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13. – 14 .5. 2009

competition day

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Martin Pecina
The Chairman of the Office
for the Protection
of Competition

Hosting the European Competition Day is an honour for us

The Czech Presidency of the Council of the European Union is almost approaching the end. In any case it can be stated that it has undoubtedly been a very important period in the history of our independent state as well as the Office for the Protection of Competition. Well before the beginning of the Presidency, I had repeatedly emphasized that I, as the Chairman of the Antimonopoly Office, don't share opinions of some politicians that the Presidency is just a marginal, unimportant and administrative matter. Therefore, our Office has strived to contribute, to the maximum extent, to the best success of the Czech Republic in the maturity test among the European countries. And I think I can proudly say: we have managed through the above-mentioned period honourably.

The European Commissioner for Enterprise and Industry, Günter Verheugen, declared in February of this year that "with less than two months of the Czech EU – Presidency completed it is already crystal clear, that this presidency is one of the most challenging since decades." He mentioned economic crisis then, through which Europe has been going, and the necessity to further intensify and deepen the principles of open market, free trade and fair competition.

It is often said that the best always comes in the end. The European Competition Day, which is held here in Brno, the judicial centre of the Czech Republic, is for the Antimonopoly Office undoubtedly the highlight of our country´s Presidency. It is a traditional working meeting of the competition authorities' representatives from the twenty seven EU countries in which opinions and experience with current competition issues are shared. It is a great honour for us to welcome here, in the South-Moravian metropolis, so many distinguished personalities of the competition law, our colleagues from competition authorities of all Europe. This meeting will surely contribute to further intensification of fair competition principles in the way that has been mentioned by Günter Verheugen several months ago.

Martin Pecina
The Chairman of the Office for the Protection of Competition

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Michal Hašek
Governor of the South Moravian Region

Ladies and Gentlemen,

I am pleased to greet via this publication the participants of the European Competition Day organized by the Office for the Protection of Competition. I consider it to be a welcomed opportunity for exchange of opinions and experience in the competition law and policy among the individual competition authorities, state authorities and expert public.

The European Competition Day is held in the South Moravian Region on the occasion of the Presidency of the Czech Republic in the Council of the European Union. I am glad that more guests to our region have the opportunity to see that the South Moravian Region offers also other possibilities than just the business ones and I hope they keep coming back as satisfied tourists and visitors.

The Office for the Protection of Competition has existed in Brno for almost twenty years and it represents one of the central administration authorities operating here. Also in the case of the Office for the Protection of Competition the location outside the capital has proven desirable. The practice has shown that to have the seat in Brno is appropriate for authorities like antimonopoly office. Together with judicial institution – the Constitutional Court, the Supreme Court or the Supreme Administrative Court – the Moravian metropolis became the legal center of the Czech Republic. As a lawyer and a Moravian patriot I am pleased by this fact, as well as by the outstanding communication and cooperation between the Regional Authority and the Office.

I wish the participants of the European Competition Day a pleasant two-day stay in the beautiful South Moravian Region.

Michal Hašek
Governor of the South Moravian Region

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Roman Onderka
Mayor of the city of Brno

Mayor's greeting

It is my great honour to welcome the participants of the European Competition Day in Brno. For the first time ever the Competition Day has been organized by the Czech Republic. Within European competition law, this is a crucial event which helps to coordinate procedures of the European Commission and national competition authorities. This event is always held by the country presiding over the Council of the EU; therefore this year, the right is exercised by the Czech Republic. It is not incidental that the European Competition Day is hosted by the city of Brno. The Czech Office for the Protection of Competition that supervises adhering to competition rules does not have its seat in the capital but in the metropolis of Moravia – therefore it is located outside the centre of key state bodies, which declares its decision-making independence.

Organizing this European competition law highlight of the year in Brno has also other, internal logic. Brno is the traditional city of justice; all important courts of the Czech Republic including Constitutional Court and Ombudsman have their seat here. Judiciary represents legal and social concept of honest and moral behavior and consists of terms such as law, legal order or fairness. Moral behavior closely relates to competition, more accurately, it is required, controlled and revised by the competition authority for operation of competitors in the market. However, it is beyond its cognizance to judge anticompetitive behavior, its final decision serves as a basis for taking an action through which individual entities seek damages at courts that are caused by anticompetitive behavior of their competitor. Therefore cooperation of competition regulator and judicial institutions is quite close and their activities effectively meet in one place right here - in Brno.

This year, the European Competition Day brings even higher benefit to the Member States of the European Union compared to previous years. Global economic recession affects many sectors of the economy and state policies, including competition policy. Exchange of opinions and experience with competition law among participants from competition authorities, state bodies or courts and professional public is truly valuable and can contribute to stabilization of market conditions in individual countries.

Roman Onderka
Mayor of the city of Brno

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Agenda
of the European competiton day

Venue:
Holiday Inn hotel - Congress Hall,
Křížkovského 20, Brno, Czech Republic

Wednesday, 13 May 2009

8.00 – 9.00 Registration

9.15 – 11.00 Opening Session

Welcome and opening speeches

11.00 – 11.30 Coffee break

11.30 – 13.00 Panel I: Private enforcement of competition law

The first panel will follow a current issue of competition policy – private enforcement of competition law. Private enforcement should help the individual victims of breaches of competition law claim their rights. In many EU member states there are not sufficient tools which would guarantee the right to compensation of suffered damages. Or, despite the existence of an effective legal framework in some countries, there have not been successful private actions at courts.

However, increasing tendency has occurred to support this form of competition law enforcement within the EU, which cannot continue without an exchange of experience with the implementation of enforcement mechanisms in individual countries.

The European Commission published the White Paper on Damages Actions for Breach of the EC Antitrust Rules which may result into specific steps towards further treatment of private enforcement issues on EU level. At the time of the European Competition Day, such steps of the European Commission following the White Paper may be defined and thus an interesting discussion is expected about their impacts on the practice of particular member states.

13.00 – 14.30 Lunch

14.30 – 16.00 Panel II: Dominance

Abuse of dominant position certainly threatens effective competition, yet it occurs in many different forms. Abusive practices are assessed with a different level of severity in particular countries and also the proof of existence of dominant position and its abuse conforms to different standards. The panel on dominance will therefore follow questions of different standards and approaches to the assessment of abuse of dominant position.

With regard to the recently published Guidance on the Commission´s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings it is expected that the discussion will cover the European Commission's approach, standing experience of national competition authorities and prospective changes for the future. Increasing importance of the 'more economic approach' in the assessment of dominant practices will surely become an integral part of the discussion.

16.00 – 16.30 Coffee break

16.30 – 18.00 Panel III: Interface between Leniency, Direct Settlement and Criminal sanctions

The third panel will focus on tools of increasing importance for the competition law enforcement which enable the competition agencies to reveal, investigate and sanction anticompetitive conduct in a more effective way.

The experience of majority of competition authorities prove that Leniency programmes have become one of the most effective instruments for detection of serious and sophisticated cartels, which wouldn't be revealed without voluntary declaration of some of the participants.

