Since the end of the last year, the Czech competition authority has repeatedly publicly confirmed that it would engage in sector inquiries more often in the future. Its chairman recently announced that it was preparing an extensive inquiry on the energy sector focused on the field of brown coal mining and heat production during the first phase. In the majority of cases, this news did not have much of an effect on the entrepreneurial community. However, there are several good reasons for businessmen to stay alert.

What is a sector inquiry?

In a nutshell, a sector inquiry is a procedure applied by a competition authority with the objective of obtaining as much information as possible regarding the functioning of a particular market or sector. Once the authority has analysed the obtained data, the competition authority should be able to identify any obstacles that might affect competition in the market, or acquire indications, or even evidence, of a particular anti-competitive practice. The results of these sector inquiries are usually summarised in a report which includes a conclusion on why the market does or does not function well. Depending on the specific circumstances, the authority may subsequently try to eliminate the identified regulatory barriers to competition by providing opinions or public statements (what are jointly called competition advocacy), or commence an inquiry focused on a particular company for a specific suspected anti-competitive behavior.

A sector inquiry is conducted by competition authorities if they conclude that a certain sector or market is not functioning in the desired manner (e.g., due to high prices or other symptoms of insufficient competition) without having a suspicion regarding the existence of a specific cartel agreement or the abuse of a dominant position which might have caused it). A sector inquiry usually concerns the whole market and all its participants, and includes a wide scale of topics, which is the main difference when compared to a formal investigation or an administrative procedure aimed at a specific limited number of undertakings and behaviour.

Market studies and sector inquiries are currently a common competition policy tool for the majority of competition authorities. Historically, the first inquiry of this kind was conducted at the beginning of the 20th century in the United States and concerned cooperation of the 20th century in the United States and concerned cooperation
tenance of motor vehicles, which commenced in 2006. Other member states of the European Union also frequently apply these inquiries: competition authorities focused on the retail sales of food in Germany, Italy, and Sweden, fuel prices at petrol stations were examined in Portugal and Hungary, the Bundeskartellamt looked into the production and wholesale of electricity in Germany, the antimonopoly authority conducted an inquiry into the field of milk sales in Romania, and centralised heating was the subject of an investigation in Finland.

Commission: energy, financial markets, pharmaceutical industry

Commission authorities of the EU member states, including the Czech competition authority, often openly profess to being inspired by the procedures and activity of the European Commission. If this should be the case with the sector inquiries, the Czech undertakings can expect an earthquake.

Since 2000, the European Commission has completed or commenced seven sector inquiries. While the first four of them covered the area of electronic communications and may be considered rather limited, the last three became major events for the relevant sectors. Initially, between 2005 and 2007, an inquiry into the energy sector was conducted. During this inquiry, the Commission sent 3000 (!) questionnaires to market participants. On the basis of the information obtained through these questionnaires, the Commission identified not only structural obstacles to competition, but also much evidence of the potential breach of the competition by the relevant market participants. In these cases, formal antitrust investigations were commenced that focused e.g. on long-term contracts (Distirigaz, EDF). The inquiries of RWE and ENI were aimed at refusing access to transmission capacity and, in the case of E.ON a GDF, at long-term capacity booking. All these previously mentioned cases were closed due to the acceptance of painful obligations by the examined companies, the best known obligations being those of the E.ON and RWE groups who were required to sell parts of their own transmission networks to third parties.

During the inquiry of the financial sector (between 2005 and 2007), the Commission approached 250 banks and 270 insurance and re-insurance companies.

The last sector inquiry looked into the pharmaceutical industry. It commenced in January 2008 with the historical first series of dawn raids in a number of major producers of original and generic pharmaceuticals. The main outcome of the one and a half-year investigation was that the entry of generic pharmaceuticals to the market was systematically delayed, partly due to the lengthy registration procedure, and partly due to certain practices that were employed by the market participants, including the abuse of patent rights, or so-called patent settlements. Patent settlements in particular became the centre of the Commission’s attention.

