

Unclassified

DAF/COMP/GF/WD(2016)13

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

02-Nov-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from Czech Republic

-- Session III --

1-2 December 2016

This contribution is submitted by Czech Republic under Session III of the Global Forum on Competition to be held on 1-2 December 2016.

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JT03404324

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- Czech Republic --

1. Introduction

1. The objective of this paper is to highlight the most important circumstances of the independence of the Czech Competition Authority (hereinafter referred to as “CCA” or “the Office”) and to answer the questions related to maintaining the independence of CCA from the political pressures. In the Czech Republic, there are several independent authorities with national competencies. These are mostly administrative bodies exercising public administration in specific areas. Their independence from government is either partial or complete. The Office belongs to a group of so-called *relatively independent authorities*. Although these authorities are bound by government decrees, their position regarding their powers is independent, as that resulting from special acts.

2. CCA is a central state administrative body and was established in 1991 to promote and protect the competition in the Czech Republic. The Office’s scope of powers is regulated by set of legal acts which state that the mission of the Office is 1) to create such conditions that favour and protect competition, 2) to supervise over public procurement, 3) to consult and monitor possible state aid and also 4) to supervise the abuse of significant market power in the sale of agricultural and food products. The Office’s responsibilities are different in each of abovementioned areas. In the field of State Aid, CCA acts as an advisory body, whereas in the remaining fields CCA acts more or less as a decision-making body. It should be noted, the following text concerns competition issues only.

3. The Office has the power and consequently the obligation to investigate complaints, initiate and conduct administrative proceedings and impose sanctions whereas the infringement of competition rules is suspected.¹ In case the infringement of competition rules is proven the Office shall issue the decision stating an offence and usually imposing a fine. The Chairman of the Office decides on appeals against first-instance decisions. The Office is also entitled to defend the issued decisions before Administrative Court and in case of appeal in cassation against court’s decision before Supreme Administrative Court as well.

4. The Office should be an independent authority for the fulfilling of the above mentioned powers. The Office follows unitary administrative model that means the same administrative authority investigates potential violations and brings the case to an end by taking a final decision and imposing a remedy. Bellow mentioned model ensures the independent decision-making process which shall resist the political influences and which shall ensure that the Office can be considered as the credible public authority by consumers, undertakings and general public.

¹ In a merger case the proceedings is initiated by notification.

2. Structural Independence

2.1 Relationship between CCA and the government

5. Independence from political power is a key feature of effective competition law enforcement. The Office is a central authority of state administration which falls under the executive branch of state power. The state administration is characterised by several features, among others by the hierarchical relations based on levels of superiority and subordination. In the Czech Republic, there are only two fully independent public authorities,² which were excluded from the superiority and subordination structure by certain special acts. Those special acts provide the exception according to which these authorities are bound only by acts and constitutional acts and not by government regulation.

6. This is not the case of the Office as the Act No. 273/1996 Coll., on the Scope of Competence of the Office for the Protection of Competition (hereinafter referred to as "Competence Act"), doesn't state similar provision. Nevertheless, CCA is sufficiently protected from political influence and thus independent decision-making body. Following safeguards strengthen the specific status of the Office:

1. The decision-making practice of the Office cannot be influenced by the government. The surveillance over the Office's activity is carried out by independent administrative courts which review the Office's decisions and which are obliged to adduce reasons for their decisions. The government is not allowed to interfere with the decision-making activity of the Office in any case. It can neither decide which proceedings should be initiated or closed by the Office, nor decide on the inaction of the Office.
2. The transparency of the Office's decisions is also ensured by their public accessibility via website of the Office and annual Decisions Collection.
3. The Office's powers provided by the Competence Act shall be limited or extended only by the regular legislative process. Independent nature of amendment to the Competition Act which reflects the responses to the ongoing competition law developments should be guaranteed by different proportions of political parties in the Parliament.
4. Unlike other governmental institutions the headquarters of the Office is not situated in Prague but in Brno, second largest city which is the judicial centre of the Czech Republic. The distance from Prague is also considered as a barrier against the political pressure.

2.2 Chairman

7. One of the most important safeguard is represented by strong position of the Chairman of the Office. The conditions of appointment and dismissal are provided by the Competence Act. The Chairman is appointed by the President of the Czech Republic (President) upon the government's proposal. The President's approval represents more autonomy for the Office and weakens the government's influence. This system is based on the shared competences in order to allocate the functions and furthermore the competencies between more decision-making entities. While appointing a Chairman, decision-making entities share the competencies – one proposes the candidate and another one is empowered to appoint the candidate. Such system with limited government activity should provide the protection of the public interest by the institutions which independence is highly needed.

² I. e. Council for Radio and Television Broadcasting and the Office for the Personal Data Protection.