During an ongoing investigation, another modern tool may be used - so-called settlement procedure. Settlement ensures that the proceeding is concluded expediously with the lowest possible expenses both for the competition authority and for business. Thus, effective competition can be restored in a very short time.

Some countries have adopted criminal sanctions for individuals involved in cartels, other consider the possibility of such consequences. The experience from some jurisdictions show, that the threat of criminal sanctions for managers and employees has the most deterring effect on creation of cartels. In which way do leniency programmes, settlement proce-

dure and criminal liability interface? Can criminalization of cartels jeopardize leniency programmes and the effectiveness of settlement procedure? Should the immunity apply also to criminal sanctions?

Speakers will surely bring an interesting point of view on these new trends and on their mutual relations within particular jurisdictions.

18.00 – 19.00 Bus transfer to Spilberk Castle

19.00 Dinner and social programme at Spilberk Castle for all participants of ECD

Thursday, 14 May 2009

8.30 – 9.00 Registration

9.00 – 10.00 Opening Session

Welcome and opening speeches by the Czech NCA and the European Commission

10.00 – 12.30 Panel IV: Cooperation within the ECN, Celebration of the fifth anniversary of the ECN[1]

The European Competition Network (ECN) was established as a forum for discussion and cooperation of European competition authorities in cases where Articles 81 and 82 of the EC Treaty are applied. It should ensure an efficient division of work and an effective and consistent application of EC competition rules. The network, which has proved to be a very effective platform for exchange of experience and cooperation on investigations of anticompetitive practices across Europe,

1 The most significant event in the area of the European Competition Network will be publication of the report on functioning of the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. As this report had not been fully prepared and consulted within the European Commission before the closing date of this publication, it will be issued in relation to it later on as a separate paper.

will celebrate its fifth anniversary this year. Therefore, the panel is dedicated to the reflections on the ECN, experience of European Commission and Member States with its operation and future cooperation. The discussion will also refer to the Commission's Report on the Functioning of Regulation 1/2003 which is expected to be released before the European Competition Day.

(11.00 – 11.30 Coffee break)

12.30 – 14.00 Lunch

14.00 – 15.30 Panel V: Global Economic Crisis and Competition

Current global economic crisis has affected many economic sectors and policies. Competition policy is not an exemption. Its importance emerged right after the burst of the financial crisis in the form of *ad hoc* rescue measures – provision of state aid and acceleration of merger approval procedure. The European Commission and national competition authorities have been hard-pressed to take the rescue measures. Not only must they act under time pressure, but at the same time adopt decisions leading to the stabilisation of market conditions while safeguarding principles of competition policy.

How should the competition authorities respond to the global crisis? Is there or should there be any set of special rules for merger approval during the 'troubled times' or in distressed sectors?

This panel discussion will focus on measures adopted so far and also on the future role of competition policy during the ongoing crisis, on tools for assessment of adopted measures and on definition of future long-term measures to stabilize the markets.

15.30 – 16.00 Coffee break

16.00 – 16.45 Closing Session

Wrap-up, invitation to Sweden, closing words

17.00 Official conclusion of the conference

Eddy De Smijter
Competition
Directorate General,
European Commission

Michele Messina
Competition
Directorate General,
European Commission

The Commission White Paper on Damages actions for breach of the EC antitrust rules

The right to compensation for the harm suffered as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) is guaranteed by Community law, as the European Court of Justice recalled in *Courage and Crehan* and *Manfredi*, respectively in 2001 and 2006. However, to date victims of EC antitrust infringements only rarely obtain reparation of the harm suffered.

In its 2005 Green Paper, the Commission concluded that this failure is largely due to various legal and procedural hurdles in the Member States' rules governing actions for antitrust damages before national courts. Indeed, such antitrust damages cases display a number of particular characteristics that are often insufficiently addressed by traditional rules on civil liability and procedure. These particularities include the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants and the often unfavourable perspective for claimants.

The current ineffectiveness of antitrust damages actions is best addressed by a combination of measures at both Community and national levels, in order to achieve an effective protection of the victims' right to damages under Articles 81 and 82 EC in every Member State and a greater legal certainty across the EU.

The general objective of the 2008 White Paper is to ensure that all victims of infringements of EC competition law have access to truly effective mechanisms for obtaining full compensation for the harm they have suffered. In designing the specific measures aimed at addressing the identified obstacles, the Commission followed three main guiding principles.

Firstly, full compensation is to be achieved for all victims. More effective compensation mechanisms mean that the costs of antitrust infringements would be borne by the infringers, and not by the victims and law-abiding businesses.

Secondly, the legal framework for more effective antitrust damages actions is to be based on a genuinely European approach, with balanced measures rooted in European legal culture and traditions.

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Thirdly, the effective system of private enforcement by means of damages actions is meant to complement, and not to replace or jeopardise public enforcement of Articles 81 and 82 EC by the Commission and the national competition authorities of the Member States.

Legal standing: indirect purchasers and collective redress

In the context of legal standing to bring an action, the Court of Justice confirmed in *Manfredi* that "any individual" who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. This principle also applies to indirect purchasers, i.e. purchasers who had no direct dealings with the infringer, but who nonetheless have suffered harm because an illegal overcharge was passed on to them along the distribution chain.

It is clear that victims will rarely, if ever, bring a damages action individually when they have suffered scattered and relatively low-value damage, as they are often deterred by the costs, delays, uncertainties, risks and burdens involved. In order to avoid these victims remaining uncompensated, it is necessary to provide for some form of collective redress.

The Commission, therefore, suggests a combination of two complementary mechanisms of collective redress to address effectively those issues in the field of antitrust:

1) A representative action for damages brought on behalf of two or more individuals or businesses. It is aimed at obtaining damages for the harm caused to the interests of all those represented. The Commission suggests that a representative action can be brought by two different types of qualified entities. The first type covers entities such as consumer organisations, trade associations or state bodies, which are officially designated in advance by their Member State. The second type covers entities which are certified on an *ad hoc* basis by a Member State, as regards a particular antitrust infringement, to bring an action on behalf of their members only. Eligibility is limited to entities whose primary task is to protect the defined interests of their members other than by pursuing damages claims.

2) An opt-in collective action combining in one single action the claims from those individuals or businesses who have expressed their intention to be included in the action. Such a system improves the situation of the claimants by making the cost/benefit analysis of the litigation more attractive, since it allows them inter alia to reduce the costs and share the evidence.

Proving the case

Considering that antitrust damages cases are very fact-intensive and that much of the evidence often lies inaccessibly in the hands of the infringers (information asymmetry), the Commission suggests a minimum standard for more effective access to evidence across all EU Member States, while avoiding the negative effects of overly broad and burdensome discovery proceedings, including the risk of abuses. To this end, the White Paper puts forward a solution that is capable of being integrated into the national systems as it further develops a mechanism that is already part of the Member States' legal orders, namely that underlying the IP Directive 2004/48/EC. Under this approach, obligations to disclose arise only once a court has adopted a disclosure order and they are subject to a strict judicial control.

