International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: The Office for the Protection of Competition, Czech Republic
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Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports of this Working Group, in particular the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

Yes, refusal to deal is a violation of the Czech antitrust law, which is understood in principle in the same way as described above in the introductory paragraph.

The Office for the Protection of Competition (hereinafter referred to as "the Office") characterizes refusal to deal as a refusal to deal goods or services, to provide access to information, to grant a technology license or to provide access to essential facilities, as well as a unilateral termination of contractual relations. This definition also includes "constructive" refusal to deal, also understood in line with the definition in the introductory paragraph.

2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?

The ACT ON THE PROTECTION OF COMPETITION, No. 143/2001 Coll. (hereinafter referred to as "the Act"), generally stipulates in Article 11, paragraph 1, that "*Abuse of dominant position to the detriment of other undertakings or consumers shall be prohibited*". Refusal to deal may by subsumed under this general clause.

Apart from the general clause, Article 11, paragraph 1 (e) of the Act stipulates particular form of abuse of dominant position, refusal to provide access to essential facilities, as follows: "*refusal to grant other undertakings access for a reasonable reimbursement, to own transmission grids or similar distribution networks or other infrastructure facilities, which are owned or used on other legal grounds by the undertaking in dominant position, provided other undertakings are unable for legal or other reasons to operate in the same market as the dominant undertakings without being able to jointly use such facilities, and such dominant undertakings fail to prove, that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable such use*." This provision also applies to access to intellectual property.

Furthermore, under Article 11, paragraph 1 (d), the Act also specifically prohibits termination or limitation of sales to the prejudice of consumers.

All the cases of refusal to deal have, however, so far been dealt with under the general clause. The courts have approved this approach, stating that the Office is entitled to use the general clause as legal basis, even in cases where the conduct assessed might be classified under specific provisions of law.[1]

3. Do the relevant provisions apply only to dominant firms or also to other firms?

The relevant provision is applied only to dominant firms.

4. Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?

A refusal to deal is a violation of the public administrative law, investigated and sanctioned by the Office in administrative proceedings.

Under the Criminal Code in force until 31 December 2009, any form of abuse of dominant position, including refusal to deal, constitutes also a crime; according to the knowledge of the Office, this provision has, however, never been used to abuse of dominance cases. The new Criminal Code prohibits only horizontal cartels, so from 1 January 2010 on, refusal to deal will be prosecuted only in administrative proceedings.

[1] Judgment of the Supreme Administrative Court of 3 October 2008, Ref. No. 7 Afs 40/2007 (*SAZKA*), accessible (in Czech) at: www.nssoud.cz.

Experience

5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?

The Office has conducted 15 investigations in the last ten years, all of them resulted into administrative proceedings (please see answer to the question 6).

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.

The Office dealt with 15 cases in the past ten years where abuse of dominant position by refusal to deal was found; 6 cases were dealing with the interruption of supply, predominantly in energy and transportation sectors [2], 2 cases were dealing with the refusal to conclude an agreement[3], 1 case was dealing with the refusal to negotiate on conclusion of agreement[4], 3 cases were dealing with the refusal to supply goods[5], 1 case was dealing with the refusal to provide access to infrastructure[6], 1 case was dealing with the restriction of supply;[7] in one case, the dominant undertaking threatened to interrupt the established contractual relationship should its suppliers claim interests associated with its late payments.[8]

For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

The Office issued decisions finding a violation of the Competition Act in 8 cases[9], six of them were challenged in court. Two cases were upheld by the court (S115/2004, S133/2004).

In two cases (S142/2002, S53/2005) the Regional Court dismissed the Office's decisions. The Office appealed to the Supreme Administrative Court, which dismissed the judgments of the Regional Court, which decided again and dismissed, again, the decision of the Office. The reason why the Office's decisions were annulled was not connected with the refusal to deal doctrine.

Two cases (S12/2005, S 227/2006) are still pending at the Supreme Administrative Court.

Please state whether any of these cases were brought using criminal antitrust authority.

