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PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

-- Czech Republic --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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1. Introduction

1. The issues of procedural fairness are becoming increasingly important in judicial review of decisions of the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as the "Office"). In particular, questions concerning protection against self-incrimination, duration of the proceedings or impartiality have arisen lately.

2. Enforcement of competition law is predominantly administrative in the Czech Republic, with the Office conducting investigations and issuing decisions, while the courts only scrutinize its conduct. Since cartel agreements constitute a crime under the Czech penal law, individuals might in theory be found criminally liable and ultimately imprisoned for the period up to 8 years; the Office is however not aware of any criminal proceedings, either in the past or currently ongoing. Even though private enforcement is also possible in the Czech Republic, there have been only a few insignificant cases. This contribution will therefore further concentrate only on administrative enforcement.

3. The Office is a central administrative body,[1] meaning that it is not subject to any of the ministries, but is on a same level with them, and that the Chairman of the Office has the same statutory powers as ministers of the Government, but for regularly attending meetings of the Government. This position is not unique to the Office; other highly specialized agencies have it as well, for example the sector regulators responsible for electronic communications[2] or energy.[3]

4. Similarly to all the administrative authorities in the Czech Republic, proceedings before the Office are governed by the Administrative Proceedings Code;[4] special provisions, concerning in particular investigatory powers and fines, are contained in the Competition Act. It is worth mentioning that the Administrative Proceedings Code was not designed for the purposes of adversarial proceedings and investigation of infringements; it therefore does not contain any provisions concerning rights of the accused.[5] In order to guarantee fair process, the courts require the basic principles of criminal enforcement to be used.

2. Decision-making process

5. As already indicated above, the decision-making process usually constitutes a two-step procedure within the Office – the first instance decision of the Office and, when appealed, the second instance decision of the Chairman of the Office.

6. The first instance decisions are issued by the head of the Competition Section, who is the Vice-Chairman of the Office, or his deputy. These decisions can be, and in most cases are, appealed to the Chairman.[6] Before the Chairman decides, the decision and the appeal against it is reviewed by the appellate

1 Art. 2 (1) of the Act No. 2/1969 Coll., on creation of ministries and other central administrative bodies of state administration of the Czech Republic, as amended.

2 Act No. 127/2005 Coll., on Electronic Communications, as amended.

3 Act No. 458/2000 Coll., on the Conditions for Undertaking and on State Administration in the Sector of Energy, as amended.

4 Act No. 500/2004, Administrative Proceedings Code, as amended.

5 According to the legislative plan of the Government, a specific legislation concerning administrative enforcement of infringements was to be adopted in parallel with the Administrative Proceedings Code; it has unfortunately not been done yet.

6 Art. 152 (1) of the Administrative Proceedings Code.

committee (in Czech: *rozkladová komise*),[7] an advisory body composed of employees of the Office (other than the Competition Section) and experts on competition law and economics from outside the Office, including private lawyers and academics. The appellate committee recommends the Chairman how to decide; he is however not bound by the recommendation and may decide in any way he finds appropriate.

7. The Chairman may either confirm the decision and reject the appeal or overrule the decision and either stop the proceedings entirely or return the case to the Competition Section, which will continue in the investigation and eventually issue another decision, which may again be appealed; while drafting the "second" first instance decision, the Competition Section is bound by the Chairman's decision. If appropriate, the Chairman may also modify the decision, for example lower the fine or alter the legal qualification. The decision of the Chairman is final and may only be appealed to the courts.

8. Although the Chairman may himself collect additional evidence, conduct oral hearings etc., it happens only under exceptional circumstances, in particular when the extent of it would be very limited. If the evidence collected by the Competition Section is not sufficient, the case is usually referred back to it.

9. As a matter of principle, anybody who, due to their relation to the case under consideration, to participants to the proceedings or to their representatives, may be believed to have interests in the outcome of the proceedings casting doubt on their impartiality, shall be excluded from performing any acts which might influence the outcome of the proceedings.[8] This rule does, however, not apply to the Chairman, who may only himself issue the second instance decision and is therefore never deemed not to be impartial – he cannot be substituted by anyone else. An action is currently pending before the Constitutional Court, where a party to the proceedings claims that the Chairman had not been impartial and that the rule excluding the possibility of his substitutability is unconstitutional.

10. The objectivity and impartiality of decision-making of the Office is thus primarily guaranteed by the appellate committee, composed predominantly of experts not involved in the investigation and not connected with the Office.

