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DOES COMPETITION KILL OR CREATE JOBS?

Contribution from Czech Republic

-- Session I --

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DOES COMPETITION KILL OR CREATE JOBS - LINKS AND DRIVERS BETWEEN COMPETITION AND EMPLOYMENT

-- Czech Republic --

1. Introduction

1. Located in Central Europe the Czech Republic is a small open economy that has since 1990s undergone a significant economic development from centrally governed system into a functioning market economy based on principles of free and undistorted competition. After the accession to the European Union in 2004 the Czech economy has been mostly dependent on the exports and imports within the EU market.

2. The primary purpose of the establishment of the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as “the Office”) in 1991 was to preserve efficient competition and enforce competition rules in the market to the benefit of the development of national economy and consumer’s welfare.

3. The Office has been provided with relatively high level of independence in performing its tasks. It is the state administration body with established decision-making process independent of any external pressure. Therefore no political calls or requests have to be considered during the decision-making process.

4. The following contribution is focused on interrelation between efficient competition and sufficient level of employment as an aspect of modern welfare state. The contribution is concerned with particular discrepancies between both aspects. On this background it describes the legal framework of the Office’s decision-making process in the area of protection of competition on the one hand and the reflection of such relations to the Office’s application practice on the other hand.

2. Competition and Employment

5. Characteristics of interrelation between efficient competition and employment may have several forms. The easiest way to gain high market share by undertaking is to offer better prices. Therefore in competitive environment the pressure to lower the price exists. Lower prices of products can be achieved by increasing the production effectivity that in most cases leads to decrease of number of jobs. In this case it can be, in general, stated that the term efficient competition and employment are in conflict.

6. Another possible form of relation between competition and employment arises when undertakings in the course of their competitive activities opt for the increase of quality of its products and services as a means to gain higher market shares. One of the possible ways to achieve this goal is to establish new jobs in order to improve after-sale services and technical support. In this case the competition could be assessed as beneficial for employment. The same applies for new positions within units focused on research and development when increasing the competitiveness by innovations.

7. Competition may play a crucial role in increasing the level of employment. For example when the market barriers are removed as a consequence of competitive pressure and subsequently the number of market players and possible employers increases significantly. In such cases competition supports economic growth and creation of new jobs in these markets and all upstream and downstream markets.

8. In practice it depends on whether and how is efficient competition on one hand and employment and welfare issues in general on the other hand balanced within the legal framework of the particular jurisdiction.

3. Competition Policy of the European Union and Social Market Economy

9. While at the beginning of the millennium the EU competition policy reflected the effort to establish the free market without any significant restrictions after the signing of the Treaty of Lisbon quite significant changes occurred. Pursuant to the Article 3 (3) of the Treaty on European Union (hereinafter referred to as "TEU") the EU "...shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance." This ambitious characteristic of internal market replaced previous focus on open market economy with free competition mentioned in the Article 4 of the Treaty on European Communities. Lawyers pointed out that the mentioned provision of TEU states for the first time in the history of the EU law the so called social market economy.

10. Considering certain contradictory aspects of social market economy and high competitiveness, the Article 3 (3) of TEU can be assessed as a statement of compromise between contradicting approaches adapting the European social model on competition within global economy. It has to be pointed out, that values and character of social market economy have been revised; however, a corresponding revision of means to protect competition has not been established. Treaty of Lisbon has not entrusted the EU with new specific competencies that would allow the EU to establish common social standards or create common system of social protection. Similarly the legal framework of competition protection in the Czech Republic has not experienced any significant changes that would allow reflection of the transition to European social market economy.

4. Czech Legal Framework

11. In the Czech Republic competition rules have been laid down by the Act on the Protection of Competition No. 143/2001 Coll. (hereinafter referred to as "the Act"). The public interest forms an integral part of aspects taken into account when the final decision of the Office is drafted. However, the Czech competition law does not specify employment issues so the possible issue of job creation/loss could play a crucial role when determining the case.

