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ROUNDTABLE ON REFUSALS TO DEAL

-- Note by the Czech Republic --

This note is submitted by the Delegation of the Czech Republic FOR DISCUSSION to the Competition Committee FOR DISCUSSION at its fortcoming meeting to be held on 17-18 october 2007.

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1. Introduction

1. This paper is the Czech Republic's contribution to the roundtable discussion on refusal to deal held as part of the OECD Competition Committee meeting in October 2007. In this paper the Czech Office for the Protection of Competition (hereinafter "the Office") will discuss the refusal to deal (hereinafter "RTD") doctrine on an example of three cases addressed during its operation in the recent years. In the Office's experience, the refusal to deal is not a very frequent form of abuse of dominant position and, as will be perceptible in the examples, it is a form that is difficult to identify and is serious in terms of impacts on subsequent productions or on consumers. In the following cases the Office succeeded in revealing and sanctioning the anti-competitive behaviour or in preventing it on time, as the case may be, with its decisions being confirmed in appellate proceedings.

2. Refusal to deal with customer dependent on delivery

2. In the recent years the Office dealt with a case of refusal to deal in the area of petrochemical material production. An original gigantic company mostly built in the second half of the 20th century was divided into two independent companies through privatisation. Oil cracking and production of basic refinery material became the task of ČESKÁ RAFINÉRSKÁ, a. s., while the production of further inputs for the petrochemical industry (such as rubber production, agro-chemistry, production of building and coating materials, synthetic fibre, etc.) became the main activity of CHEMOPETROL, a.s. Agreements were signed between both companies on the mutual delivery of material while the production of the CHEMOPETROL competitor was fully dependent on deliveries from the refinery. In such a situation of mutual interconnection of operations even a brief delivery breakdown may have a grave impact on further production and the client's equipment condition. The material provider's negotiating position was strengthened by the possibility to threat with the suspension or stopping of deliveries.

3. Subsequently, both companies failed to reach an agreement on the prices of deliveries. The period when deliveries were based on temporary contractual arrangements had lasted many months and the supplier, ČESKÁ RAFINÉRSKÁ, elected to use a negotiation tool – prohibited to a dominant player on the market – the threat and execution of RTD.

4. For this reason the Office was forced to initiate an administrative procedure on the basis of a suspected abuse of dominant position by the refinery. In its decision the Office stated that the party to the proceeding, ČESKÁ RAFINÉRSKÁ, abused its dominant position on the petrochemical materials market by stopping the delivery of materials to its long-term client, CHEMOPETROL, for approximately 39 hours on 31 May 2002 at 24 hrs, during the talks on conditions for the delivery of petrochemical materials for the period starting on 1 June 2002, without any objectively justifiable reason. By this it violated the provision of Section 11 paragraph 1 of the Act on the Protection of Competition[1] to the detriment of CHEMOPETROL and other competitors purchasing petrochemical products from this company.

5. Among other things the Office proved that in case of this refusal to deal it was almost impossible, out of technical as well as economic reasons, for CHEMOPETROL to find a substitute supplier of the required amount of raw materials to be able to continue the production within a reasonable time. In order to respond in this way the company would have had to invest considerable amounts and would have needed more time to adjust the production technology and local conditions to this situation (the railway siding capacity, etc.). ČESKÁ RAFINÉRSKÁ communicated the first information on realising its threat only about three months previously. Under the circumstances CHEMOPETROL was unable to secure such

[1] This provision is a so-called general clause prohibiting the abuse of the dominant position to the detriment of other competitors or consumers; it provides some specific cases of abuse as examples.

amount of material for production from other sources under comparable conditions to be able to fulfil its own contractual obligations toward its customers. This **dependence was then reflected in many subsequent production operations** in the petrochemical and agro-chemical industries and other competitors whose production depends on the delivery of products from CHEMOPETROL (provided that some of these competitors are connected to CHEMOPETROL with their pipe lines).