To further reduce the difficulties that the victims encounter when they have to prove their case, but also to increase legal certainty, consistency in the application of Articles 81 and 82 EC and to enhance the effectiveness of antitrust damages claims across the EU, the Commission suggests that a final infringement decision by an NCA should be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases.

Another topic covered in the White Paper and relevant in the context of proving a case relates to the fault requirement. Some Member States require the claimant to show not only the infringement of EC competition rules and the damage it has caused, but also that the infringer committed a fault, meaning that he acted intentionally or negligently. The Commission feels that the full application of this requirement to breaches of directly effective EC public policy rules, such as the EC competition rules, cannot be reconciled with the principle of effectiveness of those rules. The Commission therefore suggests these Member States that once the victim has shown a breach of Article 81 or 82 EC, the infringer should be liable for damages caused unless he demonstrates that the infringement was a result of a genuinely excusable error, that is if, applying a high standard of care, he could not have been aware that the conduct restricted competition.

The scope of the damages

The Commission in its White Paper fully endorses the broad definition of the harm caused by competition law infringements affirmed by the European Court of Justice in *Manfredi*, where it emphasised that victims must, as a minimum, receive full compensation of the real value of the loss suffered, therefore extending not only to the actual loss but also to the loss of profit and a right to interest.

To facilitate the calculation of the *quantum* of the damages, as it can become excessively difficult or even practically impossible, the Commission is committed to produce non-binding guidance on the calculation of damages, in order to provide judges and parties with pragmatic solutions to these often complicated exercises.

The passing-on of overcharges

The compensation objective also determined the solution put forward for dealing with the passing-on of overcharges, covering both the question whether or not the infringer can invoke the passing-on defence and whether or not the one to whom the overcharge has been passed on can claim damages for the resulting harm. Since the objective of the White Paper is to ensure that victims of competition law infringements receive compensation for the damage they have

suffered, it follows that if there is no harm suffered, there should also be no compensation. Therefore, on one side, purchasers of an overcharged product or service who have been able to pass on that overcharge to their own customers should not be entitled to compensation of that overcharge, thus allowing a passing-on defence to infringers. On the other side, the compensation objective also implies that the one to whom the overcharge has been passed on, i.e. the ultimate victim, can claim compensation for the resulting harm. However, the ultimate victim may be less equipped to start an antitrust damages action, for that reason the Commission makes two types of suggestions to enable these victims to bring their damages claims. Firstly, through the possibility to aggregate their claims via collective actions and, secondly, by presuming, although rebuttably, that the overcharge has been passed on in its entirety to their level.

Limitation periods

While playing an important role in providing legal certainty, limitation periods can also be a considerable obstacle to recovery of damages in both stand-alone and follow-on cases. The Commission has therefore suggested that the limitation period should not start to run before a continuous or repeated infringement ceases, or before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him. Furthermore, to keep open the possibility of follow-on actions, the Commission also suggests that a new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.

Costs of damages actions

The Commission decided not to suggest any specific changes to national cost regimes, although costs of damages actions may represent a major disincentive for victims to exercise their right to damages. The Commission therefore felt it important to encourage Member States to reflect on their cost regimes. In its White Paper the Commission also highlights the necessity for Member States to give due consideration to mechanisms fostering early resolution of cases, although the effectiveness of settlement mechanisms is directly related to the effectiveness of a credible judicial alternative. In fact, the Commission considers that only where the court alternative becomes credible, early settlements are to be encouraged as they can significantly reduce litigation costs for the parties and the costs to the judicial system.

Interaction between leniency programmes and actions for damages

In order to complement and not to replace or jeopardise public enforcement, adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant, regardless of the outcome of the application. That should avoid placing the applicant in a less favourable situation than the co-infringers who did not apply for leniency. The Commission puts also forward for further consideration the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners. However, due regard is to be given to the impact this limitation would have on the full compensation of victims of cartels and on the position of the co-infringers.

Eddy De Smijter
Competition Directorate General, European Commission

Michele Messina
Competition Directorate General, European Commission

Dominance

Jakub Chytil
Telefónica O2
Czech Republic, a.s.

The purpose of this article is to demonstrate that dominance is a dynamic phenomenon which changes in time, and that it is necessary to approach it and response to it like that also from the regulatory point of view. I will try to support it by two examples of activities of the company I work for – Telefónica O2 Czech Republic, a.s. (hereinafter referred to as "TO2"). This company is the most important provider of telecommunication services in the Czech Republic which doesn't necessarily mean that it can – as may seem at first sight – behave independently of their competitors and consumers which is considered as definition feature of dominance. A strong player operating in net industries is often labeled as "characterless" dominant by the news media regardless of whether it really is.

First example is the market for broadband Internet access. Five years ago, TO2 could have been considered dominant in this market as a provider using ADSL technology but its position has changed in time owing to competition of alternative technologies which is undoubtedly a sign of advanced competition environment.

Rapid development of new technologies extends supply of broadband services and technology that dominated the market in the past, but are not necessarily dominant today and probably won't be dominant in the future either. Also sector regulation often have troubles with the rate of technological development, slowly beginning to desist from strict regulation and gradually leaving the industry to free competition in the market, supervised by the Office for the Protection of Competition.

On the retail level, ADSL, CATV and WiFi technologies compete, forming one market. The European Commission also established in its decisions that the reason for one common market for broadband Internet access services based on different technologies is their similar characteristics that is intended use, similar price and comparable consumer demand.

Current state of competition in the above-mentioned market can be illustrated by the fact that TO2 as an owner of metallic access net for Internet provision (via ADSL technology) with accessibility practically on the whole territory of the Czech Republic, should be dominant in the retail market as well. Although its share in connection to Internet via ADSL technology is c. 82 %, its

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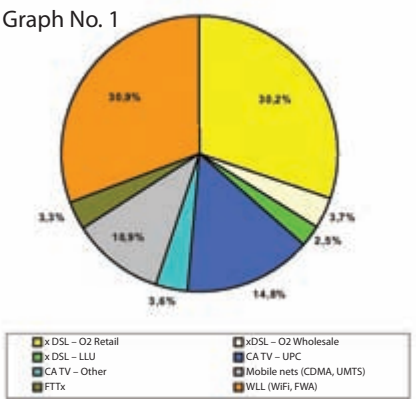
total share in the retail market amounts only to 30 %. Total number of Internet connections in fixed point was, according to the Czech Telecommunication Office, 1,680,676 on 31 December 2007. 613,220 connections were realized via ADSL technology, out of it 508,199 were connections of TO2, 309,000 connections were realized via cabled distribution, 520,000 via FWA and WiFi technologies, 183,456 via CDMA and UMTS and 55,000 connections via FTTx. The situation in the retail market is illustrated by the graph No.1.

Graph No. 1



Currently is the Czech Republic characterized by sound competition of different technological platforms and nothing suggests that one of the technologies will be dominant in long-time perspective. The stable priority of WiFi technology share is quite unique compared to other EU Member States.

Competition in the retail market for broadband Internet access has been streamlined and stiffened up in the past period. Competition on the retail level is so fierce that it influences indirectly behavior of TO2 in the wholesale market which should be taken into account in its definition or at least in identification of undertaking with significant market power. In practice, it means that if TO2 increased its wholesale prices, it would have to increase subsequently and adequately retail prices as well so that margin squeeze wouldn't occur. Higher retail price would result in migration of customers to rival providers who supply their services (cheaper) in other technologies (WiFi, FTTx or CATV).

