

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – Czech Republic

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Competition policy

For the Czech competition law, 2023 was a year of significant developments. To begin with, after more than 2 years after the implementation deadline, the Czech Competition Act was finally brought in line with the ECN+ Directive. The Czech Parliament used the amendment to introduce numerous changes to the existing toolkit of the Czech Competition Authority (CCA), some of which remain controversial. In particular, as of July 29, 2023:

- The CCA gained the power to use evidence gathered in criminal proceedings as a proof in the CCA's cartel proceedings. This includes police wiretaps, localisation and operational data, or surveillance.
- The complaint to the CCA regarding anti-competitive conduct can be filed anonymously.
- The CCA may newly sanction individuals. The maximum fine the CCA may impose on an individual is CZK 300,000 (approx. EUR 12,000). The CCA may impose the fine for example in cases of a breach of the duty to cooperate during an on-site inspection, failure to provide complete and correct information in response to the CCA request or failing to appear before the CCA upon request.
- The CCA's leniency program is no longer limited to horizontal agreements. That means that parties to vertical agreements may now also apply for leniency. The only difference is that type II leniency applications (leniency bringing substantial added value to an investigation) for vertical agreements may only lead to a maximum 30 % fine reduction – rather than the maximum 50 % reduction for type II leniency applications for horizontal agreements.
- Several rules concerning the imposition of fines changed. Two notable ones concern settlements. First, the reduction of a fine in settlement cases was previously set at 20%. The CCA now has discretion in granting reduction in the range of 10–20% of the fine. Second, settlement in bid-rigging cases previously automatically led to immunity from blacklisting. Currently, the CCA has discretion whether to impose blacklisting as a sanction in settled bid-rigging cases or not.
- In addition, the CCA may now impose a new fine for a failure to fulfil an obligation arising from a decision. The fine is capped at CZK 300,000 daily in case of an individual, and 10% of average daily turnover in case of undertakings.

Along with the amendment to the Czech Competition Act, the CCA also published revised version of its soft law. Namely, the CCA updated its guidelines on (i) imposition of sanctions, (ii) *de minimis* exception from the prohibition of anti-competitive agreements, (iii) leniency program, (iv)

settlement and alternative resolution of competition issues. The CCA also published a new notice on compliance programs. Although the changes in the soft law mostly reflect the amendment to the Competition Act, some of them are meaningful on their own:

- The CCA signals that it will be tougher with sanctions – the basic coefficient for the calculation of fines for the most serious infringements was doubled from 5–15% to 10–30%.
- The notice on compliance program formalized the CCA’s decision practice of fine reduction for efficient compliance programs. According to the notice, a compliance program may result in up to 10% fine reduction.

Merger control

In 2023, the CCA decided on a total of 54 merger cases – 40 of them were simplified procedures, 12 standard phase I proceedings, and two were phase II cases. We cover both of the phase II cases in more detail below.

In the first, the CCA prohibited a merger for the first time in 19 years. The merger concerned the acquisition of a mail delivery company, *První novinová společnost*, by the Czech incumbent universal postal service operator, *Česká Pošta*. The CCA concluded that the transaction would significantly impede competition in the relevant markets:

- For the delivery of ordinary mail and addressed direct mail, where it would eliminate the only significant competitor of *Česká pošta*,
- For the delivery of non-addressed direct mail, where the second and third largest operators would merge; and
- For subscription distribution and print mailing, where it would remove a potential competitor.

Česká pošta claimed the failing firm defence to countervail these concerns, but it did not manage to convince the CCA. The details of the decision are, unfortunately, not public as the notification was withdrawn in the course of the appeal procedure before the CCA.

The second phase II decision concerned *CETIN* and *Nej.cz*. The CCA allowed *CETIN*, the owner and operator of telecommunication infrastructure for wholesale provision of mobile and fixed network services (including xDSL or fibre connection), to acquire *Nej.cz*, a provider of retail internet access service and TV services. The CCA had concerns that the merger would impede competition on the market for retail fixed internet access services where the parties to the merger horizontally overlapped. In over a hundred of (smaller) municipalities, the market share of the merger entity on the local market would exceed 35%. In addition, the main competitors of *CETIN* and *Nej.cz* in these areas are local providers of retail internet access, who use the infrastructure access purchased from *CETIN*, the local infrastructure monopolist, for their retail offer. As a result, the CCA had concerns that the merger would reduce retail offer in these municipalities and limit investment incentives into the infrastructure’s development.

The CCA ultimately cleared the transaction subject to behavioural commitments, under which *CETIN* must:

- Either maintain its wholesale offer in a list of 187 municipalities, or create a new wholesale offer

allowing the provision of wholesale fixed internet access services with handover at a central location;

- Provide open and non-discriminatory access to all interested parties to the wholesale offer at a reasonable cost, allowing for adequate profit; and
- Invest a minimum of CZK 3,5 billion (approx. EUR 140 million) into more advanced technologies used in its network infrastructure for wholesale and retail provision of fixed internet access service.

