Abstract

The submitted study is concerned with competition (antitrust) law, understood as the regulation of anticompetitive agreements and abuse of dominance. The distinctive feature of competition law within the EU is the fact that both national and EU regulation remain in place; while the EU competition law only applies to practices which may appreciably affect trade between the EU Member States, the national law generally applies to all anticompetitive practices without any such limitations.

After the Modernization of EU competition law in 2004, the majority of cases are no longer decided by the European Commission itself, but by national competition authorities (hereinafter referred to as "NCAs"), because they are obliged to apply the EU competition law whenever they are deciding on a case which may appreciably affect trade between EU Member States; the same applies to national civil courts. At the same time, the national authorities are permitted to apply their national competition law *in parallel* with the EU one in such cases. Although the Member States are not formally required to align their national competition law with the EU one, the parallel application makes it in fact necessary.

In the Czech Republic, the Act on the Protection of Competition (hereinafter referred to as "Competition Act") was adopted in 2001; it claimed that it managed to achieve full harmonization with the EU competition law. Since then, it has been amended thirteen times, in the vast majority of cases in order to "deepen" the level of harmonization. The first goal of this study is therefore to assess to what extent is the Czech competition law really harmonized with the EU one, concerning not only the written law but in particular the practice of the Czech Competition Authority (hereinafter referred to as "CCA") and Czech courts.

The study concludes that the Czech competition law still deserves significant changes in order to achieve full harmonization. Even though the CCA's practice, generally endorsed by courts, is in most cases aligned with the EU one, the written law still contains clauses which complicate its interpretation; the Czech civil courts have only rudimentary experience with competition law and if private enforcement is to flourish, such hindrances need to be removed. The proposed changes concern first some general legislation, in particular the Civil Code, second, the Competition Act itself, and finally, the practice of the CCA.

Under the Czech Civil Code, regulation of anticompetitive agreements and abuse of dominance is a part of broadly defined competition law, including unfair competition and other practices unrelated to antitrust; as a consequence, the Civil Code contains provisions which cannot be meaningfully applied to competition law, including the definition of undertakings, the territorial scope of competition law or the legality of non-compete clauses. It is suggested that the Civil Code is amended in such a way that the antitrust law is fully independent on it.

At the same time, antitrust law is part of administrative law and its infringements are governed by the Act on the Liability for Administrative Infractions (hereinafter referred to as "Infractions Act"). This act is typically employed in order to decide on the liability of natural persons and its applicability to competition law is limited; even today, the Competition Act provides for more than 50 exemptions from the Infringements Act. I put forward that further exemptions and specific provisions are necessary, including the subjective liability for infringements, the possibility to declare that the

competition law was infringed even when the liability is time-barred or possibility to impose sanctions on several companies within the same undertaking; these changes would become even more pressing especially should the ECN+ Directive be adopted.

Further amendments of the Competition Act itself are in order as well. For no apparent reason, it still contains definitions of several fundamental notions, including undertakings, horizontal agreements, and dominance and its abuse, which differ from the EU law; even though they are interpreted by the CCA in line with the EU law, for the benefit of legal certainty (and the civil courts engaged in private enforcement), these definitions should be brought in line with the EU ones.

Finally, the practice of the CCA should be modified in a few ways. First of all, it should declare what it understands to be the aim of competition law; it is suggested it should concentrate solely on economic efficiency and consumer welfare. Apart from this policy choice, I am afraid that the CCA is wrong when it consistently decides that on 1st May 2004 (the entry of the Czech Republic into the EU), any single and continuous conduct is divided into two, and that its practice is too extensive concerning what legal entities constitute a single undertaking.

The second goal of this study concerns the parallel application itself. Although it is clearly provided for in the legislation and the courts on both the Czech and EU level do not object to it, the study argues that it is not necessary for effective enforcement of competition law and on the contrary, it may be detrimental to the parties to the proceedings. It puts forward that a more appropriate approach would be to always apply either the national or the EU competition law, but never both in parallel.

In addition to that, this study addresses another topic, closely connected to the first one. As the Modernization entrusted the NCAs and the Commission with application of EU competition law, but did not provide them with exclusive competences to do so, more NCAs or a NCA and the Commission might investigate the same case at the same time, as long as the territorial and temporal scope of their enforcement do not overlap; both Czech and EU courts seem to endorse this interpretation. The final goal of this study is therefore to ascertain whether such an interpretation is in line with the *ne bis in idem* principle.

I put forward that the *ne bis in idem* principle cannot be interpreted in such a way. Even though the jurisprudence of the Court of Justice (hereinafter referred to as “CJ EU”) is unchanging in this regard, it is arguably not in line with the case law of the European Court of Human Rights, and even more strikingly, with the case law of the CJ EU itself in all other areas of law, in particular the Schengen acquis. I suggest that the rules on jurisdiction should be amended in such a way that only a single NCA or the Commission shall be responsible for investigating a single case. Furthermore, the NCAs need to be provided with a power to declare that the EU competition law was *not* breached by certain conduct and the decisions of both the NCAs and the Commission finding no infringement should have the effect of *res iudicata*, barring other EU competition authorities from investigating the same case.

Clearly, many of the proposed changes are so far-reaching that it would be difficult to secure them in practice in the short-term; nonetheless, at least a serious debate on some of them ought to be launched, which is the ultimate aim of this study.