Another case I would like to mention as a typical example of transformation of former monopoly player is the market for access to public telephone net, the so-called fixed line. TO2 customers showed unusual sensitivity to price of monthly payment in 2002-2007 and after the price increase, however slight (the reasons for which were not commercial but forced by previous sector regulation), responded by dramatic migration from fixed telephony to mobile telephony. As the result of this migration, the number of mobile customers increased to 12.8 million by the end of 2007 in comparison to 2.5 million fixed lines. The trend of customer migration from fixed telephony to mobile telephony remains in existence even at relatively stable price of monthly payment.

Table No.1 shows the development of fixed line numbers between 2002 and 2007 and illustrates quite well high price elasticity of demand in the Czech Republic, that is very fast responses of Czech customers even to the slightest price increase.

Table No.1

	2002	2003	2004	2005	2006	2007
Fixed lines (000)	3,644	3,620	3,448	**3,213**	**2,745**	2,508
TO2%	100%	99%	98%	96%	93%	89%
Monthly payment (CZK)	285	285	285	**285**	**339**	339

This trend manifests only unilaterally from fixed telephony to mobile telephony and it is not expected that the behavior of customers in the future would be different from the development in the last years. The market for access and telephony has already reached its peak and as the result both values of the total number of telephone operation minutes (currently c. 80 % is in mobile nets) and total revenues constantly fall and it is quite illusory to speak about dominance in the market for fixed lines today.

I appreciate we can – contrary to the past – discuss with the Office for the Protection of Competition these radical changes of market environment and that we have the opportunity to present our view of these issues.

Jakub Chytil
Telefónica O2 Czech Republic, a.s.

New Guidance of the Commission on Exclusionary Abuses under Article 82

Ninette Dodoo
Clifford Chance LLP

Petr Zákoucký
Clifford Chance LLP

Richard Glover
Clifford Chance LLP

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On 9 February 2009 the European Commission (the „**Commission**") officially published its long-awaited guidance paper on abuses of a dominant position under Article 82 of the EC Treaty (the "**Guidance**"). The Guidance sets out "enforcement priorities" of the Commission when applying Article 82 to exclusionary conduct by dominant undertakings. It does not deal with other types of abusive behaviour. The Guidance is particularly relevant to the Czech market for two reasons: firstly, the Czech Competition Office (the "**Office**"), as well as the relevant Czech courts, apply Article 82 in cases where dominant undertakings abuse their position in so far as the abuse may affect trade between Member States of the European Union. Secondly, abuse of a dominant position is also prohibited under Czech competition law, which is applied even where there is no effect on inter-state trade. In both cases, the Czech Competition Office, and the Czech courts, generally follows the practice of the Commission as well as the case law of the European Court of Justice (the "**ECJ**").[1] This briefing provides an overview of the key parts of the Guidance. It also looks at the new elements introduced by the Guidance as well as suggests some of the issues which will need to be addressed in the future.

The Key Parts of the Guidance

Dominance

As regards the assessment of dominance, the Guidance suggests that an undertaking will generally have sufficient market power if it can profitably raise prices above the competitive level for two years or more. A variety of "traditional" factors will be taken into account, such as

1 ECJ refers to both the Court of First Instance and the European Court of Justice of the European Communities under otherwise stated.

constraints posed by actual or potential competitors, barriers to expansion or entry and buyer power. The Guidance confirms that high, enduring market shares in particular are viewed as providing a useful initial indication of dominance, while a market share below 40% will generally (but not always) be regarded as a good proxy for the absence of dominance.

Assessing abuse

In assessing whether a dominant company's conduct is abusive, the test set out in the Guidance is whether it impairs effective competition by "*foreclosing*" rivals in an anticompetitive way. Anticompetitive foreclosure is defined as the "*hampering*"[2] or elimination of rivals' "*effective access*"[3] to markets or supplies that is likely to allow the dominant company to profitably increase prices, or otherwise reduce output or product or service quality.[4] The requisite degree of foreclosure that must be shown will, it seems, vary according to market conditions and the presence of evidence of an intention to exclude.[5] In particular, there is still no indication of a threshold below which the degree of foreclosure can be assumed to be immaterial (e.g. if the conduct forecloses only 5% of the market to rivals).

Predation

The Commission will intervene in predation cases where the dominant company incurs a "*sacrifice*"[6] (deliberately incurring losses or foregoing profits in the short term) so as to foreclose rivals with a view to strengthening or maintaining its market power after the predatory conduct comes to an end.[7] In line with the "*equally efficient competitor*" test (see further below), pricing below the dominant company's average avoidable cost (AAC)[8] will in most cases constitute a sacrifice, but the Commission may also investigate whether alleged predatory conduct led to net revenues lower than could have been expected from a reasonable alternative conduct.

In terms of whether the conduct is capable of harming consumers, the Guidance clarifies that normally only pricing below long run average incremental cost (LRAIC)[9] is capable of anticompetitive foreclosure of an as efficient competitor and then only if other factors are present (including the negative impact of the pricing practice on competitors' ability to compete).

Exclusivity and loyalty rebates

Exclusive dealing obligations - such as an obligation to purchase exclusively from a dominant company - are most likely to result in anticompetitive foreclosure where the dominant company is an unavoidable trading partner (e.g. because it

2 Guidance, paragraph 23.

3 Guidance, paragraph 19.

4 While the test focuses on economic effects of the conduct in question, there remain some forms of conduct - such as restricting customers from testing rivals products - which the Commission will view as particularly pernicious, such that a detailed assessment of its effects may not be necessary.

5 Following the ECJ's case law, it is arguable that the degree of foreclosure to be shown may also vary depending on the kind of abusive conduct involved. The ECJ's case law suggests that a detailed analysis of the effects of tying and rebates on the market concerned may not be required to establish an abuse.

6 Guidance, paragraph 63.

7 In contrast to the US approach, proof of the possibility of recoupment of losses as a result of the predatory pricing is not required under Article 82 EC. This was recently endorsed by the ECJ in Case C-202/07 P *France Télécom v Commission*, Judgment of the Court of Justice of 2 April 2009, affirming the judgment of the Court of First Instance in Case T-340/03 *France Télécom v Commission* [2007] ECR II-107.

8 Being the average of the costs the company could have avoided by not producing the products or services that are the subject of the abusive conduct.

9 Being the average of all the variable and fixed costs that a company incurs to produce a particular product over a particular period.

sells "*must stock*"[10] products), or where they are of such long duration that customers face difficulties in switching supplier. As regards conditional rebates (such as payments granted if the customer reaches a particular volume or growth threshold of purchases during a particular reference period), the Guidance adopts a similar test to that for predation.

