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Global Forum on Competition

ROUNDTABLE ON CONCESSIONS

Contribution from the Czech Republic

-- Session I --

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ROUNDTABLE ON CONCESSIONS

1. Introduction

1. The following contribution describes the current situation in the area of concessions in the Czech Republic and the experience of the Czech Office for the Protection of Competition (hereinafter referred to as “the Office”) relevant to this issue, particularly in relation to infrastructure in the sectors of energetic (electricity, gas manufacture, heating plants), water supply, telecommunication and transport.

2. The restructuring and privatisation in the above-mentioned sectors in the Czech Republic has been under way since the mid-nineties. The conditions in these sectors were completely modified by means of new legal acts; there were set up new regulatory bodies and new private undertakings gradually enter the markets.

3. Present law system in the Czech Republic does not include the general legal regulation of concession contracts. This drawback has been addressed by compilation of the draft Concession Act in 2004 that would enact the concession in all parts of the economics, including the area of access to infrastructure. It also aims at participating of the private investors (PSP – private section participation) in operation of infrastructure. The draft Act is currently being discussed in the Parliament of the Czech Republic.

2. Goals of the new regulation

4. The main principals of the new regulation are:

- consistent enactment of the concept of concession contracts
- transparency
- assurance of effective and long term sustainable providing of services and infrastructure

5. The draft Act considers concession contracts as a means of implementing the public administration obligations and providing public services. It is assumed that the new enactment of the concession contracts will lead to cost economies in public funds due to the fact that providing of public services will be assured by the private sector with the assumption that the private entities would be economically interested in proper functioning of the system. The draft Act on Concession enacts conditions and procedure of signing concession contracts within the framework of cooperation among the contracting authority and other entities. Pursuant to the draft Act, public contracting authority shall be deemed to mean the state, a municipality or an undertaking, established or settled in order of satisfy public needs, on condition that it is funded mainly by the state.

6. Pursuant to the draft Act, the Act will not be applied on the concession contracts objectives of which are security interests, sensitive intelligence etc.

3. Characteristics of concession contracts

7. Concession contracts are generally considered to mean the contracts that have a long term status (usually 15 – 25 years) and are characterised by partial transfer of risks associated with providing of services or exploitation of infrastructure in question. This feature is the main difference between concession contracts and public contracts.

8. The specific features of concession projects are:

- concession contract with its specifications;
- preparation of approval of so called important concession contracts;
- study of feasibility;
- definition of status of the public entities in the process of preparation and realisation of concession contracts;
- concession procedure;
- framework projecting company;
- fiscal control by the Ministry of Finance;
- index of concession contracts.

9. The draft Act sets financial limits to be kept. The Office is authorised to perform supervision over observance of this Act. The Office decides on whether the contracting authority followed the rules set by the Act, imposes remedial measures and fines. Maintaining the register of concessions falls within the scope of powers of the Ministry for Regional Development.

10. With regard to the fact that the legal regulation currently finds it only in the process of approval by the Parliament, the Office has not yet been in the position to apply it and therefore has acquired no experience relevant to it until these days.

4. Other laws related to concessions

11. Entrepreneurship in individual sectors of economy is comprehensively regulated by relevant sector regulations defining the conditions for business and state administration in a given sector.

12. In the area of energy such regulation is contained in the Act on Energy (Act. No.91/2005 Coll.) defining, in line with the EU law the conditions for entrepreneurship, performance of state administration and non-discriminatory regulation in the energy sectors, i.e. electric power production, gas industry and heat production, along with related rights and duties of natural and legal persons.

13. The area of telecommunications is regulated by the Act on electronic communications (Act No. 127/2005 Coll.). The regulation is aimed at satisfying the needs of consumers and the interests of licence holders, together with ensuring reliable, safe and stable supplies in respecting the rules of competition.

14. In the area of rail transport infrastructure there is **the Act on Rails** (No. 266/1994) and the area of road infrastructure is subject to the Act on Traffic on Terrestrial Communications (No. 361/2000).