6. In the situation where there was no written agreement stipulating the conditions of delivery in line with the supplier's articles of association, nothing prevented the execution of deliveries on the basis of mutual agreements expressing the will to deliver and purchase the raw material. In order to overcome the basic disagreement – failure to agree on the material delivery price formulas – both parties adopted short-term agreements temporarily covering certain periods. Such agreement was not achieved for the period starting on 1 June 2002 by the expiration of the last valid agreement (at 31 May 2002). The Office stated that both the supplier and the purchaser did not exhaust all possibilities in their effort to reach such an agreement. Proposals by both parties were gradually converging during the talks in May 2002 and the possibility to agree on a mutually acceptable compromise solution was confirmed in an agreement at last. The refusal to deal, however, caused **damage as a result of a dominant player's conduct** on the market and it should not have been used as a negotiation argument. The Office classified the delivery suspension notice – in months – as too short for the fully dependent purchaser to find an alternative source of deliveries.

7. In the first instance decision the Office imposed a fine for violating the Act on the Protection of Competition and, subsequently, the decision in the first instance was materially confirmed by the Chairman of the Office and the imposed fine amounted to CZK 6 million (ca. EUR 210 thousand).

3. Influence of the essential facilities doctrine

8. In another case the Office had to deal with the question whether it was legally possible to abuse the dominant position of a competitor in the form of refusal to deal (RTD) without denying the access to essential facilities (EF) at the same time, i. e. whether RTD and EF are two separate concepts.

9. In 2005 the Office issued a decision declaring the abuse of dominant position by ČSAD Liberec, a. s. on the market of services provided by the bus station in Liberec. These services are rendered to entities operating public bus transport. After applying a legal appeal this decision was materially confirmed by the Chairman of the Office and, subsequently, the administrative court.

10. In the first half of 2005, ČSAD Liberec abused its dominant position on the market specified above by refusing to talk about the use and, subsequently, disabling a proper use of the bus station operated by this company to STUDENT AGENCY s. r. o. for the purpose of operating domestic public transport service on the Prague – Liberec line in both directions, even though it enabled other competitors operating on the same bus line to use the station.

11. By such conduct the party to the proceeding violated the provision of Section 11 paragraph 1 of the Act on the Protection of Competition to the detriment of STUDENT AGENCY which was discriminated in the competition on the market of services provided by carriers operating domestic public transport service on the Prague – Liberec line and also to the detriment of end consumers – passengers who demanded services of domestic public transport on the Prague – Liberec line in the period in question. The Office prohibited ČSAD Liberec to behave in this manner and a fine of CZK 2 million was imposed (ca. EUR 69 thousand).

12. During the investigation the Office was identifying, among other things, whether there was any other bus station or similar facility in the Liberec territory, which also determined the geographic relevant

market in this case, that could have competed with the bus station operated by the party to the proceeding, i. e. a station that would facilitate the party's objection that it did not occupy a dominant position on the market. The party referred to many sites where the Prague – Liberec bus line operator, STUDENT AGENCY, could park the vehicles, where passengers could get on and off and where luggage could be handled. The Office's task was to find out whether a similar site was in existence in Liberec and, at the same time, whether the capacity of the bus station operated by the party was really fully occupied, so that it was impossible to receive STUDENT AGENCY buses in it (which was another objection raised by ČSAD Liberec). It was identified in a local investigation that in Liberec there were several places where buses could be parked, that they were more or less accessible by public transport and that they provided room for the waiting of passengers. None of these places, however, was an adequate substitute for the bus station operated by ČSAD Liberec.

13. For the passengers the bus station is important since it enables the changing of buses, as the bus station concentrates a large number of public transport lines and thus the bus station is an irreplaceable public transport hub for passengers. Furthermore, the bus station offers a number of additional services to the passengers, on a smaller or larger scale, such as information boards and counters, waiting room, left-luggage, toilets, tickets sale and seat reservation office, roofed platforms, fast food stands, cash dispenser, telephone, news stand, exchange office, barrier-free access to the station, local radio, parking area, etc. The services listed above together with the possibility of changing buses mean that from the passengers' point of view the bus stations are not fully interchangeable with other places – facilities that serve or can serve as bus stops, etc. This fact, in consequence, affects the perception of substitutability of bus stations with other places by companies operating public bus transport services.