8. The lawmaker intended to protect the impartiality of the appointment dividing the whole procedure between more subjects in order to avoid the political influence. The Chairman's appointment is a political consensus which ensures suitable candidate. In spite of the mentioned system, the final decision of appointment is at the discretion of the President who can block the whole process. The question arises whether multi-person appointment committee requiring mutual consensus could be considered as more suitable choice.

9. The procedure of the dismissal has to be subject to the legal regulation as well. The reason is to protect the position of the Chairman from the potential political pressure while deciding delicate cases of public interest. The Competence Act sets conditions under which the Chairman of the Office can be dismissed. The reasons are as follows:

- non performing of Chairman's office for a period longer than 6 months; or
- the Chairman significantly damages the reputation of his office or damages the independence and impartiality of the Office.

10. The list of above mentioned reasons protects the Chairman from unjustified removal from the office for example in a case of contradictory political interests. It means the Chairman cannot be easily dismissed as well as his mandate cannot be cut. If the situation results in dismissal the Administrative Court as the representative of the independent judicial branch reviews the removal decision.

11. It is obvious the Chairman as a citizen has his own political opinions. Nevertheless, according the Competence Act the Chairman's position also requires impartiality. Following this principle, the Competence Act prohibits the Chairman to be a member of a political party or political movement when exercising his mandate to ensure the formal political independence. However the impartiality is not required before the appointment.

12. While a personal independence of the Chairman is expressed by his impartiality, an external independence of his office is represented by the prohibition of conflict of interests. Generally, the chairmanship is incompatible with any other office within the legislative power, the executive power or judicial power of the state. The incompatibility of his mandate arises from the Constitution of the Czech Republic and especially from the scope of powers of the Office which can be in the conflicts of interest with the government's one or with the sensitive cases in general.

13. This conclusion is supported by a provision of the Act No. 159/2006 Coll., on conflict of interests. The provision forbids the members of government as well as the Chairman of the Office to be employed by companies or public institutions. The purpose of the mentioned prohibition of multiplication of high state management post by one person is among others to avoid advantages consisting in gathering information, lobbying and distorting of transparency.

14. Limited period of the Chairman's mandate is closely related with the concept of the Office independence. In the public administration, there are more concepts of duration of appointment with the purpose of the independence protection. Contrary to the judges who perform their duties for indefinite period of time, the heads of the central state administration bodies are appointed for the limited period of time often with reduced possibility to re-election. Main reason for limited period of mandate is avoiding the pressure of political parties and interest groups who can influence potential re-appointment. The term of the Chairman's office is 6 years, the term can be renewed, but not for more than two successive periods. Statute presumes that the period lasting for six years is long enough to secure the possible change of Chamber of Deputies' representatives as well as the President. On the other hand, the period is sufficient for identifying the issues and finding satisfactory solution in the field of competition.

15. The Chairman closely cooperate with his first Vice-chair (head of competition section) and two Vice-chairs (one for directing Public Procurement Section and one for directing Section of Legislation and Public Regulation). When choosing his deputies the Chairman takes into account solely their professional experience.

2.3 Professional staff

16. The independence of the Office is also ensured by professional official staff. The year 2015 particularly marked Czech administration by the implementation of the Civil Service Act. After mentioned Act has entered into force, the transition of most employees under the Civil Service Act became the priority.

17. Running of selection procedure by the current Public Service Act strives for maximum objectivity and transparency – e.g. an unsuccessful applicant is entitled to file an appeal against the decision or the direct superior of candidate cannot take part in the selection committee. Relating to the selection committee, its members are elected by the human resources staff who should justify the selection of committee members in a formal administrative decision. Decisions on a selection for civil servant positions require the confirmation by the Chairman of the Office. Although strictly regulated selection process brings many advantages regarding qualification and certainty of the future employees of the Office, currently this recruitment procedure is very complicated and therefore time-consuming. Moreover it causes high workload for human resources of CCA as the amount of the administration during the selection procedure is very excessive.

18. Despite above mentioned difficulties, Civil Service Act can be considered as another tool concerning appropriate staff recruitment, as it seems to be independent and objective. The implementation of Civil Service Act also brings another benefit - new ways of evaluation of performance of civil servants, objectively reviewable remuneration and justified duration of an employment relationship in civil service.

19. The newly introduced system of civil service in the Czech administration endeavour to guarantee that the state administration should be efficient regardless of the political situation relying on appropriate official staff composed of competent and professional civil servants.

3. Decision-making independence

20. The way of initiating and closing of administrative proceedings can be considered as another important feature indicating the independence of the Office. According to the abovementioned text, the government is not competent to instruct the Office as it is not the supervisory authority of the Office.