Anticompetitive agreements

Vertical agreements

In 2023, the CCA's enforcement of the prohibition of anti-competitive agreements continued to be heavily focused on the practice of resale price maintenance (**RPM**). The CCA adopted six decisions in this area alone. The undertakings fined for RPM in 2023 include a distributor and manufacturer of kitchen appliances (approx. EUR 2.6 million), distributor of electronic appliances (approx. EUR 1.2 million), a distributor of pet food (approx. EUR 1.9 million), or a manufacturer of school bags (approx. EUR 0.4 million).

While most of the RPM cases end up being settled, there was one notable challenge to the CCA's approach, which resulted in the the Czech Supreme Administrative Court (SAC)'s landmark *Baby Direkt* judgment. The judgment concerned a fine that the CCA imposed in 2020 on a distributor of children's goods (prams, car seats, children's furniture *etc.*) for dictating minimum resale prices to its business partners over the course of 7 years (2011–2018). In the binding part of the decision, the CCA qualified the infringement as a continuing offence, and defined it summarily, both as regards the parties to the prohibited agreements (referring to *Baby Direkt*'s agreements with "its buyers"), as well as the illegal conduct itself (referring to illegal agreements concluded "mostly by verbal and e-mail communication").

On appeal, the SAC did not find that delimitation satisfactory, referring to the judgment of the European Court of Justice in *SuperBock*. It emphasized that the CCA is required to describe each partial attack of a continuing offence and prove accord of wills between a supplier and a customer in every individual case. While the judgment arguably increased the requirements that the CCA must meet for its decisions on RPM not to be quashed in court, in practice, we have seen only limited impact on the CCA's decision-making. While the CCA seems to have abandoned its practice of summarily referring to "buyers" and now lists all of them in the binding part of its decisions, it continues to describe the illegal conduct itself summarily, with an identical paragraph. It remains to be seen whether the administrative courts will consider such a change satisfactory.

Another notable case on vertical agreements concerned *Zásilkovna*, a delivery company with a network of thousands of pick-up points in the Czech Republic, mostly used for the delivery of parcels from e-shops to customers. The CCA raised concerns over the non-compete provisions in contracts between *Zásilkovna* and its pick-up points, which allegedly prevented them from delivering parcels from competing shipping services – not only for the duration of the contract but also for a certain period after its termination. Given the significant market share of *Zásilkovna* in the relevant market of small parcels delivery (of weight up to 30 kg), especially in the segment of external pick-up point delivery, the CCA was concerned that the non-competes result in

foreclosure. To address these concerns, *Zásilkovna* offered commitments, which the CCA eventually accepted, following market testing (market testing of commitments being a novelty for the CCA). According to the commitments, after two years of duration of a contract between *Zásilkovna* and a pick-up point operator, the pick-up points will be able to deliver parcels of *Zásilkovna*'s competitors as well, provided that they will fulfil several qualitative criteria. In addition, if a contract is terminated, the non-compete can outlive the contract for a maximum of one year.

Horizontal agreements

The CCA adopted the total of 10 cartel decisions in 2023. These included bid-rigging practices in tenders for the security and modernization of railway crossings (with the highest fine imposed amounting to approx. EUR 1.7 mil.), a cartel of distributors of Xiaomi electronics (fine of approx. EUR 0.9 mil.), or a decision of an association of dentists concerning the regular publishing of price lists (for a period of over 10 years) for stomatology products and calling onto its members to increase prices.

Apart from the investigation of the standard cartel agreements, the CCA declared that it will focus also on protection of competition in labour markets, reflecting the trend adopted by many competition authorities across the EU and elsewhere. To raise public awareness about the illegality of no-poaching and wage-fixing agreements, it published a policy brief. The CCA also opened investigations on first two cases of no-poaching agreements. Both cases concerned provisions in the codes of conduct of associations of undertakings, which required their members to use non-compete provisions in the contracts with their employees "as widely as possible". The CCA saw these provisions as an attempt to prevent poaching of employees between the members of the associations. The CCA ultimately closed both cases without initiating formal proceedings after the associations agreed to remove these provisions from their codes of conduct.

Dawn raids

In 2023, the CCA conducted the total of nine on-site inspections – significantly less than in the preceding year, where it conducted 32 of them.