14. For carriers the most significant service provided by a bus station is the possibility to use arrival and departure platforms for the purpose of getting on, getting off and changing of passengers using the domestic or international lines or occasional lines (with a minimum parking time guarantee) or the possibility to park on the bus station premises. The carrier information publishing is another important service. For carriers and their drivers the bus stations usually feature a dispatch service, cleaning at the station, relaxation room, toilets, canteen, car wash and other services, filling station, etc. The Office stated that from the carrier's point of view the bus station is not adequately replaceable with other sites that do not provide services connected with a bus station operation.

15. Further, it was identified that the capacity of the bus station in question was not fully utilised and it enabled the use by other Prague – Liberec bus line operators, one of such carriers being the station operator, i. e. the party to the proceeding, ČSAD Liberec. In this context the Office carried out a detailed analysis of the timetables of all carriers using the bus station and the Office staff members spent one full day at the station monitoring the capacity utilisation.

16. The Office's conclusions concerning the party's abuse of its position on the market of services provided by its station while attempting to harm its competitor on the market of bus transport services on the Prague – Liberec line were confronted with the allegation by ČSAD Liberec that abuse of dominant position is achieved only by the fulfilment of facts in issue of denying access to essential facilities (EF) without which other competitors cannot operate on the market. The party pointed out the fact that the allegedly harmed competitor continued to provide its services and operate its line, even though passengers are served on the road close to the bus station. The bus station therefore cannot be a facility satisfying the EF definition.

17. The Office was of the same opinion as the party to the proceeding, yet it stated an abuse of its position. After gathering all materials relevant for the decision the Office reached the conclusion that companies operating public bus transport services do not need to use a particular stop as an essential facility (even if it is a bus station at the terminal point of the line) in order to compete on the market of

services provided by public bus transport operators. On the other hand, however, it was identified that the possibility to use the previously described terminal point of the line represents a significant part of the carriers' activity and also part of services offered to consumers – passengers. Without this quality the particular carrier, STUDENT AGENCY, can compete with its competitors and offer services to customers – passengers but with difficulty[2], which fact discriminates this company in the competition on the market and, at the same time, it damages this competitor as well as consumers – passengers for whom the bus station represents unique comfort during their travel. The party to the proceeding had a dominant position, as in relation to the carrier it was in the position of the sole operator of the bus station in Liberec. This bus station does not have an adequate substitute on the defined geographic (local) market that STUDENT AGENCY could possibly use.

18. The Office and, at a later stage, the court concluded that the party to the proceeding did not operate a facility in the sense of *essential facility*, because even without access to this facility STUDENT AGENCY (or any other carrier) could compete on the market, i. e. could offer its services to customers. On the other hand, on the market of services provided by the bus station in Liberec to entities operating public bus transportation the party to the proceeding was in a dominant position which it was not allowed to abuse – if there were no objectively justifiable reasons for doing so. Such reasons were not identified.

19. This case gave an answer to the question whether an abuse of dominant position by denying access to a facility or refusing to deal must always take the form of denying access to an essential facility (EF) or whether the subject facility does not necessarily have to meet the conditions in the EF definition and still, by an unjustified denial of access to it, the competitor can abuse its position. Both the Office and the administrative court drew the conclusion that the answer is affirmative. Even though the bus station does not meet the EF definition conditions and carriers can provide their services without access to the station, at the same time, it represents an obvious quality that affects the transportation service standard. The dominant competitor apparently did not face competition by fair means and in order to eliminate its competitor it took advantage of the fact that it was the sole provider of services connected with the Liberec bus station operation. So as to qualify its behaviour as a *refusal to deal* (RTD) it is sufficient to use the general clause prohibiting the abuse of the dominant position to the detriment of another competitor provided that the subject facility does not necessarily have to meet the conditions of the *essential facility* (EF) definition.

20. The conclusion may be that **RTD and EF are closely related** and frequently connected competition doctrines (where EF is in the position of a special fact in issue of dominance abuse), **however**, these doctrines are **not fully identical and the existence of EF is not a necessary condition for the declaration of RTD**, even if the subject behaviour of the dominant entity takes the form of denying access to a facility.