Tying and bundling

Tying occurs where purchasers of a product in which a company holds a dominant position (the tying product) are required to purchase another product (the tied product). Bundling occurs where products are either sold jointly in fixed proportions (pure bundling) or where the dominant company also makes them available separately, but at a higher aggregate price than the bundle (mixed bundling). The Commission will normally take action only where: (i) an undertaking is dominant in the tying market; (ii) the tying and tied products are distinct products (such that in the absence of bundling, a substantial number of customers would purchase them separately); and (iii) the tying practice is likely to lead to anticompetitive foreclosure.[11]

Refusal to supply

The Commission will consider refusal to supply as an enforcement priority if: (i) the product or service is objectively necessary to be able to compete effectively on a downstream market; (ii) the refusal is likely to lead to the elimination of effective competition on that market; and (iii) consumer harm is likely to result (taking into account that imposing an obli-

10 Guidance, paragraph 36.

11 The Commission's most recent application of this analytical framework is its landmark *Microsoft* decision, which the Court of First Instance endorsed. The Commission fined Microsoft for unlawfully tying Windows Media Player to the Windows operating system. See, Case COMP/C-3/37.792 - *Microsoft*, C(2004) 900 final. Ninette Dodoo was co-counsel for certain trade associations and software companies, which supported the Commission in its successful defence of Microsoft's appeal against the Commission's decision. See, Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

gation to supply may undermine the dominant firm's incentives to invest and innovate).[12] The Commission recognises that, as an alternative to refusal to supply, a dominant undertaking may decide to charge a price for the product on the upstream market which, contrasted with the price it charges on the downstream market, effectively prevents an equally efficient competitor from competing profitably.[13]

Key changes brought about by the Guidance

This Guidance clarifies a number of issues. First of all, it confirms that exclusion is a derivative antitrust offence. The thinking behind the Guidance is to protect the consumer (under the consumer welfare test) as opposed to guarding the interests of competitors. It is therefore the exploitation of the consumer that Article 82 seeks to avoid. Exclusion will only therefore be relevant if and to the extent it leads to the exploitation of the consumer.

Secondly, the Guidance confirms that a dominant undertaking may justify conduct leading to foreclosure on the grounds of efficiencies. This is the case if the suspected conduct would guarantee a benefit for consumers that outweighs any harm.[14] In this respect, the traditional four-element test under Article 81(3) EC Treaty is applied by analogy: (i) the efficiencies have been or are likely to be realised as a result of the conduct concerned; (ii) the conduct concerned is indispensable to the realisation of these efficiencies; (iii) the likely efficiencies benefit consumers; and (iv) effective competition in respect of the products concerned is not eliminated (i.e. there is no residual competition and no foreseeable threat of market entry from the dominant undertaking's competitors). The question remains whether it is appropriate to apply all four criteria for the efficiency defence, stipulated for concerted practices, in respect of unilateral abusive conduct.

Thirdly, the Guidance reveals that technological tying, in the eyes of the Commission, is worse than contractual tying, because the dominant undertaking makes a "*tying or bundling strategy a lasting one*".[15] Here, the Commission also includes a negative externality of technological tying in the anticompetitive calculus, namely that "*technological tying … reduces the opportunities for resale of individual components*".[16] The latter is very much in keeping with recent policy statements in favour of open systems.

Finally, the Guidance reveals that cross-subsidies may qualify as predatory, even if the firm is not dominant in the predation market. If a firm is dominant in the market for product A, it could also be liable for abuse of a dominant position for using its profits to subsidize predatory pricing in the market for product B, in which it is not (yet) dominant. This could be the case even where products A and B are unrelated.[17]

12 See, also *Microsoft* where the Commission fined Microsoft for its unlawful refusal to provide interoperability information to third parties to enable them to develop competing work group server products, which interoperate with Microsoft's dominant products.
13 Guidance, paragraph 80.
14 *Ibid*., paragraphs 28 and 30.
15 *Ibid*., paragraph 53.
16 *Ibid*., paragraph 53.
17 *Ibid*., paragraph 63, footnote 39.

SOME ISSUES THAT STILL NEED TO BE ADDRESSED

The economic effects doctrine - the "equally efficient competitor" test

Dealing separately with exclusionary abuses creates the impression that the Commission is more concerned with the impact of practices on competitors than on consumer welfare in so far as the Guidance aims at indirect protection of consumers by defending competition.[18] This is unique to the EU system. Other tests may need to be considered that bring the consumer to the forefront if observers are to be convinced that Article 82 seeks to protect consumers and not competitors . It remains to be seen to what extent the effects-based approach under Article 82 will differ from the one under the European Merger Control Regulation (ECMR). It also remains to be seen to what extent the Commission will apply a full "effects-based" approach under Article 82. It may be that some members of the Commission may be reluctant to apply an effects-based approach fully given the ECJ's unwillingness to embrace this approach in some cases.[19]

18 *Ibid*., paragraph 55.

19 See, for example, Case T-219/99, *British Airways v. Commission* [2007] ECR, Case C-95/04 P, *British Airways v Commission* [2007] ECR I-2331; Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, affd in Case C-202/07 P *France Télécom v Commission*, Judgment of the Court of Justice of 2 April 2009; Case T-30/898 *Hilti v Commission* [1991] ECR II-1439; Case T-83/91 *Tetra Pak v Commission*, [1994] ECR II-755; Case T-203/01 *Michelin v Commission* (*Michelin II*), [2007] ECR II-4071. As an Advocate-General recently reminded the Commission in British Airways "even if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by Article 82 EC as interpreted by the Court of Justice." Case C-95/04 P *British Airways v Commission*, Opinion of Advocte-General Kokott of 23 Februay 2006.

Dominance

Most of the debate and attention given to the reform of Article 82 has focussed on abuse. The subject of dominance itself has not been discussed in any great detail. However a greater attempt should be made to clarify the relationship between dominance and abuse. It is also the case that some of the most controversial community law decisions have involved dominance findings based largely on market share analyses alone.[20] A deeper and wider consideration of the role and proper scope of the dominance analysis in the application of Article 82 would therefore be welcome; in particular, an "effects-based" approach is to be encouraged.[21]

Absent clear safe harbour tests

The Guidance includes useful analytical steps, but does not present us with clear safe harbours or *de minimis* thresholds, which would allow businesses to screen out conduct that is clearly non-abusive. For businesses, it would be useful to provide a safe harbour that conduct is presumed non-abusive if less than a significant proportion of the market is affected. Regrettably, the Guidance stops short of providing clarity on what proportion of the market must be affected before the Commission intervenes. The Guidance rightly points out that it is not necessary to show that competitors have "*exited*" the market to establish foreclosure. It is sufficient that effective competition is foreclosed. However, the Guidance does not specify when the Commission will consider this to be the case. It seems that the assessment will require a case-by-case analysis, which absent cogent and convincing economic evidence could lead to arbitrary results.