11. The Competition Section has also adopted additional safeguards to guarantee quality of its decisions. First of all, it may ask outside analysts and experts for their views; this possibility is being increasingly exercised. Secondly, the "Devil's advocate" panels were established to scrutinise the first instance decisions before they are issued. The Devil's advocate panel is composed of the senior officials of the Competition Section, not directly involved in the investigation of the case, nor drafting of the decision.

3. Confidentiality

12. Under the Czech law, parties to the proceedings (and their representatives) have an unlimited access to the Office's file and a right to make copies of documents contained therein during the whole course of the proceedings. In particular, they have the right to be acquainted with documents which will be used as evidence. The complainants, who are not considered to be parties to the proceedings, have no special procedural rights and they are dealt with in the same way as the third parties (see below).

13. As far as confidential information is concerned, the Czech law distinguishes between business secret and classified information. Classified information (e.g. state secret)[9] is excluded from the general

7 Art. 152 (3) of the Administrative Proceedings Code.

8 Art. 14 of the Administrative Proceedings Code.

9 According to Art. 38 (6) of the Administrative Proceedings Code, this is either state secret or information of similar character, as defined by the Act No. 412/2005 Coll., on the Protection of Secret Information, as amended, and information upon which the obligation of secrecy was imposed by a special legislation.

right to access the file; if however it is to be used as evidence, the parties to the proceedings have a right to see it, but they cannot make copies nor take notes of it.[10]

14. The same regime applied with respect to business secrets in the period of 2005 – 2009. Currently, if it is possible to inform the parties to the proceedings about the content of a particular document without revealing the actual business secret, the access to business secret will not be granted at all. The Office takes the view that in this way, the right of defence on the one hand and the respect to business secret on the other is balanced. Such a system was in place before 2004, but was abandoned because of the new Administrative Proceedings Code, in force since 2005, which does not contain any provisions on protection of business secrets; an amendment to the Act on the Protection of Competition had to be adopted in order to guarantee it.

15. The undertakings need to identify which information constitutes their business secret; the Office is entitled only to check whether the defining principles of business secret, as set by the Commercial Code, are fulfilled. The law does not provide for any mechanism for resolving possible disputes concerning the nature of specific information; it has however not been needed so far.

16. When a decision of the Office is published (both on internet and in an annual publication), the business secrets are omitted and substituted with the sign of "[*business secret*]"; only the parties to the proceedings obtain full version of the decision.

17. There are no specific provisions concerning access to documents submitted by leniency applicants, in particular the corporate statements. There are two cases to be decided by the Chairman of the Office where the Competition Section refused to grant access to the leniency applications before the statement of objections. These problems have not yet been discussed by Czech courts.

18. Third parties (as well as the complainants) may also be granted access to the file if they can demonstrate sufficient legal interest or other serious reason; they would never be granted access to business secret. In the last five years, the Office did not enable third parties to access the file.

4. Requests for information

19. On the Office's request, the undertakings shall be obliged to provide the Office with complete, correct and truthful documents and information, including the books and other business records or other records which may be important for clarification of the subject of the proceedings in writing within the deadline stipulated by the Office.[11] The Office may request such information not only from the parties to the proceedings, but from any undertakings which may have it in their possession. For failure to produce the requested information, the Office may impose a fine up to 1 % of the net annual turnover of the undertaking concerned.[12] The information may be requested in this way during sectoral inquiries, during the proceedings or even before it, while assessing whether there are sufficient grounds to open the proceedings.

20. When requesting the information, the Office shall state the legal grounds and the purpose of the investigation and advise that the failure to provide the information or to enable its verification may be subject to a fine imposed by the Office. The undertakings are, however, not briefed in detail about the case;

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10 Art. 38 (6) of the Administrative Proceedings Code.

11 Art. 21e of the Act on the Protection of Competition.

12 Art. 22c of the Act on the Protection of Competition.

on the other hand, if the information is requested from undertakings that are parties to the proceedings, they are informed about the proceedings and the theory of the case at the beginning thereof.

21. The law does not provide for any time limits concerning provision of the requested information; the deadline is set individually in every case, taking into regard the amount of information requested and difficulty of gathering it; on a request by the undertaking, the deadline may be prolonged.