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[2] Středočeská energietická – case number S64/2000, Česká Rafinerská – case number S142/2002, Vysoké Pece Ostrava – case number S25/2004, Teplárenská společnost Hlinsko – case number S115/2004, RWE Transgas, a.s. – case number S53/2005, Dopravní podnik Ústeckého kraje – case number S227/2006

[3] SPT Telecom, a.s. – case number S104/1999, Technické služby Prostějov – case number S133/04

[4] ČSAD Liberec – case number 12/2005

[5] Lom Praha – case number S36/1999, Adamovské Strojírny – case number S110/1999, Wrigley, s.r.o. – case number S118/1999

[6] ČAS Service – case number S279/2003

[7] Mostecká uhelná – case number S69/2008

[8] Interimek, s.r.o. – case number S60/1999.

[9] 2 cases are still pending at the Office

No, there is not any case.

Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.

Please see annex 1.

7. Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.

The Czech legal order generally admits private parties to challenge a refusal to deal in court The Office is aware of 3 cases where the claimant asked for the supplies not to be stopped or a contract being concluded. Two of them were dealt with in parallel by the Office: the case ČSAD Liberec (see Annex 1) and a case concerning interruption of supplies, where the Office has not issued the decision yet, whereas the last one was only decided by the court in civil proceedings.[10]

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.

    a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?

The Office considers refusal to deal to be abusive if the following circumstances are present:

- the refusal relates to a product or service that is indispensable to the exercise of a particular activity on a downstream market
- the refusal is likely to lead to the elimination of effective competition on the downstream market
- the refusal is likely to lead to consumer harm.

The refusal to deal is evaluated case by case; in most cases, the practice has to be susceptible to exclude or threaten to exclude (some) rivals from the market. It is however not a requisite that all of the rivals would be excluded.

    b. Must consumer harm be demonstrated? Must the harm be actual or may it be just likely, potential, or some other degree of proof?

Yes, harm to consumers must be proven. Actual harm however does not need to be

[10] Insurance company Všeobecná zdravotní pojišťovna (hereinafter referred to as "VZP") refused to conclude an agreement concerning the medical transport as a result of a selection procedure. The court resulted from the decision of the Office, which stipulated, that the VZP has the dominant positron on the market. The claimant asked for concluding an agreement, fulfilled all conditions and, according to his opinion, there was no difference between him and other competitors. The court imposed VZP to refrain from abusing of dominant position and conclude the agreement with the claimant.

demonstrated.

c. Does intent play a role, and if so what role and how is it demonstrated?

No, the intent does not play a role, since abuse of dominance is considered to be an objective offence under the Czech law. The intent is, however, considered while the fine is calculated, since it influences the seriousness of delinquency.

d. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

Yes, the fact of a history of dealing between the parties is taken into account, but only as one of many factors; prior course of dealing is not a requirement for liability to arise. For the undertaking which has a history of dealing, it would usually be more difficult to demonstrate objective justification of the refusal to deal. It also is a settled case-law that in the case of history of dealing, the dominant company cannot simply interrupt its supplies but has to give its customers some time, in which they would be able to adapt to the new conditions.

e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

Yes, the fact that the dominant firm sells its product to everyone except its main rival is relevant, but not with regard to finding whether there was an offence, but while considering its seriousness. When the undertaking decided not to deal with its rivals or potential rivals, it is considered that the dominant firm is trying to exclude its rivals from the market and such a refusal is evaluated as a more serious violation.

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.

Even though the concept of essential facilities is specifically provided for in the Competition Act (see Question 2 above), the Office does not have any practical experience with it.

If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.

The Office does not have any experience with "intellectual property" cases.

a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?

b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

11. Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.

Unless the regulation itself requests the dominant undertaking to behave in a way that otherwise would have constituted an abuse of dominance, in which case there would be no offence committed, the fact that the refusal occurs in a regulated industry does not play any role.

12. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.

No, the analysis does not change; the Office does not distinguish between state-created monopoly and dominant company without state share.

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

Czech law does not specifically provide for the concept of a constructive refusal to deal, it is however considered to be a form of abuse of dominant position. Dominant firms cannot avoid liability simply by making their terms of trade so onerous that no buyer would ever find it worthwhile to make a purchase; an obvious way to deter buyers for example would be to set an inordinately high price, create unacceptable delays in delivering the product or imposing inconvenient requirements.

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

Yes, margin squeeze is a form of abuse of dominant position under the Czech law.