The omission of discrimination

A section on discrimination in the Guidance is needed if it is to have any real practical use. Many rebate programmes have both potentially exclusionary and exploitative effects, in particular exclusivity and individualised target rebates.[22] Guidelines would be welcome in the national markets in this area especially for the purpose of analysing pricing practices in industries, which have been liberalised recently or are in the process of being liberalised and where incumbents may be viewed, in some countries, as abusing their position after years of enjoying exclusive rights and monopoly rents.[23]

20 Case T-219/99, *British Airways v. Commission* [2007] ECR , Case C-95/04 P, *British Airways v Commission* [2007] ECR I-2331. See also Case COMP/A.39.116 - *Coca-Cola,* paragraph 24 where the Commission indicated that it had based its assessment of dominance on market shares exceeding 40% and more than twice the share of the nearest competitor in a narrowly defined market.

21 The ECJ's judgment in Hoffmann-La Roche provides useful guidance in this respect. See, Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

22 Case T-219/99, *British Airways.*

23 The question of discrimination has been, for example, addressed by the ECJ in relation to *„grandfathering rights"* for capacity of Dutch cross-border interconnectors. See Case C-17/03 *VEMW and Others* [2005] ECR I-4983.

Conclusions

The consolidation of the Commission's approach to Article 82, as revealed by the Guidance, is a positive step forward. Not only does the Guidance clarify certain issues it also provides us with new elements to take into account. What needs to be applauded is the more effects-based approach the Commission has taken to the enforcement of Article 82. Although the Commission may have fettered its discretion to pursue certain exclusionary conduct by dominant companies, that fetter is non-binding on the interpretation of Article 82 by the ECJ in Luxembourg, the national courts and the national competition authorities within the EU. In this respect, although the Czech authorities could use the Guidance when handling investigations under Article 82 as well as under national law, they remain free to impose stricter rules on unilateral conduct should they wish to do so.

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Authors are part of the Antitrust Counsel Group of Clifford Chance LLP. This article reflects the personal views of the authors and is not to be attributed to Clifford Chance LLP or any of its clients.

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Will the possibility of criminal sanctioning of cartels contribute to more effective enforcement of competition law?

On January 8, 2009 the Parliament adopted a new Criminal Code (hereinafter the "**Criminal Code**") and on February 9, 2009 the Criminal Code was subsequently published in the Collection of Laws under the No. 40/2009 Coll. For the area of competition law the adoption of the new Criminal Code is interesting particularly because of the fact that since the force of the new Criminal Code, i. e. since January 1, 2010, conclusion of a cartel agreement will be incorporated into the legal order of the Czech Republic as a merit of criminal act.

According to Article 248 para. 2 of the Criminal Code the person *"… who in conflict with other legal regulation on the protection of competition concludes an agreement with its competitor on price fixing, market division, or any other agreement distorting competition…"* should be punished by maximum three years of imprisonment, prohibition of business activities or forfeiture of assets or other property.

Although the application practice itself will show whether and how this provision of the Criminal Code is exploited, or whether it will affect competition delicts in a similar way as the existing Article 127 of the Criminal Code which has not been practically applied, I consider its imposition to the current conditions in the Czech Republic to be at least controversial.

Criminal sanctioning of persons concluding cartel agreements should serve particularly as a "deterrent" element and should discourage the undertakings, or the persons acting on their behalf, from the conclusion of the most serious cartel agreements (on prices, market division). At the same time the criminalization of the participation in a cartel should enable direct sanctioning of persons participating in the cartel negotiations, i. e. managers, who often conclude cartel agreements without the awareness of the owners, while the fines by competition authorities are imposed on the owners. The fact that the participation in a cartel is „criminalized" in several countries (the USA, Germany, Denmark, France, Canada, Australia, etc.) has been also used as an argument for the incorporation of Article 248 para. 2 into the Criminal Code.

It is evident and everyone would agree that the criminal sanction to persons taking part in the negotiations of cartels is in comparison with the imposition of a fine from the side of the

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competition authority a more perceivable and more serious threat. However, I think that it is important to be aware of the fact that the threat of such a sanction is significantly decreasing in case when such a sanction is not applicable in practice or when the relevant bodies are not able to apply the sanction correctly in practice. At the same time, with regard to the seriousness of such a sanction, it is not possible to leave out the danger of an application on purpose or abuse of this provision. In my opinion, in relation to the cartel criminalization, more than in another cases, arises the question whether it is purposeful and beneficial to introduce a new legal regulation in case this legal regulation does not reflect the situation in the country and the ability of the bodies responsible for penal proceedings to expertly examine and sanction such action.

Cartel agreements often represent sophisticated arrangements and their detection and assessments necessarily involves adequate specialization and proficiency. In the situation when in the Czech Republic also the Office for the Protection of Competition, as a narrowly specialized body supervising the protection of competition, i. e. among others the observance of prohibition of cartel agreements conclusion, has problems to ensure sufficient number of skilled employees, it is at least doubtful that the bodies responsible for penal proceedings would be able to create a sufficiently specialized team focusing on cartel issues.

In the current environment in the Czech Republic, the cartel criminalization is, in my view, connected with huge risks. Firstly, the risk that the provision will not be used in practice and the honest purpose of its introduction, i. e. the threat of a perceivable sanction for the cartel participants, will thus be minimized. Secondly, the risk that this provision will become means of purposeful, or even "bullying" procedures and will be used selectively also in cases which are obviously not targeted by it. In my opinion, the contribution of the introduction of cartel agreement as a criminal act is at least doubtful in competition law enforcement in the Czech Republic.

On the contrary, the cartel criminalization in the Czech Republic may even make the detection of cartel agreements more difficult. In recent years the competition policy of the European Commission as well as the practice of the Office for the Protection of Competition in the cartel area have aimed at the motivation of cartel participants to cooperate with competition authorities in detection of cartels in the framework of Leniency Programmes. The principle of these programmes lies in the submission of evidence of the existing cartel by its participants, whereas the "reward" for this cooperation has the form of remission or decrease in the sanction imposed by the competition authority.

Will someone be interested in the cooperation with the competition authority if the criminal immunity of the Leniency Programme is not guaranteed by the current legislation? The person who voluntarily submits to the Office for the Protection of Competition evidence of the cartel existence may get into a situation when such evidence will be used as evidence against this person in the framework of the criminal prosecution. The motivation to cooperate voluntarily with the Office in detecting cartels may thus be significantly limited, or "eliminated". In its result for the competition law, the cartel criminalization may paradoxically mean a smaller number of detected cartel agreements in comparison with the situation when the new provision was not stipulated in the Criminal Code.

From the above mentioned it is evident that from a broader context I perceive the practical contribution of the introduction of cartel agreement as a criminal act in the Czech legal system more than sceptically. I am afraid that those who put this legal regulation through have not helped anything, but harmed a lot.

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Settlement Procedure in Antitrust Cases

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Introduction

Settlement procedure in antitrust has its origin in jurisdictions in which cartel agreements are traditionally qualified as a crime. The biggest experience with settlements have the United States of America, where this institute has been on a regular basis used in the form of "plea agreements" for many years; similarily in Canada, Australia, New Zealand or the South Africa.

The implementation of settlement procedure has gradually spread over the years. We can encounter cases of settlement procedures for example in France or in the Netherlands where cartel agreements and other anti-competitive conducts are investigated in administrative proceedings, same as in the Czech Republic[1].