The Commission examines the functioning of the market in the EU, and therefore its authorisations under community competition law obviously also apply to the undertakings and companies seated in the Czech Republic and Slovakia. Some of them already have experience with the Commission’s sector inquiries.

Situation in the Czech Republic

At the present day, any sector inquiry poses as a standard tool of the competition policy and takes various forms in different countries. In some states, the competition authority is authorised, or even obliged, to conduct an investigation only if instigated by the government or the parliament, while in other states the competition authority alone may decide whether it will conduct an inquiry. Information concerning the market may either be provided to the competition authorities on a voluntary basis or enforced through fines or rights of investigation typically used in administrative proceedings related to a specific violation.

The Czech Office for the Protection of Competition enjoys considerable liberty and exceptional rights. Firstly, it is up to its sole discretion which sector it will focus on or whether it will pay attention to a particular sector at all. Additionally, it cannot be tasked by the state, at least not officially or in a binding manner. As far as its authorisation is concerned, after the last substantial amendment of the competition law in 2009, it has been made certain that the position of the Czech competition authority is almost identical to that in the administrative proceedings concerning cartel agreements or the abuse of a dominant position. This means that it is authorised to require the provision of information, commercial books, and records, relating to the subject of the inquiry, in any quantity and form (electronic or paper). Similar to the Commission, it is authorised to conduct dawn raids in commercial premises of the competitors, i.e. at their seats, in their establishments, or in company cars, in order to collect any commercial records located in these premises. The undertakings are obliged (povinni) to submit to the investigation and provide any necessary assistance. If the employees of the competition office encounter resistance, they are authorised to force entry into the commercial premises. Moreover, in the course of the sector investigations, the Czech competition authority is authorised to conduct dawn raids in premises other than the commercial ones, i.e. in private premises (subject to court permission). A competitor who has failed to provide the required information or assistance during a dawn raid may be fined by the Office for the Protection of Competition up to 1% of its annual turnover. As this fine is of a procedural nature, it may be imposed repeatedly, and amount up to 10% of the annual turnover in total.

These rights, despite being similar to those possessed by the Commission, are by no means standard in the European Union. For instance, in the UK, the Office for Fair Trading and the Competition Commission also undertake sector inquiries, however, they may not force the participation in the exercise from any undertaking.
Consequently, inquiries are mainly based on voluntary answers to the sent questionnaires and on voluntary participation in structured phone and personal interviews.

Questions

For the most part, we agree with the opinion that competition authorities should know the markets of the undertakings where their activities operate. In many cases, a sector inquiry may be a more suitable tool than formal proceedings. We can hardly object to any activity of the competition authority which focuses on the identification and proposed change of deficient regulation preventing the development of free competition.

On the other hand, we cannot ignore the criticism pointing at the unlimited powers of competition authorities, the unclear rules for the selection of sectors, and the actual inquiry procedure and its extreme costs. It is an accepted rule that a competition authority may not commence administrative proceedings concerning the violation of competition law without having a concrete and serious suspicion; therefore, a competition authority is not authorized to go for fishing expeditions. If sector inquiries include dawn raids, as they do in the Czech Republic, they may help bypass this obstacle by referring to “the situation on the individual markets indicating distortion of competition”, which, according to the current legal situation, is the only statutory prerequisite for the application of a sector inquiry. The lack of any further limitations of the competition authority leads to the worry that the Czech Office for the Protection of Competition will also be authorised to go for fishing expeditions during sector inquiries.

Considering the vague definition of the precondition for the application of sector inquiries in competition law, it seems suitable for the competition authorities to clearly declare on what grounds they decide to commence a sector inquiry in a specific area. General justifications referring to a number of received complaints, without specifying the subject matter of these complaints, or why the competition authority considers them substantiated enough to look into the situation by means of a sector inquiry, does not seem to be very instructive for undertakings, and does not contribute to the transparency of the authority’s activity.