21. Generally, if there is a suspicion of involvement in cartel or any other infringement of competition law, anyone can submit a complaint, even anonymously. In line with the Act No. 143/2001 Coll., on the Protection of Competition (hereinafter referred to as "Competition Act"), the Office is obliged to investigate the complaint and initiate the proceeding *ex officio* if the infringement of Competition Act is found. Then, the proceeding is conducted by the Office. The alleged infringer can be found guilty in the proceedings on the basis of legal and economic arguments. No duty is set by the Competition Act or any other legislation to initiate the proceedings on the basis of the complaints.

22. With regard to the decision-making process, the Office issues the first instance decision, which states an offense and may also impose a fine, as one of the types of administrative penalty. Each appeal against the first instance decision shall be decided in the second instance by the Chairman. The final decision of the Chairman shall be reviewed by the independent Administrative Court after the action is brought.

23. In addition to its decision powers within administrative proceedings, the scope of CCA's powers was recently extended to exercise so called prioritization of individual cases. Since 2012, the Competition Act includes a provision which permits the Office to not initiate the proceedings *ex officio* if there is no public interest due to low level of detrimental effect on competition.

24. The purpose of this provision is obviously avoiding marginal infringement of competition law. At the same time, the provision protects the competition from political pressures which can easily arise in the case the indeterminate legal term is not construed within its intended purpose. The provision should protect the activity of the Office from the political influence as well as ensure the transparent procedure and the predictability of taking a decision.

4. Financial Independence

25. The activity of CCA as well as the other state authorities is funded from the state budget. On the other hand, the existence of separate budget chapter shall be considered as another kind of the independence safeguard. This safeguard is even strengthened, when a central administrative body is entitled to propose its own budget or its structure, as is the case of the Office.

26. In this regard, its independence maintained due to fact the Office as a budget chapter administrator does not need to wait for reallocation of funds from the chapter by the Ministry of Finance and once managing its funds approved under chapter is relatively autonomous.

27. However, the Czech Government represented by the Ministry of Finance is not bound by the CCA's budget proposal when preparing a draft law on state budget. Therefore, the government exercises significant power to affect the activity of the Office by potential restrictions of the budget.

28. Moreover since the Act on Civil Service has come into force the government is no more authorized to interfere in aspect of remuneration of civil servants in case the systematization of official positions has been already approved. This would not apply only in case of organizational change of the Office, for example due to loss of one of its powers.

29. Apart from the political pressure, there is also a real threat of pressure exerted by the business stakeholders, which can be strengthened in connection with personal interests of the official staff. Such persons or undertakings might endeavour to influence the regulatory authorities with a goal of promoting their own interests. It might lead the authority employees to decide in favour of such entities with the expectation of getting better job by working for these entities. This threat is sometimes described as "*agency capture*". In order to set a protection against this type of risk, the law provides different safeguards. As an example relating to CCA it can be concluded the restriction for the management and also members of the staff to pursue business or other remunerative activity, membership in a management or supervisory bodies of undertakings, or their duty of confidentiality even after they have left the Office.

5. Conclusion

30. From the abovementioned it follows that the Office has all the prerequisites to play a role of independent competition authority. Although CCA is a part of state administration, its status should not be and in practice it is not influenced by political power and also decision making activity of the Office should reflect neither political nor private concerns. The position of a Chairman is one of the most important safeguards of the Office's independence. Both the President and the Government of the Czech Republic are partially engaged in the process of Chairman's appointment. Such arrangement prevents the appointment of a candidate close to one of particular political party. The time bound mandate and strictly defined framework of the Chairman's dismissal also strengthen independent position of CCA.

31. As for human resources perspective, the another Office's independence safeguard is represented by professional staff, which is selected only on basis of objective and qualitative criteria since the Act on Civil Service has come into force. It should be noted, the implementation of this Act is the only fundamental change related to the Office's independence during last 15 years.

32. The only imperfection of independent position of the Office might be represented by the government's possibility to influence the annual overall amount of the Office's financial resources. Nevertheless the government is no more authorized to interfere in aspect of remuneration of civil servants after the systematization (i.e. legally binding arrangement) of official positions is approved.

33. As indicated above, according to the current legislative framework the government has no possibility to influence the Office's decision-making activity which is the subject of judicial review only.

34. As the only one and rather a formal issue remains the absence of legal provision that would *de iure* exclude the Office from the relation of subordination to the government. Usually administrative bodies that are independent from government are bound only by generally binding regulations and it is because these administrative bodies are expressly excluded from the range of government's decrees via certain *lex specialis*. In relation to the independence of the Office, such provision is missing. There are two possibilities to approach this issue however both may result into contradictory outcomes. Either the status quo is maintained, leaving the Office's position "relatively" independent or the Office initiates incorporation of explicit exclusion of the Office from the reach of government's regulatory power. Nevertheless legal experts believe such expressive exclusion would bring the violation of constitutional law because article 67 of the Constitution of the Czech Republic provides that the Czech Government is supreme executive body with no exceptions thereof.