The rather rare procedures by the Office based mainly (or solely) on circumstantial evidence resulted (except one case) in decisions on performance of prohibited concerted practices. These practices eliminate competition among the undertakings by co-operation that takes the place of independent and competitive behaviour, exclude uncertainty of future business conduct of competitors, and are reached through direct and indirect contacts. This concept doesn't assume existence of an agreement; the factual behaviour of the undertakings in the market is examined instead, that would show signs of prohibited interaction beyond reasonable doubts.

19. Common attitude to the assessment of circumstantial evidence is that such a set of information on undertaking's behaviour must be gathered that would exclude any interpretation of the evidence but that stating existence of a collusive arrangement. In other words, there must be no doubt the conduct of undertakings in question is illegal, non-justifiable and that it is resulting from performance of prohibited type of agreement.

20. Therefore in proceedings lacking direct evidence such as an agreement on collusion or positive testimony of an eye-witness, it is necessary to gather all available pieces of non direct evidence that would form a sufficient body of evidence for issuing a decision able to stand possible further appellate procedure before a court.

21. Non direct evidence – examples:

- hand-written notes;
- correspondence and email traffic between competitors;
- minutes of business dealings or negotiation;
- testimony of a witness (not participant in an agreement);
- telephone logs;

- travel records;
- other anonymous denunciations etc.

22. For detailed illustration of the individual types of evidence dealt with in the practice of the Office see the case study below.

5. Supportive types of indirect evidence

23. The collected indirect proofs often require further reasoning by means of supportive indirect evidence on collusion in a case. Assembling all the aspects and possible views on the case then resembles putting together small pieces of a mosaic. Following main types of supportive evidence are distinguished in the practice of the Office:

5.1 *Economic evidence*

24. Economic analysis enables the Office to describe behaviour of the undertakings by means of economic terms, methods and simplifications. The purpose of economic evidence is to distinguish whether mere parallel conduct of undertakings occurred in the relevant market or whether there's a sign of competition distortion. Possible alternative explanation (e.g. increasing prices of inputs) for the competitors' behaviour must be excluded reliably.

5.2 *Information about collusion facilitating practices/circumstances*

25. Certain evidential value may be attributed to practices or circumstances that facilitate cartel formation, or make it easier for competitors to reach or sustain an agreement, especially communication of competitors through consultative bodies or sector chambers (associations of undertakings). Typically, information would be exchanged beyond the authorization of an association (e.g. the association requires its members to provide it with given type of information regularly, which complies with relevant rules). The members may then co-ordinate the information exchange and provide additional information.

5.3 *Characteristics of a market predisposed to collusion*

26. Market situation showing following features may be regarded as predisposed to collusion:

- Existence of entry barriers (requirements for licenses etc.);
- Market saturation and low product or technology innovation;
- Symmetry among the main competitors (relating to capacity, costs, market shares);
- Structural links, co-operation arrangements (+personal and property interests);
- Market transparency for the competitors;
- Product homogeneity;
- Slow increase in demand and low demand elasticity;
- Multi-market contacts.

5.4 Possible sources of evidence

27. When collecting evidence, the Office acts on the authority granted to it by the Act, according to which the Office is authorised to request that undertakings and, unless a special legal regulation states otherwise, the bodies of public administration provide it with documents and information the Office needs for its activities, and to ascertain their completeness, truthfulness and correctness. In proceedings conducted by the Office pursuant to the Act, undertakings shall be obliged to submit to investigation by the Office.

28. Before formal steps are taken, information has to be gathered that would make sure that there is evidence on violation of the law sufficient for taking further action. First of all, information from sources other than relevant undertaking/undertakings is collected in order to obtain as much objective and impartial information as possible. There are many information sources serving this purpose such as mass media, Internet etc. Materials issued by associations or councils of undertakings represent important and reliable source of precise and up-to-date information. Pursuant to the Czech law, the Office may use evidence once already acquired, after proper updating and verification of it (the use of evidence isn't limited to the case for which it was gathered).

29. If there is reasonable assumption of competition rules infringement but not enough affirmative evidence in a case, the Office initiates administrative action formally and carries out simultaneous local investigations – so called dawn raids - to collect further information from the alleged competition rules violators. These inspection procedures bring significant advantage to the Office in the form of element of surprise that prevent frustrating the proceedings by concealing or destruction of evidence on the collusion.

30. Leniency programs represent other source of evidence to which the national competition authorities gradually turn more and more often, as the cartel agreements, secret by their nature, become more and more sophisticated. Such a program provides particular conditions allowing the fine otherwise imposed on companies in breach of competition law to be remitted or substantially reduced. This offers undertakings engaged in collusive arrangement quite stimulating incentive to co-operate with the Office in providing information on their and the other cartel members' behaviour. Accordingly, the Czech leniency program states that: "The Program is designed for those undertakings that would like to terminate their further participation in cartel, but so far have not dared to do so because of their fear of imposition of a substantial fine."

31. So-called whistle-blowers (often dismissed or dissatisfied employees) may provide useful information on the undertaking's behaviour as well. It may therefore prove fruitful to request the investigated undertakings for providing lists of employees dismissed in recent months.