22. As far as the extent and structure of the information requested are concerned, the undertakings may discuss their difficulties with the Office. On one occasion, the Office inspected a database of one undertaking in order to verify that it really does not store the information requested; thereafter, the request was modified to suite the structure of the database.

23. In one recent case, the Office requested specific information in writing and the undertaking concerned refused to provide it because, in its view, it would be contrary to the right not to incriminate oneself. Since the Office insisted on the provision of the documents, the undertaking referred the dispute to the court, seeking a court order prohibiting the Office to request these documents.

24. Te Regional Court, however, dismissed the motion, stating that if there is a legally conducted proceedings and the Office exercises its investigatory powers within the limits of the proceedings, the court will not interfere with it until the final decision is issued – only there may the participants claim that the evidence was collected in an unlawful way.

5. Agreed resolutions

25. There are no rules concerning settlements (direct resolutions) in the Competition Act; the Office has nonetheless closed 4 cases in this way in the last two years. Currently, the Office is finalising guidelines that would summarise the rules concerning settlements.

26. The settlement was so far reached in cases concerning abuse of dominance and vertical agreements. The Office takes the view that, in principle, the settlement is possible with respect to all kinds of anticompetitive infringements.

27. The settlement negotiations may, in principle, be commenced at any time in the course of the proceedings before the statement of objections; in the past, they were opened shortly after initiation of the proceedings. The proposal for settlements must come from the participants to the proceedings (and if there are more of them, from all), the Office may, however, indicate that certain proceedings are particularly suitable for it.

28. The settlement programme, as so far exercised by the Office, pursues two objectives. The first is procedural effectiveness – the participants have to accept the qualification of facts and law done by the Office, and commit themselves not to propose additional evidence, nor insist on full extent of the statement of objections. The other is investigatory – if the Office is not fully aware of the full extent of the infringement and the participant provides additional information constituting significant added value, the fine will be further reduced. In the past cases, both objectives were fulfilled and the fine was reduced by 50 %.

6. Judicial review and interim relief

29. The power to review the final decisions of the Office (i.e. decision issued by the Chairman) is entrusted to the administrative courts; in general, there are no courts specialised to review decisions of the Office.

30. Decisions of the Office are scrutinised by the Regional Court in Brno (in Czech: *Krajský soud v Brně*); there are currently two panels (each composed of three judges) dedicated to competition law. The complaint (in Czech: *žaloba*) may be lodged with the court within two months after the decision was delivered.[13] The court has full jurisdiction, i.e. it reviews the questions of both the facts and the law.

31. The decisions of the Office are enforceable even when being reviewed by the court; the mere fact that a complaint was filed does not relieve the undertakings from their obligation to pay fines. Simultaneously with the complaint, the petitioner can, however, also ask for it to have a suspensory effect, thus removing (until the court finally decides) all the legal effects of the decision.[14] The courts are, however, extremely reluctant to grant such an interim relief – the claimants would have to prove that immediate fulfillment of the duties imposed by the Office's decision would cause them irreversible harm.

32. Against the decision of the Regional Court it is possible to file a cassational complaint (in Czech: *kasační stížnost*) to the Supreme Administrative Court (in Czech: *Nejvyšší správní soud*); both the Office and the other parties to the proceedings before the Regional Court may file it. In the past, there was one panel (composed of three judges) dedicated to competition law, that system has been, however, abolished and today, any of its panels can decide. The deadline for filing the plea is only two weeks;[15] only matters of law may be claimed.[16] As the formulation of the complaint requires a high level of legal experience, the petitioner must be represented by an attorney-at-law;[17] the Office, on the other hand, may be represented by its legal service. The petition for interim relief may be filed also with the Supreme Administrative Court, under the same conditions as described above.

33. Against the decision of the Supreme Administrative Court, it is finally possible to file a constitutional complaint (in Czech: *ústavní stížnost*) addressed to the Constitutional Court (in Czech: *Ústavní soud*), if fundamental constitutional rights of the parties were allegedly breached.[18] Such a complaint has been very rare in the past, however, their number has been increasing and there are currently three proceedings concerning the Office pending before the Constitutional Court.

13 Art. 72 of the Code of Administrative Justice.

14 Art. 73 of the Code of Administrative Justice.

15 Art. 106 of the Code of Administrative Justice.

16 Art. 103 of the Code of Administrative Justice.

17 Art. 105 of the Code of Administrative Justice.

18 Art. 72 *et seq* of the Act. No. 182/1993 Coll., on the Constitutional Court, as amended.