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Independent Sector Regulators – Note by Czech Republic

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http://www.oecd.org/daf/competition/independent-sector-regulators.htm

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Czech Republic

1. Introduction

1. The main objective of this paper is to describe experience gained by the Czech competition authority – the Office for the Protection of Competition (hereinafter referred to as „the Office"), during the interaction with two significant sector regulators active within the jurisdiction of the Czech Republic, namely the electronic communications (hereinafter referred to as „telecommunications") sector regulator and the energy sector regulator.

2. Both these regulators are active in so-called network sectors, which are characterized by a tendency towards a natural monopoly, strong barriers to entry, mainly due to the high costs of business' establishment and the power of undertakings already operating in the sector. In addition, a potential entrant needs the consent of the regulator which besides other things decides on the extension, change or withdrawal of the service. The necessity of provided service is also characteristic, because society considers the services provided by these sectors to be crucial from both economic and social point of view.

3. Also for these reasons, there is a society need to regulate these sectors in order to protect consumers from the significant market power of some undertakings, to promote investments and protect investors from unexpected government actions as well as to promote economic efficiency. The achievement of these objectives is not easy. Regulatory authorities should therefore meet certain prerequisites in order to be successful in carrying out their duties. This comprises, in particular, the independence of the regulatory authority, its legitimacy, the implementation of fair regulatory procedures, the expertise and the effectiveness of the regulatory authorities.

4. However, the objectives of such regulators may overlap with those of the authorities promoting competition policy. Indeed, competition policy shall be applied in all sectors of the economy without almost any exception, while sector regulation is typical only for a certain type of sectors, i. e. network sectors. Thus, in those sectors where competition policy is applied together with sector regulation, there may be a difficulty in determining which issues should fall within the scope of powers of competition authorities and which types of conduct should be regulated by direct sector regulation.

5. Sector regulation and competition regulation differ mainly in terms of time. While sector regulation is carried out ex ante, competition regulation is applied ex post. Competition law and direct regulation also differ in kind of remedies imposed on market players. Competition law remedies are mostly addressed to the specific conduct or behaviour of undertakings which have distorted the competitive environment in the market. Sector regulation is applied on entities under supervision of sector regulator and defines in detail a behaviour of regulated entities. For instance, it determines a level of wholesale prices, conditions for the provision of certain services, etc.

6. Consequently it is obvious that setting clear rules applicable to activities of both the sector regulator and competition authority on one hand and their mutual cooperation on the other hand should be a priority as this will be a benefit for the free market economy as well as for competitors operating in the relevant sectors and last but not least for consumers.

2. Telecommunication Regulator and Energy Regulator

7. As noted above, when it comes to negotiation and cooperation with regulators, the Office has most of the experience with the telecommunications regulator and the energy regulator. It is no coincidence, because the Office deals regularly with many undertakings, which fall within the regulatory competence of the Czech Telecommunication Office[1] (hereinafter referred to as "the CTO") or the Energy Regulatory Office[2] (hereinafter referred to as "the ERO").

8. The CTO was established by the Electronic Communications Act (No. 127/2005 Coll.) on 1 May 2005 as the central administrative authority for exercising state administration in the matters determined within the Act, including market regulation and determining the terms and conditions for undertaking´s business in the sphere of telecommunications and postal services.

9. The CTO has its own chapter in the state budget and is established as an accounting entity. The CTO is headed by a five-member Council, its members and the Chairman are appointed and dismissed by the Government on a proposal from the Minister of Industry and Trade. Although the CTO is a central government authority, its activities are closely linked to the Ministry of Industry and Trade, thus the level of its independence may be considered as questionable. The CTO carries out its activities through individual units, i. e. sections, departments and separate units.

10. The ERO was established on 1 January 2001 pursuant to the Energy Act (No. 458/2000 Coll.) as an administrative authority responsible for regulation in the energy sector. The ERO acts independently and is governed only by laws and other legal regulations. In exercising its powers, the ERO shall not receive or seek instructions from the President of the Czech Republic, the Parliament of the Czech Republic, the Government, or any other executive body or natural or legal person.

