Abstract

This paper analyzes regulation of abuse of dominant position under the law of the European Union and under the Czech law.

Both the European and Czech competition laws are not only very similar, as the Czech Act on Protection of Competition is inspired by the European competition law, but after the so called modernization of the European competition law, including the decentralization of its enforcement, the Czech authorities are entitled (and obliged at the same time) to apply the European competition law. Given the special relation between the two legal orders, this paper does not attempt to *compare* the two, but rather to analyze them it their mutual relation, which is the basic view for the submitted analysis.

Firstly, a basic introduction to the problems of competition economics is presented, including characteristics of the basic functions and principles thereof. An explanation of the economic background and different models of competition follows, particularly of those important for understanding the specifics of dominant undertakings' behaviour and motivation. Models of monopoly, oligopoly and monopolistic competition are briefly described in opposition to the model of perfect competition and also some other important approaches to this issue are addressed, including the basic views of the so-called ordoliberal school which formed the roots of the European competition law and the contemporary shift towards a more effects-based approach, focused on the consumer welfare.

Chapter 4 presents an overview of the basic provisions of the European Union's competition law, their context and scope of application. The Article 102 of the TFEU applies, as explicitly stated therein, to abuses by one or more undertakings of a dominant position within the internal market or in a substantial part of it, in so far as such abuse may (appreciably) affect trade between Member States. This basically forms jurisdictional criteria that are addressed in Chapter 4.

An overview of the Czech competition law follows in Chapter 5.

The relation between the EU competition law and the Czech competition law is addressed in Chapter 6. Generally, undertakings have to comply with both European and Czech competition laws. Relationship between the two and their application has been laid down in the Regulation No. 1/2003. According to Article 3 thereof, the national competition authorities are obliged to apply Article 102 of the TFEU if they assess an abuse covered thereby; the Member States may enact stricter national laws with regard to the unilateral conduct; and the application of national laws observing predominantly different objective than Article 102 of the TFEU is not precluded.

Any possible discrepancy between the European and Czech laws would need to be resolved according to the principle of priority of the European law. However, that would be an *ultima ratio* solution. Given that the provisions of the Czech law concerning abuses of dominant position are rather general and the most of their real content is determined by case law, it is submitted that any possible conflicts should be resolved by an interpretation conforming to the European law.

A concurrent application of national and European law is addressed and analysed on the basis of Czech case law, which seems to have resolved that a parallel (and, in certain circumstances, subsequent as well) application of both the European and Czech provisions is possible, however, any fines must be carefully reasoned and must conform to the principles of administrative punishing. The national authorities are not, however, entitled to render a negative decision in respect of an alleged breach of the EU competition law (i.e., they cannot rule that no breach has been committed; they can only rule that they have not found grounds for action on their part).

Chapter 7 analyzes undertakings as the addressees of the competition law on the background of the relevant European case law in comparison to the undertaking as perceived in the Czech competition law. It is submitted that even though some differences may be seen between the European concept of undertaking and the Czech legal provision setting out its legal definition for the purposes of the Czech competition law, the meaning of the Czech notion of “competitor”, being a counterpart to the European “undertaking”, should be interpreted in the same meaning.

A detailed analysis of the concept of relevant market follows in Chapter 8. It is stressed that a correct establishment of the relevant market is crucial for subsequent stages of application of competition law. The establishment of the relevant product, geographic and temporal markets is addressed, as well as the common fallacies that may be found in the case law.

Chapter 9 is dedicated to the concept of dominance and to the process of its ascertaining. The relevant factors are analyzed from the view of the established case law. An analysis of the new approach announced by the Commission in its Guidance on Enforcement Priorities with regard to the exclusionary abuses is given, submitting that the Commission may have overstepped which would be reasonably expected from a soft law document, as it in fact attempts to change criteria laid down by the case law.

An analysis of the concept of “abuse” is submitted in Chapter 10. After a basic introduction, an abuse as an objective category is analysed together with the notion of causality, followed by the notion of the special responsibility, objective justification and proportionality. The frontier delimitating an abuse is analyzed on the basis of the concept of competition on the merits (based on the ordoliberal approach), followed by noting that the Commission attempts to introduce a concept of anticompetitive foreclosure to the harm of consumers as a more effects-based criterion.

Types of conduct that may constitute an abuse are addressed in Chapter 11, being however aware that any conduct, even though not caught in an particular provision of letters (a) through (d) of Article 102 of the TFEU, may be found abusive. The approach of the Czech Act on Protection of Competition is the same in this regard. It is shown on certain individual cases that the Court of Justice and the General Court do not fully accept the modernized approach which the Commission attempts to introduce.

Chapters 12 and 13 deal with legal consequences of a breach of the competition laws both European and Czech, under public and private enforcement, respectively. An analysis of relations between the

provisions governing the abuse of a dominant position and certain other unilateral conduct set out by the Czech law is submitted in Chapter 12.

Chapter 14 presents conclusions. It summarizes the author's view with regard to the analyzed concepts, stressing the importance of the European competition law for the Czech competition law practice, the need of an interpretation of the national law in conformity with the European law and the opportunity to take advantage of the reasoning of the European decisions, which is at appreciably better level than the Czech decisions, even though the situation in the Czech Republic gradually improves. The importance of high quality case law is stressed, as the most of the real content of the competition law is not set out in written legal acts, but is formed by the individual decisions of the authorities.

The contemporary shift towards a more economic, or rather more effect based approach, is noted. However, it is submitted that the attempts of the Commission to introduce new "more effect based" concepts based on anti-competitive foreclosure and the harm to competitors pose risks that may be presently overlooked. It is submitted that the European courts have not fully accepted the Commission's approach. Given the decentralized system of application of the European competition law, as well as the anticipated promotion of the private enforcement, it may lead to a dissimilar application of the European competition law by different authorities.