It is thus evident that settlement procedure is more and more popular with competition authorities all over the world and hence it has been naturally included among the instruments of the European Commission. In June 2008 settlement procedure has been implemented also in the European Union in connection with the anti-competitive cunduct falling within the jurisdiction of the European Commission[2]. For this reason it is probable that settlements will spread around the European Union as the competition authorities of individual member states project the new European regulation into their procedures and proceedings.

Substance and purpose of settlement procedure

Settlement procedure can be basically regarded as a contract in which each side agrees to give up some entitlements it would have if the case went through a full administrative proce-

1 In this connection it is necessary to mention that the new Criminal Code which will enter into force on January 1, 2010 qualifies the most serious anti-competitive cunducts as a crime. However, the focus of the competition regulation in the Czech Republic will still be on administrative proceedings conducted by the Office for the Protection of Competition, eventually by the European Commission, with the effort to strengthen the role of the private enforcement of competition law before civil courts.

2 See the Commission regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases; Commission Notice on the conduct of settlement procedure in view of the adoption of Decision pursuant to Articles 7 and 23 of Council Regulation (EC) No. 1/2003 in cartel cases.

dure - the competition authority gives up the right to impose higher penalties; the defendant gives up certain procedural rights and the possibility of "an exoneration" in the form of an acquittal[3]. In particular, it is possible to view the substance of settlement procedure in the fact that the parties to the proceedings admit their liability for the anti-competitive conduct (participation in a cartel) including the legal qualification of this conduct in exchange for a recudtion in fine from the part of the competition authority.

The purpose of settlement procedure is primarily an expedited and simplified solution of the antitrust problem in cases when the parties to the proceedings agree with the conclusions of the competition authority concerning the given issue. Significant expedition and simplification of the proceedings brings about increased efficiency of investigation – settlement procedure enables the competition authorities to deal with more cases while using constant resources, which strengthen the public enforcement via an efficient and timely solution of anti-competitive phenomena. This significantly increases the general credibility of the competition authority, increases the number of solved cases and thus the overall preventive (deterrent) effect on both the affected and third undertakings. Settlement procedure is beneficial also from the point of view of the settling parties who save human resources, time and even financial resources (reduction in fine, shorter and expedited proceedings, lower expenses on related counselling, etc.) and may get involved in the disposition of the case and and influence the final outcome.

Course of settlement procedure

Firstly, it is necessary to mention that the settlement is dependent on an initiative of the parties to the proceedings and the parties are thus not obliged to submit to it. At the same time, however, they do not have the legal right to settle their case – the competition authorities, or the European Commission, reserve a significant discretionary power (*no right to settle, no duty to settle*). Finally, even if the settlement procedure has been initiated it is possible to withdraw the motion anytime in the course of the administrative proceedings (up to the final decision) and to continue in the standard proceedings. The concrete steps leading to the "simplified" decision may more or less differ in individual jurisdictions. However, in general it is possible to say that at first it is necessary that the party to the proceedings has an interest in the initiation of a settlement procedure. Consecutively, bilateral settlement discussions take place based on statement and exchange of opinions on possible objections of the competition authority (the Commission), responsibility and the amount of fine, and access to evidence and other documents in the file. This stage is followed by a conditioned settlement proposal by the parties, usually including admission of liability for the anti-competitive conduct toghether with legal qualification, indication of the maximum acceptable amount of fine and confirmation of the parties that with regard to the above mentioned they do not intend to ask for further procedural actions. The competition authority then confirms the conditioned settlement proposal (e. g. statement of objections or other formal acceptance of the conditioned proposal). Next comes the answer of the parties confirming that the acceptance of the competition authority corresponds to the contents of the conditioned proposal. This practically concludes the settlement procedure, only the issuance of a formal document (final decision) from the part of the competition authority/Commission remains. The right of appeal against the issued decision is respected.

Relationship between settlements and leniency program

The main distinction between leniency program and settlements is that leniency represents above all an investigation

3 See Plea Bargaining and Settlement of Cartel Cases, OECD, 2006: http://www.oecd.org/dataoecd/12/36/40080239.pdf.

tool for detection of cartel agreements and for acquisition of evidence against individual participants. The scope of fine reduction then widely varies according to the time when the party to the proceedings avails the advantages of the leniency program (the sooner the better) and to what extent it contributes to the disclosure of the anti-competitive conduct (the so-called added value principle). On the contrary, settlements aim to simplify and expedite the proceedings and the participants who decide for it are "rewarded" by a fine reduction of the same amount. More fundamental issue is, however, the mutual relationship between settlements and leniency. In this regard the most important fact is that it is possible to use both the institutes in the framework of one administrative proceeding cumulatively, i. e. when fulfilling the defined conditions it is possible to benefit from both the leniency program and settlement procedure. However, it is necessary to mention that as a result of the different aims of the two instruments, the starting point for the two procedures differs. In general, settlement procedure may be applied only at the moment when the competition authority/European Commission has gathered enough evidence to back up its conclusions about the anti-competitive conduct and the legal qualification of the conduct. At that moment the time period for application of leniency ends, as it aims at the phase of evidence gathering. Thus the main principle is that when the time for settlement procedure comes, the time for leniency is over – the procedures primarily cover different phases of the proceedings.

Problematic issues of settlements

From a more general point of view the following is regarded as a problematic issue connected to settlements: as a result of a broader use of settlements, a decrease in the overall deterrent effect may occur due to the reduction in imposed fines. Thus the rules governing the settlement procedure must be transparent and predictable and the proceedings before competition authorities/European Commission consistent and fair. At the same time the competition authorities should not use settlement procedure to easily „get rid" of more difficult cases. If these conditiones are fulfilled, it is possible to anticipate that the position of the competition authorities, as well as the enforcement of the competition rules, will strengthen. There are also certain concerns that settlements affect procedural rights of the participants. However, this argument can be refused on the ground of the fact that the parties to the proceedings have a free choice to decide whether they want to pursue the settlement procedure or not. Moreover, this decision is usually based on an expert opinion of their legal counsellors. In addition, ss mentioned above it is possible to withdraw from the settlement procedure during any individual phase of the proceedings and an appeal against the first-instance decision is not exluded either.

Specifics of settlements in the Czech Republic

In the Czech Republic there is at present no explicit legislative stipulation of settlment insitute in antitrust cases. However, the general legal framework enables implementation of this procedure. That is why the settlement procedure has already been used by the Office for the Protection of Competition and at least in one case the final decision has been issued. From the point of view of legal certainty and predictability of the Office´s decisions, it would be desirable to implement settlement procedure into the Czech competition law, either via an amendment to the current legislation or for example via an Office´s notice (e. g. as in case of leniency program).

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Martin Pecina
Chairman of the Office
for the Protection
of Competition

Economic crisis and competition authorities

Economic crisis has been impacting the whole world for several months already. The crisis is so deep that is can be compared to the Great Depression which had affected developed countries in the 30s of the last century. The crisis is so deep that it occupies the governments of virtually all the bigger countries and most of international and non-governmental organizations. Of course, discussion cannot be avoided on the part of competition authorities either.