11. The objective of ERO is, in particular, protecting the justified interests of customers and consumers in energy industries, price control and supervision over the energy market and over compliance with the requirements of competition by all participants within this market wherever competition is not feasible. Licensing, including oversight over licence holders, dispute adjudication, promotion of supported energy sources and oversight over licence holders' adherence to the conditions for carrying on business, as the basis for the preconditions for reliable electricity, gas and thermal energy supply, and also coordination of international cooperation are also principal tasks of ERO.

12. Similarly to the Office, the ERO operates as an independent chapter within the state budget and does not have any economic activities, any ownership interests in domestic or foreign companies, or any special-purpose transfers. It is not entitled to provide subsidies and returnable financial assistance, to have any expenses resulting from licensing contracts or to have any subordinated organisational components.

13. Both abovementioned sector regulators, as well as the Office, are independent central state authorities fulfilling their powers on the basis of authorisation given by special legal acts. All these public bodies follow unitary administrative model according to which the same administrative authority investigates potential violation and brings cases to an end

[1] See https://www.ctu.eu/

[2] See https://www.eru.cz/en/

by taking a final decision eventually imposing a remedy. This model ensures the independent decision-making process which shall ensure that these regulators are considered as credible public authorities from the perspective of consumers, undertakings and general public.

3. Interaction between Regulators

14. In addition to the competition law, also individual sector regulations that are part of the Czech legal system provide references to protection of competition, especially in relation to the sector of telecommunications and the energy sector. It is therefore logical that the competition authority cooperates mostly with regulators in these two sectors.

3.1. Czech Telecommunication Office

15. Regarding telecommunications, it should be noted that the laws governing this sector in the Czech Republic explicitly indicate which issues fall under sector regulation and which they leave within the scope of competition rules. Individual roles of the sector regulator, the CTO and the Office are therefore clearly divided. Sector regulation of the CTO is carried out ex ante and should also aim to compensate any missing effects of the competition.

16. The role of the sector regulator also consists of establishing conditions for the proper functioning of the whole sector, including in terms of competition, protection of consumers and other market participants until a fully competitive environment is achieved. The Czech legislation also stipulates that a sector regulator shall not, by acting and deciding, confer an advantage on one entrepreneur or consumer, or a group of entrepreneurs or consumers, to the detriment of other competitors. The sector regulator also continually assesses the effects of the established conditions in relevant markets and assesses whether there is effective competition. These considerations, which are valid at least for the whole territory of the European Union, clearly make coordination of activities between the sector regulator and the competition authority both appropriate and necessary.

17. Cooperation between the Office and CTO is based on the applicable law, mutual contracts or is established ad hoc if needed.

18. The Telecommunication Act itself stipulates the following forms of cooperation: (i) mutual provision of complaints and information, (ii) assisting in administrative proceedings or other activities of both authorities provided for by legislation, and (iii) cooperation in cases of State aid provided within the sector.

19. Concerning the information exchange, for reasons of legal certainty and protection of the third party's rights, the confidentiality of the information must be ensured by both authorities.

20. As regards administrative activities, cooperation is based on mutual consultation on general regulatory measures in the sector of telecommunications. Furthermore, cooperation is carried out in the form of requests for opinions when conducting analysis of relevant markets in the field of telecommunications. The authorities shall cooperate with each other, requesting opinions on pending decisions issued within their competencies, and shall endeavour to reach a consensus on these opinions.

21. Regarding cooperation based on agreements, a permanent working group has been established between the authorities with a parity representation of their experts. At this level, information is exchanged and joint positions or opinions are prepared. Within this platform, it is possible to efficiently share data and information important for the proper performance of the administrative activities of both authorities.

22. Cooperation in the working group is not limited to the antitrust issues only but also to the assessment of questions arising from State aid rules. To conclude the cooperation between the Office and CTO, these are the most significant issues addressed: i) retail data market analysis, ii) consultation in auctions of frequency spectrum iii) provision and support of postal services, iv) abuse of dominant position by mobile operators, v) consultation on the issue of a borderline between appropriate and inappropriate sharing of services, infrastructure or frequency spectrum between mobile operators.

3.2. Energy Regulatory Office

23. Also in the energy sector, the roles of the sector regulator, the ERO and the competition authority, are quite clearly defined. Similarly as in the field of telecommunications, cooperation between these two public administration bodies is based on the law as well as contractual or ad hoc basis.