The Office has not concluded any case of margin squeeze yet. In the pending ones, it considers that in general, the following criteria have to be fulfilled:

- dominant position of the undertaking on the upstream market
- vertical integration: the (upstream) dominant delivers goods or services to the downstream market, where it is also active
- input on the upstream market is an essential commodity for the competitors on the downstream market, this input cannot be replicated (there are no close substitute inputs) and it is impossible to compete effectively without the input
- the downstream market is not effectively competitive, i.e. on this market there are expected competitive profits and vertically integrated dominant firm has rational stimulation to exercise margin squeeze[11]
- products on the downstream market are close (perfect) substitutes,

[11] ineffectively competitive downstream market does not necessarily mean, that the vertically intergrated firm has a dominant position on this market (significant market power), also due to the possible existence of several upstream essential input markets, which are together key providers of services on the downstream market (bundled downstream services), in such a case margin squeeze analyses cannot be related to one product, but it is necessary to analyze all services offered by the dominant firm

- objectively justifiable reasons do not exist for the behaviour of the dominant company

You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's competition laws?

Predatory pricing is analyzed on the basis of cost test, whether the undertaking is able to manage its own price policy, but it is also assessed in the relation to all relevant cost items of the dominant, that are classified into fix costs and variable costs; when assessing margin squeeze the price of input is stipulated as a price of input charged to rivals and the relation to the cost on the downstream market is assessed. In the case of margin squeeze the assessment is targeted on the ability of the competitor, which is equally efficient as the dominant company, to reach normal profit on the downstream market. The Office also applies the test of equally efficient competitor as universal test wherever it is possible (depends on the evaluated market).

Similarily to the predatory pricing analysis, when assessing the case of margin squeeze it is necessary to consider the existence of additional capacity of the incumbent when margin squeeze is applied.

The future recoupment is assessed differently from predatory pricing, because when the margin squeeze is applied the dominant can be profitable due to the integration (i.e. vertically integrated dominant does not necessarily sacrifice future profits).

The Office doe not have any experience with the cost benchmarks.

The duration of practice is considered and analyzed from the point of view of the impact on the market, whether the behaviour was capable of harming rivals and consumers. It is impossible to stipulate in advance the borderline from which margin squeeze does or does not have a negative impact on competition; the evaluation is needed on case by case basis. It is clear that the longer margin squeeze is applied the higher probability of negative impact on the market.

While short-term margin squeeze is applied, it is proper to analyze whether the practice has not deterrent effect, which should prevent from entering the market and therefore has exclusionary effect. In case of marketing strategies it is proper to concentrate on the duration and repetition.

Generally we can claim that the analysis and evidence of margin squeeze is much more challenging with regard to obtaining suitable and sufficient data, especially price data (components of price in case of nonlinear prices), particular costs items and margins in satisfying time line.

In general the highest probability of margin squeeze application is in case when the upstream prices are regulated and downstream (retail) prices unregulated and most of the income/profits come from downstream market. Criteria for evaluation of margin squeeze in a regulated

industry are not different. When evaluating margin squeeze the Office cooperates intensively with sector regulators (the Czech Telecommunication Office, the Czech Energy Regulatory Office).

Presumptions and Safe Harbors

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

The safe harbors are only concerned with the dominant position, not its abuse. It is presumed that an undertaking is not dominant when its market share is lower than 40%; the presumption is rebuttable.

16. Are there any circumstances under which there is a safe harbor for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

No, there are not.

Justifications and Defenses

17. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

Refusal to deal can be under the Czech competition law considered as abuse of dominant position only when there are no objective reasons on the side of dominant undertaking, i.e. other reasons than effort to exclude the rival of other undertaking from the market. For example, refusal to deal is justifiable when the dominant is not able to meet even its own needs of target product.

This can be demonstrated on a specific approach for the application of the essential facilities doctrine. The dominant which owns or uses infrastructural facility has to enable other competitors to gain access unless it would be impossible for operational (for example, fulfillment of security standards) of other (for example, absence of capacity) reasons.

Remedies

18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

The Office imposed remedies in two cases discussed in question 6, i.e. case ČSAD Liberec and case RWE Transgas.

In case ČSAD Liberec, the remedies were as follows:

- transparently stipulate detailed rules for using the bus station in Liberec, which is operated by the undertaking in accordance with the objective and equal conditions for STUDENT AGENCY,

- enable STUDENT AGENCY to use the bus station in Liberec in proper manner.