12. In antitrust cases the Office has not dealt with infringement that could present employment concerns. In the Czech jurisdiction the possible negative effect of competition enforcement could arise from too extensive sanctions imposed for breach of competition rules. Should the sanction had a liquidating effect (a fine that would cause a risk of bankruptcy) on the undertaking, the sanctioned undertaking would have to end its commercial activities and terminate employment contracts with its employees. However, the Office does not impose fines that would have such effects on undertakings.

13. As regards antitrust issues the institute of settlement procedure may, in theory, provide the Office with the possibility to emphasize the social aspects, therefore also the employment issues. A 20 % reduction of the fine stated in the Statement of Objections can be granted if the undertaking admits the

commitment of the administrative offence and if the Office considers the reduced sanction to be sufficient concerning the character and severity of the administrative offence. The Office will rather opt for the use of settlement procedure if the sanctioned undertaking faces economic difficulties or is active in the region with higher unemployment.

14. Also in the area of merger control the Act does not state any particular social aspects that should be considered by the Office. Pursuant to the Article 17 of the Act when examining a notified concentration, the Office shall primarily assess the necessity of preservation and further development of effective competition, the structure of all markets affected by the concentration, the shares of the parties to the concentration in such markets, their economic and financial power, legal and other barriers to enter relevant markets by other undertakings, the alternatives available to suppliers and customers of the parties to the concentration, the development of supply and demand in the affected markets, the needs and interests of consumers and research and development provided that it is to the consumers' advantage and does not form an obstacle to effective competition. The Office shall not approve a concentration provided it would result in a substantial distortion of competition in the relevant market particularly because it would result in or would strengthen a dominant position of the undertakings concerned.

15. The Act does not include employment issues or public interest as an aspect or a part of assessment in the merger review process. It is a paradox that these aspects were included in the previous competition act (No. 63/1991 Coll.) pursuant to which even concentration allegedly restricting competition could have been cleared if the merging parties had proved that the harm caused by competition restriction had been sufficiently balanced by economic benefits arising from the transaction. Even though the current wording of the Act does not include similar provisions the Office takes into account the employment issues (creation/loss of jobs) as so called mitigating circumstances when examining the transactions. However, as it is not established in the Act the employment issues may not form a part of the reasoning of the decision to block the merger or to approve the concentration subject to conditions.

16. While communicating with merging parties the Office assesses the possible impact on employment and future plans of the parties as regards the job creation or losses. As stated above the employment concerns alone shall not form grounds for the final decision and the Office would have to base its reasoning on other aspects.

5. Case study

17. In 2014 the Office approved a concentration between retailers of consumer goods, subject to structural conditions accepted in order to ensure efficient competition in the relevant markets. Conditions included commitments to sale several stores in four regions.

18. Within the first phase of the administrative proceedings the Office concluded that the investigated merger had raised substantial competition concerns and might distorted competition in the territory of four cities where the activity of merging parties overlapped and their combined market share significantly exceeded the 40 %. In such areas merging undertakings were subjects to lesser competition pressure from competitors holding significantly lower market shares or number of stores.

19. Even though the Act does not include assessment of such aspects, during the merger review process the Office was also concerned about the possible job losses as one of the suitable purchasers was not willing to take over all employment contracts existing between the acquired stores with all its employees. The Office addressed this issue informally during the negotiations about the sufficiency of proposed commitments. At the end the suitable purchaser did take over the employees indirectly by concluding new employment contracts when the acquisition was completed. No plans to decrease the actual number of jobs existed and level of employment should not be affected.

6. Conclusion

20. According to abovementioned, assessment of non-competitive issues in broader context (e.g. including also social-economic aspects) is in practice usually applied by the means of inclusion of such facts into mitigating circumstances, i.e. supportive arguments for acceptance of certain conduct of undertakings. It is complicated to unilaterally assess whether this approach characterized by relative balance is suitable. The approach emphasizing mainly undistorted competition without taking into consideration any other criteria when assessing competition cases is most certainly advocated by significant number of experts. On the other hand a notable number of advocates of the opposite approach integrating also other aspects into this process exist. It is certain that only further development of the competition law may reveal whether the current approach is correct and sufficient or whether the competition assessment will incline solely to one of the mentioned approaches.