4. Dominant firm´s right to refuse one customer

21. The Office also addressed the issue of refusal to deal in an administrative proceeding with a mobile operator, Eurotel Praha – currently Telefónica O2 Czech Republic (hereinafter "Eurotel"). This

[2] Similar decision was issued by the Commission in the case Sea Containers v. Stena Sealink, case 97/19/EC – essential facility is such facility or infrastructure without the use of which competitors cannot provide services to their customers. See also the judgement by the European Court of Justice in the case Oscar Bronner GmbH & Co. v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG., case C 7/97. It was decided repeatedly that this was not an abuse of the dominant position in the form of "denying access to essential facilities" (EF) in case that there are real or potential substitutes, even though they are less advantageous. This is why the particular "facility" does not have the character of being essential.

proceeding was initiated on the basis of a complaint by Eurotel filed to the Office, trying to establish whether its potential behaviour consisting in refusing a direct trade relationship in the area of Go products distribution[3] with the company FINOS (Go products seller) is an abuse of its dominant position under the Czech Act on the Protection of Competition. Eurotel refused to establish this direct co-operation without stating any reason and in the absence of objective reasons. After reviewing the case the Office stated that such behaviour would be an abuse of dominant position on the relevant market of prepaid Go services to the detriment of FINOS. The Office's view was later on fully confirmed by the Regional Court in Brno.

22. Eurotel refused to supply one customer – FINOS – with Go prepaid cards. Prepaid cards as a payment tool used in order to pay for telephone calls in prepaid services are issued by all mobile operators in the Czech Republic provided that one mobile operator's prepaid card cannot be used to prepay services from another mobile operator. If customers wish to increase the Go service credit, they have to obtain a credit voucher (prepaid card) issued exclusively by Eurotel.

23. The subject of administrative proceeding was to assess the behaviour of Eurotel in entering an agreement on business co-operation with the distributor of prepaid cards and not in respect of the end customers. The Office assessed whether the distributor had a possibility to enter a contractual relationship with an entity issuing prepaid cards in order to be able to continue selling these to its customers. When selling prepaid cards the distributors and retailers are allowed to compete among themselves in setting the final retail price of the card.

24. Eurotel refused to specify any reasons for terminating the co-operation; on the contrary, it insisted that it could refuse to establish a contractual relationship with FINOS without giving any reason. However, with regard to the market share on the relevant market of Go prepaid cards (they are not replaceable by any other cards or telecommunication services); the Office was forced to state that such behaviour on this market would be an abuse of dominant position. Especially in a situation where Eurotel, according to its information, assessed every offer of co-operation on an individual basis, evaluated them ad hoc and no candidate was disqualified from the assessment in advance. Eurotel further stated that it had set no criteria and conditions for entering its distribution system, it was supposed to be an open distribution system and entering it was not conditioned by any criteria or conditions that the candidates for distribution would have to meet; the access was free. For this reason the Office stated that in terms of access to open distribution systems the producer enjoying the dominant position is generally obliged to treat the candidates interested in entering the system on a non-discriminatory basis, i. e. behave identically in similar cases. The behaviour of a producer that does not respect such a requirement could potentially bear the signs of the fact in issue of an abuse of dominant position as defined by law, to the detriment of the distribution candidate.

25. Eurotel's objection that the competition in distributing Go products cannot be affected by refusing one candidate for the distribution of Go products, as there are great many distributors and a rejected candidate was not excluded from the distribution of Go products absolutely because it had a chance to enter a business relationship with one of the existing contractual partners of Eurotel, does not change the above. The extent of the distribution network in terms of distributor numbers or level as well as the openness of the system do not absolve the competitor in the dominant position from the obligation to treat other competitors and consumers under similar conditions in a similar way, so that unjustified discrimination or preference of competitors or consumers were avoided.

[3] Go products – prepaid mobile operator services. The customer does not pay monthly fees to an operator, does not sign a written agreement, does not pay any activation fee and pays only for the actual calls and text messages.

5. Conclusion

26. The Office's decision-making practice should send a clear message to dominant companies that they cannot abuse their dominant position toward customers and competitors, not even by refusing to supply them with their products and services. The fact that the cases of refusal to deal were not justifiable and did not represent healthy competitive behaviour can be proved by the fact that the first-instance decisions by the Office were confirmed by appellate bodies in further instances. The Office intends to continue this established trend and to carefully assess on case-by-case basis whether the refusal to deal does or does not cause a detriment to competition and customers.