In case RWE Transgas, the remedies were as follows:

- introduce agreements which regulate the terms of purchase and sale of natural gas so that the agreements include equal conditions comparable with the conditions established for the regional distribution network of RWE holding,
- stipulate the duration of contractual relations for 5 years at most,
- stipulate the conditions so that gas delivery for customers within the Czech Republic to a balance zone of every regional distributors is enabled,
- take measures which enable the consumers to choose the supply of the single commodity or combined gas delivery, i.e. gas delivery including transportation, storage, within all regional distribution network

19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?

We are not able to answer this question in general, the Office always considers the given terms of the case and than decides about imposing or not imposing of a remedial measure.

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please expain your response.

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

The Office considers the refusal to deal to be a serious form of abuse of dominant position and it is one of the key issues in its current activity, as is clear from the cases investigated in the past ten years. Presently, the Office puts accent on the margin squeeze concept. Currently the Chief Economist Department is preparing a study on margin squeeze in telecommunications sector. 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.

22. Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.

ANNEX 1

Case Česká Rafinérská S142/2002

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.

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.

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 Competition Act to the detriment of CHEMOPETROL and other competitors purchasing petrochemical products from this company.

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 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).

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.

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).

The decision was dismissed by the Regional Court, the Office appealed to the Supreme Administrative Court, which dismissed the judgments of the Regional Court, which decided again and dismissed the decision of the Office. Now the case is pending and the Office is preparing new decision.

Case ČSAD Liberec S12/2005

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. 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.

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.

By such conduct the party to the proceeding violated the provision of Section 11 paragraph 1 of the Competition Act 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).

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.

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.

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. 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.

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 fulfillment 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.
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, 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.

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.

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 behavior 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.

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 behavior of the dominant entity takes the form of denying access to a facility.

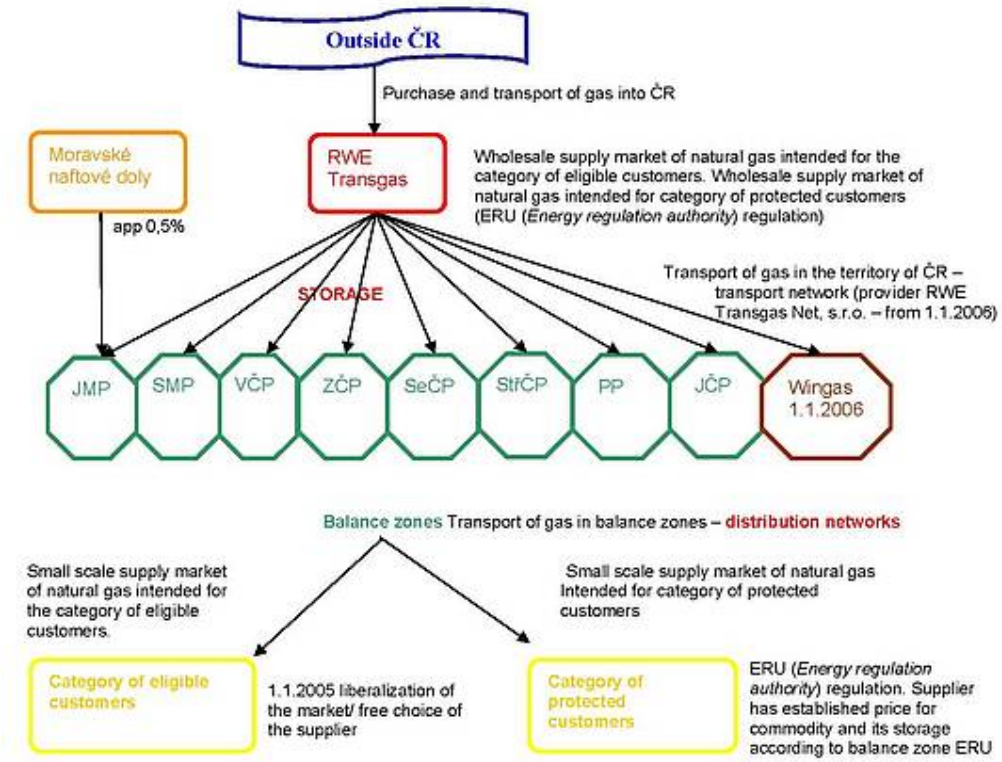
Currently the case is pending at the Supreme Administrative court.