In the meetings of directors general of competition authorities, at the conferences and working parties of competition authorities' representatives, at least small room for crisis issue can be always found. How should competition authorities approach the crisis then? I am convinced that we have to start from the definition of the scope of activities of competition authorities. Competition authorities should protect competition, which means, above all, setting up equal conditions for everybody. The authorities have to ensure that dominant undertakings do not distort competition environment to the detriment of their weaker competitors through their economic power. They have to detect prohibited agreements that distort competition through provision of unjust advantage to the limited number of undertakings. Put simply, they have to do their best to set up and maintain environment as homogeneous as possible.

I am convinced that maintaining the same or equal conditions for undertakings is much more important than adherence to liberal principles. What do I want to say? If a large country supports some sector of its industry with huge amount of money, we can disregard it only to the extent when these rescued companies do not jeopardize their European competitors. Everybody must understand that if an American automobile company rescued with huge subsidies expels from the market and liquidates even just one European automobile company, it is not right. I don't mean to say here that we should act on impulse and "pour" money in many different sectors of our economy. None competition authority can be happy about increasing cumulative state aid. However, our task is to avoid the situation when the non-efficient ones that are subsidized would liquidate the efficient ones whose governments act restrainedly. I believe that the European competition authorities should become partners to national governments in solving these issues, as the situation is serious and our approaches have to be unified.

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Merger control is another issue that is widely discussed today. Competition authorities have to ensure that merging companies do not gain such market power that would enable them to harm their business partners. At the time of deep crisis, the approach of the authorities to mergers induced by the crisis needs to be changed. It is obvious that an authority has to assess a concentration of two large competitors that have increasing market shares in a completely different way from a concentration leading to rescue of the companies which may have huge shares in their markets but their power is plummeting and one of them is on the verge of bankruptcy. Apart from very sensitive assessment of such a concentration, the criterion of time necessary for assessment of the notification is quite important in those cases.

I am of an optimistic nature, thus I believe that this crisis however deep it is, won't last long. And above all I believe that competition authorities in the European Union and all over the world ensure an environment friendly to entrepreneurship both in good and in bad times.

Martin Pecina
Chairman of the Office for the Protection of Competition

Kristián Chalupa
Director of External
Relations Department

Office for the Protection of Competition in Dates

1991

After the fall of the totalitarian regime in the Czechoslovakia, one of the first measures initiated in favor of building a market economy was adoption of legal provisions protecting the competition. Federal Assembly Act on Protection of Competition, which came into force in March 1991 stipulated that for the area of Czech Republic it would be a competition authority of the Czech Republic. Its new headquarters was established in Brno instead of Prague in order to declare its independence in decision-making process. The Czech Office for Competition took up its activities on June 1, 1991. Its first chairman and later minister was Mr. Stanislav Bělehrádek. During the existence of the Federation, as like as its Slovak counterpart, the Office fall under the Federal Office for Competition. The first chairman of this institution was Mr. Imrich Flassik.

1992

Newly established Ministry for Competition was entrusted with the competition law enforcement. It seat stayed in Brno, which was becoming judicial centre of the Czech Republic. It had its offices also in Ostrava and Plzen. Transformation of the antimonopoly office into a ministry was closely related to the ongoing process of privatization.

1994

The ministry extended scope of its powers with the surveillance over the public procurement. Purpose of the surveillance was to secure that the resources collected from the tax payers' money would be spent in a transparent and effective way along with avoiding particular bidders to be given advantages during the public tender awarding process.

1996

Ministry has been transformed into the Office for the Protection of Competition. The Office is central body of public administration independent from the executive power. The Office is chaired by the chairman, who is appointed by the president on proposal of the government. The Chairman holds his office for six years for maximum two successive periods.

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1999

Mr. Josef Bednář, former vice-chairman, became the Chairman of the Office for the Protection of Competition. He led the Office until the September 2005 when his term of office expired.

2000

Scope of the Office's powers was extended again by surveillance over the state aid rules in the Czech Republic. During the years 2000-2004 the Office acted as an decisive body in issues of state aids incompatible with the EU rules. After the accession of the Czech Republic to the EU the Office's task is not only the monitoring of the state aid but also active assistance to the Czech undertakings in application of the European law in the area of state aid. Decision-making power is now given to the European Commission.

2004

Accession of the Czech Republic to the European Union and subsequent changes in legislative framework and in powers of the Office.

2005

Mr. Martin Pecina became the chairman of the Office for the Protection of Competition. He was appointed by the president of the Czech Republic Mr. Vaclav Klaus.

2006

The Office for the Protection of Competition held a conference at the occasion of the fifteenth anniversary of competition law enforcement in the Czech Republic. International conference called Competition and Competitiveness, held on November 28th and 29th was an important meeting of competition law experts. One of the main objectives of the conference was to contribute to the general awareness of competition policy. More than thirty speakers had the opportunity to speak in Brno. The main speakers included for instance the chairman of the German Bundeskartellamt and chairman of the International Competition Network (ICN), Ulf Böge; chairman of OECD Competition Committee, Fréderic Jenny, deputy General Director of EU DG Competition, Emil Paulis, or the chairman

of the UK Competition appeals tribunal, Sir Christopher Bellamy.

2007

This year became a significant turning point for the Office. Almost all of the employees moved to the new seat in the newly reconstructed building in trida Kpt. Jarose 7 street in Brno. After a long time of a provisional working in rented premises came to an end.

2008

Construction of the extension of the building of the Office's seat was completed in trida Kpt. Jarose street. All the employees of the Office for the Protection of Competition can finally work "under the roof of one building".

Kristián Chalupa
Director of External Relations Department

Kristián Chalupa
Director of External
Relations Department

Employees of the Office had to wait for their new building

In November 2006 the Office for the Protection of Competition held a prestigious international conference "Competition and Competitiveness", recalling the fifteenth anniversary of the competition law enforcement in the Czech Republic. Less than a two years later, in the spring of 2008, employees of the Office finally got their own building. Since its very beginnings in 1991 the Office was seated in rented and inconvenient premises of the Constitutional Court. Necessity of solution had been evident yet it was the changes in management of the Office in September 2005 which led to obtaining former building of the Army of the Czech Republic on třída Kpt. Jaroše street without any charges.

Reconstruction works on new-renaissance building started in summer 2006 and as early as in April of the next year first employees moved into new premises. Total costs for the reconstruction and finishing of a building reached CZK 170 million.

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Contemporary seat of the Office has more than hundred-year history. Construction of the building began in 1897 and finished seven years later. Since its construction until the end of the Second World War served as a boarding school for young girls of Brünner Frauenwerb-Verein association. After the 1945 the building had several owners. Many men probably remember that in the contemporary seat of the Office, conscriptions for young recruits took place as for the Municipal Military Authority had its headquarters here.

"For the first time in the seventeen-year history of our authority we have our own seat with the necessary equipment and accessories" stated chairman of the Office Mr. Martin Pecina during the opening ceremony of the finally completed building in June 2008. In this respect he referred to the previous yeas as time of formulating the shape and background of the Office and stated that the Office become an independent and respected authority with very good reputation.

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Text deadline: April 16, 2009
Graphic layout, printed by: Computer Press, a. s.

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