32. Co-operation with sector supervision or regulatory authorities can be very helpful in gaining information on undertakings and their behaviour in the market, relevant market structure, other than competition rules that are to be observed by the undertakings. The Office may in this way obtain better overall picture of the market situation. The Office would typically ask relevant supervision or regulatory authority to prepare an expertise that would subsequently be applied to a case.

33. According to the Office's practice it is advisable to investigate anonymous denunciations as well (see the case study below).

6. Cartel prosecution in the Czech Republic

34. Nowadays, neither legal entities nor natural persons are prosecuted criminally for any competition rules violation under the Act. However, the Czech Penal Code provides certain types of

acquisitive offences that may be applied to possible breach of the law, e.g. provisions on tender manipulating (agreements on bid rigging).

35. The Act holds liable undertakings violating its provisions in administrative not criminal proceedings, in which the Office may impose fines of up to CZK 10 million or up to 10% of the net turnover achieved in the preceding calendar year. Both intentional and negligent infringements of the prohibitions stipulated in the Act are subject to the sanctions. When the Office establishes an infringement of the prohibitions stipulated by the Act, it may decide, according to the subject matter of the case, to impose remedial measures as well.

36. When deciding on the amount of the fine, the Office shall take into account in particular the gravity, possible recurrence and duration of the infringement of the Act. When assessing the gravity of the infringement, account must be taken of its nature, its actual impact and the size of the relevant geographic market. Horizontal restrictions such as price-fixing and market-sharing cartels are both in jurisprudence and in the practice of the Czech competition authorities regarded very serious infringements that are likely to be fined with the highest amounts possible. Again, the form of the breach of the law is not determining for the total amount of the fine; the degree of wrongfulness of such a breach is what matters. The need of sufficiently deterrent effect is also pursued by the Office in setting harsh fines for cartel formation.

6.1 Case study – Concerted Practices of Bakery Producers

37. An example of an agreement distorting competition, where the Office's decision was based solely upon indirect evidence, follows:

38. The three most important producers of bakery products operating in the Czech Republic were held liable for performing concerted practices in the relevant market, specifically for fixing of prices of their products, by which they engaged in horizontal hard-core cartel. The bakeries co-operated particularly in the way of the exchange of information, which normally would have been be a subject of their business secret or that of their partners. They shared information on their business strategy towards their business partners - purchasers (supermarket chains), which enabled them to increase their prices simultaneously, and to retain their market shares without a threat of possible reprisal from their competitors.

39. Unannounced inspections (dawn raids) were conducted in the premises of all the three undertakings. As direct evidence, such as an agreement on collusion or positive testimony of an eye-witness, was lacking, other types of evidence must have been applied.

40. Correspondence (mostly e-mail) between the competitors was detained during the dawn raids that subsequently formed the major part of the evidence in the case, confirming anti-competitive character of the competitors' contacts. An E-mail written by the director of A company, sent to the director of B company, and forwarded to the director of C company, containing price analysis of their major purchaser (a supermarket chain), and common price strategy towards this purchaser, belongs to the most important documents acquired in the proceedings. A request of a member of a company middle management directed to the director of the company for the instructions on the dealings with the competitors concerning their price strategy may be mentioned as well.

41. Other type of evidence collected during the dawn raid in the companies' premises is represented by minutes of top management meeting held by a company, comprising price information on B Company, not publicly available at the time the meeting was held, which provably were communicated to a company by their competitor in advance.

42. During the administrative proceedings, time and place of two of the competitors' secret meetings were communicated to the Office anonymously. The Office's employees were charged with examining the

information, which turned out to be truthful. The meeting indeed took place, and photographs were taken of both of the parties' cars parked in front of a building where the meeting was held (license plates were eventually identified as belonging to both of the competitors). Even though less significant indirect proof was obtained, it was still useful for completing the "mosaic" of evidence.

43. Testimony of witnesses (supermarket chains' representatives) supported economic evidence on the anti-competitive conduct of the bakeries, concerning the non-substitutability of the main suppliers of bakery products that constituted their huge bargaining power, actually the control over the market, which the minor bakery producers were not able to compete, and the coordinated approach to their business partners. The intended price increase was announced to the purchasers of the undertakings on the same day, with similar or the same words, arguments and conditions, and the amounts by which were the price increased.

44. Personal and property interests also played a big part in the competitors' position in the market: the A and B companies were co-owners of a company distributing a part of their production, and B and C company were vertically connected to the producers of flour that strengthened their position in the market.

45. Sufficient evidence was collected that supported the Office's view that the situation in the relevant market was showing competition distortion rather than a mere parallel business conduct of the competitors. The Office found that prohibited practices were accomplished in the market, declared this in a decision, imposed fines on the undertakings amounting to CZK 120 million, and prohibited performance of the practices for the future. Aggravating factors (hard-core intentional competition rules infringement, strong position of the undertakings in the market due to their vertical integration, significant market shares, substantial damage incurred by the consumers through the cartel performance), as well as sufficiently deterrent effect were taken into account by the Office when setting the fines in the case.