Notably, the CCA issued two fines for non-cooperation during inspections. In the first, the CCA imposed the record fine of EUR 910,000 on a mobile phone and other electronics wholesaler for the failure to provide cooperation to inspectors during a dawn raid. Specifically, one of directors refused to hand over his mobile phone to the inspectors, and another one, while complying with the request, handed over the devices only after manipulating and deleting the data on his mobile phone and laptop. In the meantime, the e-mail box of one of the company's employees was secretly deleted and when the inspectors demanded a back-up of the e-mail box, the company refused.

Another case of non-cooperation during a dawn raid involved a wholesaler of household appliances. The company's representatives refused to allow the CCA to fully inspect its business records and an e-mail account of one of the employees. They also prevented external access to the company's website, enabling the manipulation of its content. The CCA imposed a fine of EUR 552,000.

Sector inquiries

During the previous year, the CCA was pulled into the public debate over the continuing inflation of the prices of foodstuffs. As a result, it conducted a fast, three-months-long sector inquiry in the area of the prices of flour, milk, eggs, poultry and butter. The CCA found no indication of anticompetitive agreements or dominance in the sector – to the contrary, it found that the retail sale of foodstuffs is characterized by intense competition. Also, the CCA concluded that vertical integration is not a systemic issue in the sector, and none of the individual links of the distribution chain is to be solely blamed for the price increases.

The CCA also published the results of its sector inquiry into distribution of human pharmaceuticals focused on the period of 2021–2022. Faced with a number of complaints, it inquired whether direct-to-pharmacy and direct-to-hospital distribution systems distort competition on the market. The conclusion reached by the CCA was rather straightforward – the direct distribution models are justified by more efficient control of the circulation of pharmaceuticals and reduction of their exports. According to the CCA, to hinder these models would mean endangering the availability of pharmaceuticals on the market.

Abuse of dominance

In 2023, the CCA issued the total of 3 abuse of dominance decisions, which were all subject to commitments. Most notably, the CCA investigated *Honeywell's* practices related to its certification training for installation, commissioning, maintenance, and repair of electrical fire alarm and evacuation radio equipment. *Honeywell* conditioned the participation in these certification trainings by the purchase of its products for which it provided the training. The CCA was concerned that this practice disadvantages undertakings providing the concerned services as the respective technical norms prevent them from providing the services without *Honeywell's* training. As a commitment, *Honeywell* agreed to no longer required these purchases from the certification training participants.

Outlook for 2024

It seems like the momentum for expanding the powers of CCA is not going away in 2024. In January 2024, the CCA published legislative suggestions aimed at further strengthening of its powers by yet another amendment to the Czech Competition Act. At the time of this article being published, the CCA proposes for itself the following new powers:

- The power to impose behavioural and structural remedies on undertakings active in markets which the CCA finds dysfunctional – without need to find anticompetitive conduct. Proposed remedies range from imposing an obligation to provide access to networks, infrastructure, or data, to enter into contracts or to notify any acquisition in a given sector.
- A “call-in” option in merger review, giving the CCA the power to require both ex-ante and ex-post notifications of mergers falling short of the turnover thresholds anchored in the Czech Competition Act. This would concern undertakings with a turnover of at least CZK 100 million.
- Ability to impose fines of up to CZK 10 million on managers engaged in anti-competitive

conduct and disqualify them from acting as a statutory body for up to five years.

- The expansion of the CCA's power to request access to data and information available to other state institutions. According to the CCA, the change would give it access to the data of approx. ten state institutions, which it currently lacks given the special legislation in place governing these institutions.

Although these suggestions might seem far-reaching, the CCA originally intended to call for more, such as the power to conduct dawn raids in concentrated market without suspicion of competition law infringement, or the power to request access to operational and localization data from the relevant service providers.

The current Czech Government encourages these proposals. That said, it is too early to say what will come out of them. It will be one of the critical developments to follow in 2024.

In terms of the enforcement, the CCA focus in 2024 should be, according to the statements of its representatives, on companies with significant impact on key markets, prioritizing investigations of complex cartel agreements, abuse of dominance and vertical agreements. It is expected that the CCA's focus on RPM will also continue in 2024 as well. In any event, we can look forward to eventful 2024 for the Czech competition law.

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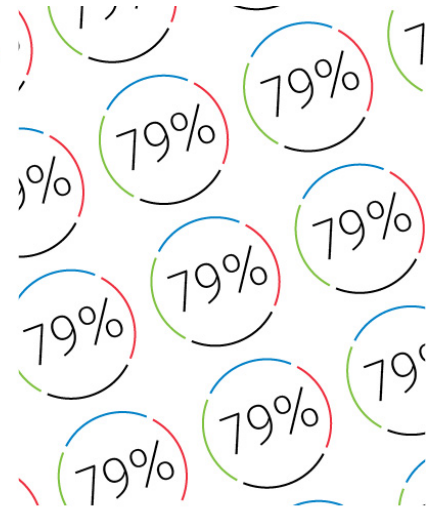
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