

## **Czech Republic: The Czech Supreme Administrative Court cancelled the judgment of the Regional Court in a predatory pricing case and provides guidance regarding the use of economic analysis (Student Agency)**

January 2014

### **Subject matter of the case**

On 3 November 2010 Student Agency, s.r.o. ("**Student Agency**"), a transport services and travel services provider was found guilty by the Office for Protection of Competition (the "**Office**") for an abuse of its dominant position on the market for public passenger bus transport services between the cities of Prague and Brno,<sup>1</sup> for which a fine of CZK 6,185,000 (approximately EUR 229,000) was imposed on Student Agency.<sup>2</sup> Following a remonstrance filed by Student Agency, this decision was confirmed by the Chairman of the Office; however, the fine was reduced to CZK 5,154,000 (approximately EUR 191,000).<sup>3</sup> In its decision, the Office defined the relevant product market as the market for bus transport services between Prague and Brno (i.e. excluding rail transportation). For the purposes of the relevant market definition, the Office conducted an economic analysis<sup>4</sup> and assessed in particular the price differences between rail and bus transport, the frequency of the service, the duration of the journey, and the quality and reliability of the service. On the basis of the finding that the market share of Student Agency was over 75 per cent on the relevant product market, the Office concluded that Student Agency had a dominant position.

According to the Office, in 2007 and 2008 Student Agency abused its dominant position by setting ticket prices which were lower than its average monthly costs per transported passenger (i.e. it engaged in predatory pricing). In the view of the Office, the purpose of introducing such predatory pricing was to eliminate ASIANA, spol. s.r.o. – a competitor which recently entered the market.

### **Review by the Regional Court**

Student Agency disagreed with the decision of the Office and filed a petition with the Regional Administrative Court in Brno ("**Regional Court**"), disputing in particular the narrow market definition followed by the Office.

In its assessment, the Regional Court confirmed that the behaviour of Student Agency on the market could be considered to constitute prohibited predatory pricing; however, it disputed the conclusions made by the Office regarding the market definition.<sup>5</sup> The Regional Court accepted some of the arguments used by the Office for the relevant market definition. Additionally, the Regional Court requested an expert economic opinion analysing the bus and rail transport market for the Prague-Brno route. The expert opinion did not find any price correlation between the rail and bus transport on this route. In its analysis of customers' behaviour, it indicated that rail passengers tend to react positively (i.e. switch to bus transport), if the prices of bus transport decrease. However, it did not find any such switching behaviour on the part of bus customers in the event of a price

<sup>1</sup> The two biggest cities in the Czech Republic, approximately 200 km apart from each other.

<sup>2</sup> Decision of the Office of 3 November 2010 *Student Agency*, case no. ÚOHS-S162/2008/DP-4490/2010/820/DBr.

<sup>3</sup> Decision of the Chairman of the Office of 3 February 2011 *Student Agency*, case no. ÚOHS-R 169/2010/HS-2676/2011/310-PGa.

<sup>4</sup> In particular, the price-correlation analysis, cross-elasticity analysis and stationary prices analysis. For more details, please refer to section 130 and following of the decision of the Office of 3 November 2010 *Student Agency*, case no. ÚOHS-S162/2008/DP-4490/2010/820/DBr.

<sup>5</sup> Decision of the Regional Court of 9 November 2012, case no. 62 Af 27/2011-409.

decrease in rail transport. Although this finding of “one-sided-substitutability” corresponds to the findings reached by the Office, the Regional Court stressed that the Office did not sufficiently analyse switching behaviour on the part of customers of other bus transport providers. Hence, the Regional Court argued that the main factors considered by the Office in defining the market narrowly do not lead to the clear conclusion that the rail and bus services between Prague and Brno are separate markets. The Regional Court claimed the Office did not sufficiently analyse customers of other bus services providers and their behaviour in connection with prices decreases in rail ticket prices.

Because the Office failed to prove the existence of two separate markets (i.e. bus and rail services between Prague and Brno), in the view of the Regional Court, the decision of the Office should not be made on the basis of such market definition.

Further, in the view of the Regional Court, the Office did not sufficiently address the level of quality of services provided by Student Agency. The Regional Court even indicated that the relevant product market could even consist solely of the bus services provided by Student Agency.<sup>6</sup>

### **Review by the Supreme Administrative Court**

Following a filing of extraordinary relief by the Office, the case was dealt with by the Czech Supreme Administrative Court (“**Supreme Administrative Court**”). The Supreme Administrative Court assessed only whether there were reasons on the side of the Regional Court to cancel the decision of the Office (i.e. it assessed the issues connected to the market definition); however, it did not analyse any alleged abuse of dominance.<sup>7</sup>

Like the Regional Court, the Supreme Administrative Court praised the Office for using economic methods in its analysis. However, in contrast to the Regional Court, which claimed that the switching behaviour of customers of other bus transport providers should have been further analysed by the Office, the Supreme Administrative Court took the view that the Office took into account all the relevant bus transport competitors in regard to the customer behaviour of their passengers. Therefore, the Supreme Administrative Court rejected the finding of the Regional Court that further evidence should have been provided concerning the behaviour of the customers of competing bus transport companies. As regards the substitutability between bus and rail transport services, the Supreme Administrative Court concluded that the Office had sufficiently proved that the substitutability between bus and rail transport services is rather one-sided (i.e. that the rail customers do sometimes switch to bus transport if the prices for bus transport decrease, while bus transport customers usually do not switch to rail transport if the price of rail tickets decreases).

Hence, the Supreme Administrative Court concluded that the evidence gathered by the Office (together with the above-mentioned expert opinion requested by the Office) constituted sufficient basis for the Regional Court to decide whether the Office had defined the relevant market correctly. Therefore, the Supreme Administrative Court cancelled the decision of the Regional Court. This means that the Regional Court will deal with case again; however, this time, it will be bound by the conclusions reached by the Supreme Administrative Court.

### **Conclusion**

The decision of the Supreme Administrative Court sends a clear message to the Regional Court that, in its review, the Regional Court must assess the evidence gathered by the Office (which to a significant extent has a purely economic basis) and draw its legal conclusions from this evidence. This is actually something that the

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<sup>6</sup> For more details on the decisions of the Office and of the Regional Court, please refer to *Jiri Kindl*, The Regional Court in Brno takes a strict view on relevant market definition by the Office for Protection of Competition (Student Agency), 9 November 2012, e-Competitions Bulletin November 2012, Art. N° 49680.

<sup>7</sup> Decision of the Supreme Administrative Court of 30 September 2013, case no. Afs 82/2012-134.

Regional Court attempted to avoid by cancelling the decision of the Office (arguing that that further evidence should be provided).

The present case is one of the first in the Czech Republic in which advanced economic analysis and economic evidence have played a key role. Therefore, the conclusions reached by the Regional Court and the Supreme Administrative Court regarding the use of particular economic evidence will provide important guidance in the further use of the “more economic approach” in Czech competition law.

Source: *Karel Svoboda*, The Czech Supreme Administrative Court cancels the judgment of the Regional Court in a predatory pricing case and provides guidance regarding the use of economic analysis (Student Agency), 30 septembre 2013, Bulletin e-Competitions September 2013, Art. N° 61106, [www.concurrences.com](http://www.concurrences.com)

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