15. All the abovementioned laws have in common that they do not contain particular regulation of concession procedure, however, they regulate the conditions for business in the given areas, especially as regards the substantial technical issues, and they must be taken into consideration in the concession proceedings.

16. In the course of drafting these Acts, the Office, as a mandatory commentary spot in the legislative process, enforced and applied its comments aimed at support of competitive environment. This approach was applied by the Office especially in the area of energetic. In doing so, the Office took utmost regard of the OECD recommendation, contained in the Report on Structural Separation in Regulated Industries (2001).

5. Sector regulators

17. In the areas of energy and telecommunications there are independent sector regulators – in the energy sector (comprising electric power market, gas market and heat production) this is the Energy Regulatory Office, in the area of telecommunications this role is played by the Czech Telecommunications Office. Establishment of an independent regulatory office is currently under consideration. Carrying business in the given sector falls within competence of relevant sector regulator. Establishment of sector regulators has been supported by the Office in long term. Application of procompetitive principles and support of competition is also one of the main goals of sector regulators.

6. Access to infrastructure and the Act on the Protection of Competition

18. From the competition law's point of view, concept of concessions is related to the concept of so called essential facilities regulated by the Act on the Protection of Competition (No. 143/2001 Coll., hereinafter referred to as "the Competition Act").

19. The infrastructure, which is a condition for use of provision of socially important services, is regularly of essential facility character. It is impossible to provide given services, such as i.e. electric power and drinking water supply etc., without such a facility.

20. The issue of refusing access to essential facility is covered by the demonstrative listing of the possible forms of prohibited abusing dominance under Article 11 of the Competition Act. The Article states in its letter f) that:

“Refusal to grant other undertakings access, for a reasonable reimbursement, to own transmission grids or similar distribution networks or other infrastructure facilities, which are owned or used on other legal grounds by the undertaking in dominant position, if other undertakings are unable for legal or other reasons to operate in the same market as the dominant undertakings without being able to jointly use such facilities, and such dominant undertakings fail to prove, that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable such use; the same proportionately applies also to the refusal of access, for a reasonable reimbursement, of other undertakings to the use of the intellectual property or access to the networks owned or used on other legal grounds by the undertaking in a dominant position, if such use is necessary for participation in competition in the same market as the dominant undertakings or in any other market”

21. In other words, the provision covers cases, where the dominant entity commands, on the basis of whatever reason, privileged access to an essential facility and the other undertakings that do not have such access may not access to any alternative facility, without use of which they are unable to provide their services. At the same time, the dominant undertaking may be justifiably required to enable access to its

facility. Even under meeting these conditions, the dominant undertaking is obliged to enable access to its facility only if the other party is willing to pay an adequate compensation for it. In line with the decision of the Czech High Court in Olomouc proving existence of an essential facility may be a precondition for finding dominant position of an undertaking.

7. Activity of the Czech Competition Office related to the issue of Concession

7.1 Decision making activity

7.1.1 Refusal of access to the bus central station – application of the concessions principle

22. The Office recently dealt with a case, where the operator of a local central bus station (hereinafter referred to as “the Station Operator”) in the municipality of Znojmo, Czech Republic, refused to provide some of the operators of public bus line transportation with access to the area of the central bus station. The Station Operator carried out its business on the basis of licences issued by the municipality in the role of the operator of national public line personal bus transportation and carried out most of its line transportation in the framework of ensuring basic transport services within the public service obligation (i.e. including subsidies for settlement of provable loss). Furthermore, the Station Operator was the lessee of the bus station.

23. The new local carriers asked the Station Operator for enabling access to the Station and use of the departure stands. However, this requirement was rejected by the Station Operator. The Station Operator reasoned this step by claiming that it was impossible to enable almost double amount of vehicles departure from the Station at the same time, be it for the cause of capacity, safety or technical issues. The new carriers were thus forced to establish bus stops for their lines at other places in the municipality.

