# Dentons Prague Alert - Two major developments in competition law

August 1, 2023

# Competition Act amended – Competition authority is given stronger tools

An amendment to Act No. 143/2001 Coll., on the Protection of Competition (Competition Act) was published in the Collection of Laws on 14 July 2023, with effect from 29 July. It both transposes the ECN+ Directive (Directive (EU) 2019/1 of the European Parliament and of the Council) and also supplements the Competition Act with the practical experience of the Office for the Protection of Competition (ÚOHS).

## Key changes under the amendment

- **The concept of protecting the identity of the complainant is put into law**. A complainant's identity may be protected upon request if its legitimate interests are threatened. ÚOHS will thus be obliged to take measures to ensure that the identity of the complainant cannot be discovered by the competitor whose conduct is the subject of the complaint. In practice, this institute may be practical, for example, for distributors complaining about wholesalers or manufacturers enforcing retail prices (so-called retail price maintenance or RPM). Such complainants are often in a position of dependence and may fear retaliation by the competitor in question.
- Where inspections of business premises are concerned, **it will no longer be necessary to specify all the premises where the on-site inspection (dawn raid) is to be carried out**. It will now be sufficient to simply identify the competitor itself. The amendment will thus reinforce ÚOHS's position during a judicial review, resulting in increased challenges when defending undertakings against such inspections.
- **ÚOHS will be empowered to use as evidence records and data on telecommunications traffic obtained in criminal proceedings**. This may be of crucial importance. ÚOHS is often in need of evidence and the use of legally obtained wiretaps can help ÚOHS uncover a number of secret cartel agreements. However, it will depend on how often wiretaps are used in practice. It is more likely to be in isolated cases where law enforcement authorities consider that ÚOHS will be a more appropriate body to investigate the infringements in question. It will also depend very much on the willingness of the prosecuting authorities to provide such data to ÚOHS. At the same time, any transfer of wiretaps to ÚOHS can be expected to be subject to judicial review, and it will be for the courts to assess whether transfers and use of wiretaps by ÚOHS will be justified in light of the case law of the European Court of Human Rights. This is a controversial provision, as the practice of law enforcement authorities regarding the possibility of interception of communications between accused (suspected) persons and their lawyers (defense counsels) suffers from inconsistent interpretation.
- **More clarity has been added to the "settlement procedure"**: ÚOHS now has the power to decide whether (or not) to apply, under the settlement procedure, a 10-20 percent reduction to an imposed fine. Previously, the rule

was that if the conditions for settlement were met, ÚOHS would always reduce the resulting fine by 20 percent. Also as part of the settlement procedure, ÚOHS will now be able to impose a ban on public contracts for up to one year.

- **A party to any secret agreement aimed at distorting competition is entitled to submit a leniency application**. Previously, only a party to a "horizontal agreement," i.e. an agreement between competitors, could do so. Now, for example, a party to a vertical agreement (e.g. a distribution agreement) that contains certain prohibited arrangements, such as a prohibited arrangement on RPM, can apply for leniency. It is often very difficult for ÚOHS to detect the full scope of a vertical agreement. Thus, this provision is to encourage competitors to disclose their participation in vertical agreements that the competition authority was not aware of or could not prove the existence of. Based on the public comments of ÚOHS representatives and the text of the amendment, we can presume that ÚOHS will be much more careful in weighing whether to grant leniency or settlement applications. Nor will it provide an automatic guarantee of a fine reduction in situations where undertakings show only modest efforts to cooperate in detecting cartel or other anti-competitive behavior. This should be a rather exceptional practice.

In parallel with the amendment, **ÚOHS is preparing an update to several accompanying guidelines** (non-binding practical guidelines). These should contribute to providing more detail to the parameters for administrative discretion in selected situations and thus correct the degree of discretion in deciding on the relevant sanctions. The new guidelines regulate, in particular, how ÚOHS will proceed and assess leniency and settlement applications and how it will use competition advocacy to resolve the cases under investigation.

### What are the implications for businesses?

All the changes introduced by the amendment should be reflected in the compliance programs of companies. These programs should help employees (i) recognize conduct that exceeds the limits of competition law, (ii) know how to proceed in cases where such conduct is detected and at the same time (iii) prepare them for cases of surprise investigations by ÚOHS. Functional compliance programs are important because ÚOHS takes them into account when imposing fines—and can reduce them by up to 15 percent—and it severely sanctions any obstructio committed by untrained employees during an inspection of the local premises. Recently, ÚOHS has imposed fines for such obstructions amounting to as much as 1 percent of the annual turnover of the undertaking or group to which the undertaking under investigation belongs.

## Foreign Subsidies Regulation starts to apply

As of 12 July 2023, the first part of Regulation 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (FSR) can be applied. The European Commission can now carry out an ex officio reviews of foreign subsidies if it suspects that the subsidy distorts the internal market. The review may result in structural or behavioral measures or the proposal of commitments to address the market distortion concerns.

Until now, state aid legislation has only regulated subsidies granted by EU member states. The new regulation is therefore intended to level the playing field between companies with subsidies from member states and those with subsidies from non-EU countries.

In the context of the FSR, the meaning of subsidy or financial contribution from a third country is the same as state aid. A subsidy from third countries is therefore any advantage granted by a third country to an undertaking carrying out an economic activity in the internal market, either directly or indirectly, which is limited in law or in fact to one or more undertakings or to a specific sector—i.e., a subsidy with an element of selectivity. In practice, subsidies can thus take the form of, for example, tax breaks, grants, loans and guarantees or the supply of goods and services on non-market terms. The concept of a third country is, as in public aid regulation, broadly defined and includes any

entity, from governments to municipalities to private companies, whose activities are attributable to a third country (for example, state-controlled joint-stock companies).

In terms of temporal scope, the European Commission can examine subsidies received by an undertaking over the last 10 years. To this end, the Commission may request information from companies or even carry out local investigations, including on the territory of third countries.

However, the mere existence of a foreign subsidy is in itself not problematic, and the Commission will subsequently examine whether the subsidy distorts the internal market. This can be presumed to be the case if the subsidies are of a kind without which the undertaking in question would be forced to close down, directly facilitating mergers or imports, or taking the form of unlimited guarantees. Such types of subsidies have the potential to distort competition in the internal market.

If the Commission concludes that the undertaking under investigation has received a subsidy that distorts the internal market, it will impose remedies or accept commitments from the undertakings concerned. These can be structural (e.g. cancellation of an acquisition, divestiture of assets or reduction of capacity or market presence) or behavioral (e.g. provision of access to infrastructure or a license on fair and equitable terms, disclosure of R&D results, repayment of a foreign subsidy with interest, or adjustment of the management structure).

On 12 October 2023, further provisions of the FSR will enter into force, imposing an active obligation on undertakings to notify mergers (acquisitions) and tenders to the European Commission if the thresholds for the amount of the subsidy, the turnover of the undertaking or the value of the contract are exceeded. For more information, see our article of 15 February 2023 available **here** (*in Czech only*).

**If you have any questions, please don't hesitate to contact us.**

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