Case RWE Transgas S53/2005

In March 2007 the Office imposed a fine of CZK 240,000,000 on RWE Transgas, the dominant gas supplier for an abuse of dominant position.

In the period from November 5, 2004 to August 8, 2006 the above mentioned company was not allowing the providers of competing regional distribution networks to enter into an agreement about the conditions of sale/purchase of natural gas and in this way was not allowing them to effectively compete with providers of regional distribution networks of RWE holding. Companies Jihočeská plynárenská and Pražská plynárenská were therefore put in disadvantageous position in the competition for so-called eligible customers.

RWE was also refusing to supply natural gas elsewhere than into so-called balance zones of individual regional distributors and in this way it was blocking and restraining the establishing of the competitive environment. In situation when regional distributors are buying natural gas when entering the balance zone, they are forced de facto to accept the conditions set unilaterally by one party of the proceeding. For example, Jihočeská plynárenská has been interested in supplying outside its balance zone but it has been repeatedly refused by RWE Tansgas. Competitor in dominant position has been therefore creating artificial barriers for other competitors to enter into the market, or creating barriers to expansion for existing competing regional distributors in the market.



The above mentioned behaviour of the party to this proceeding needs to be evaluated as even more serious as it has been committed in the very beginning of the gas industry liberalization in the Czech Republic. It has negatively influenced market that was gradually opening to competition and where every exclusionary practice of the competitor in dominant position could slow or in other way endanger the positives for the consumers connected with liberalization and better competition.

The sector with key importance for the provision of energy to consumers and also for economics as a whole has been influenced at the same time. The sector where any kind of anticompetitive behaviour has very serious consequences. Such behaviour can directly or indirectly influence various areas of life of any company or consumer.

As regards the amount of fine, it has been reduced by 130 million CZK in comparison to the first instance decision. Chairman (chairman is the first appellate instance within the Office) has based his decision on number of reasons. Decision of RWE, that its sister companies (regional distributors) will not carry out business outside the balance zone, cannot be considered as a breach of law. Further the proceeding regarding possible breach of law has been ceased in question whether RWE eligibly set the price for storage of the gas for

the category of eligible consumers in the same way as the price for category of protected customers in 2005. Such potential breach of law has not been clearly and sufficiently proved.

On appeal the decisions was cancelled by the Regional Court. The reasoning of the Regional Court is based on an assumption that the legal interests protected by the Czech and the EC law are identical (i.e. they have the same object) and that the Community dimension of a behavior determines in a mutually exclusive way whether national or EC substantive law is to be applied to it. The Supreme Administrative Court dismissed the judgment of the Regional Court and upheld the decision of the Office. The decision was returned to the Regional Court, which dismissed the decision of the Office and returned it back for new hearing.

The decision was dismissed by the Regional Court, the Office appealed to the Supreme Administrative Court, which dismissed the judgments of the Regional Court, which decided again and dismissed the decision of the Office. Now the case is pending and the Office is preparing new decision.

Case Dopravní podnik Ústeckého kraje S227/2006

By its first-instance decision the Office imposed on Dopravní podnik Ústeckého kraje (DPÚK) a fine of CZK 700 thousand for abuse of dominance. As of August 1, 2006, DPÚK suspended bus transportation in the Ústecký Region for financial reasons, and gave Ústecký Region a mere five-day notice of the suspension. In total, the operation of over 2,000 bus lines operated mainly under the public service obligation was suspended with immediate effect. In the opinion of the Competition Office, the actual suspension of operation is not in conflict with the Competition Act, as DPÚK found itself in a financial situation that objectively prevented it from further operation of the lines. However, a dominant undertaking providing regular long-term services to consumers cannot suspend the provision of such services without giving adequate prior notice of such suspension, so as to allow for a timely adaptation to the new business strategy of the service provider. Given the nature of public bus transport and the area serviced by lines discontinued by DPÚK, the merely five-day notice given on July 26, 2006 to the Ústecký Region cannot be deemed to constitute an adequate and timely notice. Through its conduct, the transportation company caused detriment to end consumers, i.e., passengers using public bus transport in the Ústecký Region. The harm was further aggravated by the fact that the suspension affected the entire Ústecký Region, and the fact that the bus lines concerned fulfil basic transportation requirements of the passengers. The decision was confirmed by the chairman, now days the case is pending at the Supreme Administrative Court.