24. However, the Office found within the proceeding on this matter that the Station Operator enabled certain carriers access to the Station. This was true especially in case of distance lines. In the course of the proceeding the Office dealt especially with the question whether the Bus Station constituted an essential facility in the sense of the Competition Act. The Office dealt also with the issue whether the Station Operator was obliged to enable access to the Station in line with the non-discrimination principle and on the basis of a concession agreement. During an on-spot inspection the Office found that the Station area was not a classical enclosed facility, as it is usually the case, but that it forms sort of integrated transportation terminal, where it was possible to use various means of transportation – railway, bus and local ones.

25. The Bus Station operated by the party to the proceeding is only a part of this transportation terminal. It was assessed in this case whether it was possible for the carriers to operate the public line personal transportation also without using the services/bus stands of the Station. After considering all circumstances the Office came to the conclusion that the participation of the bus carriers in competition on the market of bus transportation was not depending solely on the use of services/bus stands within the terminal as essential facilities. The carriers were capable of carrying out their business even in situation where they would have been using bus stops outside the terminal. For this reason neither the terminal in Znojmo nor its part may be considered an infrastructure facility in the sense of the Competition Act. Therefore the Station Operator was not obliged as a concession provider. In case that it would have been considered an essential facility within the meaning of the Act, the access would have had to be granted subject to principles of non-discrimination and concession application.

26. As regards the detriment in competition caused to other competitors, the Office found that realisation of departures/arrivals of buses from other stops than those situated within the terminal did not endanger or restrict the new bus carriers from the viewpoint of their competitiveness. Concerning possible

detriment caused to consumers – passengers, the Office found that the individual stands located within the terminal are not significantly different. Therefore the Office did not find any damages caused to competitors or consumers.

7.1.2 Conditions imposed in case of a concentration between undertakings - application of solutions alternative to concessions

27. The Office has not dealt with the concessions related issue of access to essential facilities only in the area of abuse of dominance, but also in the area of concentrations between undertakings. In number of decisions the Office imposed conditions for realisation of a concentration that assisted support of competitive environment and enabled access of third parties to infrastructure.

7.2 “Virtual power plant” as a condition for approval of a concentration

28. In the case of a concentration between the dominant producer of electricity with certain regional distribution companies the Office applied a condition consisting in creation of a so called “virtual power plant”. In this way, the auction principle was applied as alternative to concession, with the same goal of ensuring transparent and non-discriminatory access. The solution consisted in enabling a part of the production capacity of the dominant producer to independent competitors, which subsequently compete with the electricity produced by the given capacity/facility on the energy markets. The sale of electricity is realised in the form of an auction, which allows transparency of the transaction. The virtual power plant appears to be the only measure for creating a functional and non-discriminatory market that would ensure access of independent traders to the free electric capacity.

29. The first auction round already took place in the beginning of 2006. The representatives of local and foreign undertakings participated in the auction and the demand exceeded the supply more than five times. The prices resulting from the auction assume 15% increase in the wholesale electricity prices for 2006. This increase follows from the high fuel prices and growing lack of production capacities.

7.3 Competition advocacy

7.3.1 Comments of the Office on the draft Act on Water Ducts and Sewers

30. In its comments on the draft amendment to the Act No. 274/2001 Coll. on Water Ducts and Sewers, the Office presented its view that from the viewpoint of competition environment in the area of water industry it is more advantageous to enforce so called operational model of infrastructure ownership and services operation consisting in separation of the entity holding the water infrastructure (usually a municipality) from the entity operating this infrastructure. The Office therefore recommended enacting the operational model into the submitted draft Act as the only possible model. Such an arrangement would enable performance of tenders and granting concessions for operation of infrastructure. Such a possibility does not exist in case when the owner and operator are one person.

31. The Office also enforced the principle that the Act stipulated the maximum period for which it is possible to conclude contracts on operation of water infrastructure. Such a measure should prevent closure of the market as a result of existence of a series of long term contracts between the operators and municipalities leading to actual elimination of functioning “competition for the market”.

32. Enacting the operational model and setting maximum period of duration of concession contracts on operation of water infrastructure would have following positive effects:

- Pressure on lowering prices and increasing quality of services
- Better position of the customers by means of strengthening the position of a municipality as the infrastructure's owner
- More transparent operation of the water infrastructure

33. The abovementioned principles will be further enforced by the Office in the future amendments to the relevant legislation.