But this is not an academic debate. The decision on conducting an inquiry in a certain sector, and on including a specific undertaking in the inquiry, has very unpleasant consequences for the concerned undertaking, such as, among others, the incurring of unexpected costs. Such costs are not to be neglected. The Business and Industry Advisory Committee to the OECD calculated that, in a model sector inquiry conducted by the British OFT or Competition Commission, the costs incurred by an undertaking in connection with such an inquiry may amount to up to GBP 6.5 million (approximately CZK 180 million). Although in the Czech Republic the costs will not be so dramatically high, it is still necessary to expect that considerable funds will be spent. This applies even more in a situation where the Czech Office for the Protection of Competition requires, with increasing frequency, large data files from the undertakings for its economic and econometric tests. For illustration, these may include data pertaining to all business transactions concluded by the undertaking over the last several years. It is then not exceptional that the collection of such data requires the involvement of several employees, for the period of several weeks, without any entitlement to compensation for the incurred costs.

In this connection, we are facing another problematic aspect of sector inquiries: an increasing number of experts on competition law and administrative sanctions hold the opinion that, in a broader sense, the application of competition law by the competition authority has the nature of criminal prosecution, and therefore, basic penal principles should be applied to it. One of these principles is that the accused person has the right to remain silent and/or that they have the right not to be forced to give testimony. The current legislation for sector inquiries conducted by the Czech Office for the Protection of Competition, or by the Commission and the procedures they currently apply, do not provide any guarantee that the information obtained from an undertaking during a sector inquiry, i.e. at the time when the person was not “accused”, will not be used against them in subsequent administrative proceedings. Such a procedure would be in conflict with the prohibition of enforced self-incrimination, which is the one of the main penal principles, despite that fact that it has not been definitively accepted in proceedings before the Czech Office for the Protection of Competition.

How to prepare for a sector inquiry? Robert Neruda, a managing associate of the competition practice group of the law firm Havel, Holášek & Partners answers:

We can assume that the Office for the Protection of Competition will conduct sector inquiries with increasing frequency and use more sophisticated procedures. Also, the Commission’s sector inquiries can directly affect Czech entities. Therefore, undertakings should not ignore or underestimate this issue. It seems appropriate for them to be aware of their duties in order to avoid high fines for any breach of these duties. However, they should be aware of their rights ensuing from the nature of antitrust proceedings, but also of the limited power of the competition authorities. They should know how to respond to questions raised by the competition authority in order to comply with their statutory duty and, at the same time, protect their rights guaranteed by the Constitution. Today, many leading companies have a compliance program in place and organize training courses on competition law and the powers of the competition authority for their employees. Information about sector inquiries should become an integral part of these activities. As in other cases, prevention may save a great deal of money and worry to the undertakings.
Havel, Holásek & Partners, attorneys-at-law, based in Prague, with offices in Brno, Ostrava, and Bratislava and with 20 partners, nearly 130 lawyers, and a total staff of more than 300 employees, including 100 employees of the cooperating collection agency Cash Collectors, is the largest Czech-Slovak law firm. The firm currently provides services to approximately 500 clients, more than 30 of which have been ranked as Czech Top 100 companies; approximately 70 rank among the Fortune 500. The firm has won the largest number of awards in the last two years in the Czech Republic’s Law Firm of the Year competition, and can be considered the most successful law firm of 2009 and 2010 in the Czech Republic. This year, the firm was awarded the prestigious Who’s Who Legal Award and was ranked the best law firm in the Czech Republic of the year 2011, and was also ranked the No. 1 local law firm in the overall ratings published by Practical Law Company. Furthermore, Havel, Holásek & Partners was awarded an ILO Client Choice Award 2010 by International Law Office (ILO), which named it the best-rated law firm by clients in the Czech Republic. Our lawyers are regularly cited as leading or recommended specialists by renowned international rating publications, such as PLC: Cross-border, European Legal 500, Chambers Global Guide, European Legal Experts, Global Law Experts, and IFLR 1000, all of which have cited Havel, Holásek & Partners as one of the best law firms for transactions carried out in the Czech Republic in the areas of mergers and acquisitions, corporate and commercial law, banking and finance, capital markets, insolvency and restructuring, real estate and construction law, labour law and dispute resolution.

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