24. The outlines of the legally defined cooperation between the two authorities are set out in the Article 17 (c) of the Energy Act. The ERO and the competition authority shall provide each other with suggestions, information and other forms of assistance that are necessary for carrying out their tasks. As in the sector of telecommunications, the confidentiality of exchanged information has to be preserved. Moreover, the Energy Act provides the range of information that is transmitted by ERO for review by the competition authority. It contains mainly information on i) a conduct of market participants which may reasonably be considered as distorting or restricting competition or leading to such restriction or distortion, ii) an application of restrictive or unfair terms in contracts in the electricity, gas or heat markets or iii) a methods of pricing electricity, gas and thermal energy supply for households.

25. In carrying out their tasks, both authorities shall cooperate by providing each other with opinions on the decisions to be adopted within their respective areas of competence. Representatives of both authorities shall seek to achieve consensus on these positions, whether in the electricity, gas or heat markets. Concerning administrative activities, cooperation also takes place in the form of consultation on general regulatory measures in the energy sector, with the aim not to distort the proper functioning of competition.

26. Regarding the cooperation resulting from bilateral agreement, as in the telecommunications sector, the permanent working group has been established between the authorities. Both authorities are allowed to exchange information and prepare joint positions or opinions to enable proper performance of their activities.

27. Most significant outputs of the working group include i) an evaluation of the functioning of the electricity wholesale rules under the Wholesale Energy Market Integrity and Transparency Regulation (REMIT 1227/2011/EU), ii) evaluation of State aid rules in the field of renewable energy sources, iii) consultations in cases of an abuse of dominant position of gas and electricity distributors, iv) assistance in regulation and setting up conditions for heat sector enterprises, and v) joint position on the issue of overcompensation in the field of renewable energy sources.

28. With the objective of establishing a stable regulatory framework in the energy sector, the Memorandum of Cooperation between the Office and ERO has been concluded. The purpose of this Memorandum is to contribute to the development of mutual relations and cooperation between the two authorities, through the establishment of well-functioning regulatory framework which both parties consider as a prerequisite for the participation of all stakeholders in the energy sectors.

29. Main objectives of the Memorandum are as follows: i) setting up and maintaining active cooperation while dealing with specific cases, ii) exchange of information, experience and suggestions, while respecting the statutory assumptions and principles of good administrative practice, iii) sharing information on forthcoming legislative changes and cooperation while addressing issues resulting from these changes, iv) training employees in areas related to competences of the authorities and v) ensuring participation of the other Party of the Memorandum in conferences or similar educational events.

4. Cooperation in Practice

30. Cooperation between the Office and the CTO has been proved to be beneficial during the preparation of the 700 MHz and 3400-3600 MHz frequency spectrum auction which is supposed to take place the next year. From the beginning, both authorities acted in close cooperation with a view of preventing possible contradictions as soon as possible. The auction represents significant issue, as the conditions of the auction are connected with high expectations of the entry of a new mobile operator into the Czech telecommunication market. At the same time, the auction should allow existing operators to build new 5G networks. The Office has declared that a tender process in form of an auction is an instrument consistent with competition law and it would, while maintaining transparent and non-discriminatory approach, allow fair competition between tenderers. From a competition point of view, the establishing of the terms and conditions of the auction can be generally considered as pro-competitive, provided that setting of these conditions is not discriminatory, because otherwise it could lead to a possible lessening of competition in the market.

31. Another problematic aspect of the upcoming auction is the issue of network sharing, or possibly other forms of cooperation between mobile operators in connection with meeting the development criteria. It is desirable that the development criteria of a tender procedure should not encourage operators to conclude potentially anticompetitive network sharing agreements or other forms of cooperation and coordination in order to meet these criteria, without providing adequate consumer benefits. Mutual consultations between the Office and the CTO were also necessary in relation to the issue of wholesale use of frequencies in situation where the operator does not offer its services to end customers but to other operators. Coordination between the sector regulator (CTO) and the competition authority is desirable especially when setting an acceptable level of network sharing not only for the auction itself, but also for the sector as a whole.

32. An example of cooperation within the energy sector based on the Memorandum of Cooperation between the Office and ERO can be mentioned as well. In particular, it is a case related to the wholesale gas market where the ERO intervened. The case concerned a dispute in which the underground gas storage operator, while applying for connection to the transmission system and complying with all legal requirements for connecting, did not agree to the terms of the connection contract submitted by the transmission system operator. From the point of view of the sector regulator, this conduct constituted a violation of the

Energy Act by the transmission system operator for failure to fulfil a legal obligation, since it laid down conditions which were clearly above the limit predicted by the Energy Act.

33. The ERO forwarded the information to the competition authority, which initiated administrative proceedings for possible abuse of a dominant position by the transmission system operator, who insisted on conditions that were beyond the limit set by the Energy Act. Thus, the transmission system operator prevented the acceptance of the draft contract by the underground gas storage operator, which was the necessary condition for connecting this facility to the gas transmission system. The competition authority did not assess the issue of the connection agreement as such, as this is subject to sector regulation. The Office now examines the conduct of the transmission system operator, which is clearly anti-competitive by preventing another competitor from entering the gas storage market.

34. However, there are cases where the cooperation is not as smooth. In general, the Office is entitled to give comments on the proposed measures of sector regulators related to the protection of competition. At the beginning of the formation of mutual cooperation, the Office raised fundamental comments on a number of measures proposed by the CTO, especially regarding draft analysis of particular relevant markets, certain tenders for granting rights to use the radio frequencies and some methodologies of the CTO. Initially, those comments of the Office were generally not accepted by the CTO. Nevertheless both authorities gradually agreed on rules of preliminary discussions on points which were classified as an essential. Within these discussions, there is an opportunity for clarifying the views of both authorities, eventually finding a better or compromise solution. Such practise effectively leads to a reduction of the number of essential comments of the Office, and in particular improves the quality of submitted measures from the competition point of view.

35. Further example, where the differences between the views of the two authorities hindered their smooth cooperation, is represented by the case concerning assessing the functionality of the mobile data market in the Czech Republic. The CTO is obliged to assess whether any relevant market within the field of telecommunications fails to maintain competitive and therefore there raises a need to introduce new regulatory measure. Prior to introduction of such measure, the sector regulator has to conduct a competitive assessment of the market. However, in this specific case, there was a different view of the competition authority and the CTO. Following its own sector inquiry, the Office noted that the market of mobile data is functional within the territory of the Czech Republic, but the CTO came to a different opinion. The European Commission, which was also asked for an opinion on this matter, reached similar conclusions as the Office. The Commission requested the sector regulator to reconsider its conclusions and refrain from considering implementing new regulatory interventions.

5. Conclusion

36. Although the Czech legislation formally defines the competences of the competition authority and the regulators in the telecommunications sector and the energy sector quite clearly, there may be some differences in its practical interpretation. This applies particularly to cases where the sector regulator has to consider issues related to the level and quality of competition. It might happen, and in some cases it happens, that the views of the sector regulators and the competition authority differ. It is also not always clear whose opinion is decisive and which is merely supportive.

37. This situation may lead to an uncertainty in legitimate expectations of regulated entities and consumers. They expect that the state, represented by both competition and regulatory authorities, will be able to clearly define rights and obligations applicable in particular sectors. If there are two different views on a single issue, such as the concept of effective competition, two approaches can be distinguished. Firstly, regulated entities wait and take only necessary steps without added value. Secondly, they do not respect any of the authorities´ opinions and their activity might be on the edge of infringing the law. It is therefore more than desirable, in the context of the cooperation between sector regulators and the competition authority, to clearly define the boundaries of competence and to determine when and in which case the public authority in question has a leading role.

38. Notwithstanding some difficulties encountered by the authorities during their mutual cooperation, it can be considered that the current relationship between the Office on one side and the two regulators on the other side may be assessed positively and is certainly beneficial for these authorities as well as other participants in relevant sectors. Contacts have been established between representatives of both sides, communication between them has been improved and the level of their expertise on the issues addressed by the other side has increased. Documents provided to the Office by regulators are an invaluable source of information on the situation in the relevant markets. Thus, the competition authority does not rely anymore solely on information provided by undertakings. Last but not least, due to early communication on regulatory measures proposed by sector regulators, the possibility of eliminating potential negative impact on competition already during the preparation of these measures has been opened.