

2016 Amendment of the Czech Significant Market Power Act of 2009

by

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Abstract

The Significant Market Power Act (SMPA) adopted in 2009 regulates the assessment of, and the prevention of, the abuse of market power in the sale of agricultural and food products. The Act generated many controversies from the outset, survived legislative proposals for its abolition, to be finally amended in 2016. However, this kind of legislation failed to solve most of the problems and even managed to create additional controversies. The new amendment formally simplified the actual wording of the SMPA by transposing its numerous earlier

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appendixes, which contained an exemplary list of prohibited forms of SMP abuse, to the actual text of the Act. It also improved transparency and clarity with respect to its earlier vague and ambiguous terminology. At the same time, the amendment seriously modified the scope and principal philosophy of the SMPA by removing the previously required “substantial detriment to economic competition” as the pre-condition of the applicability of the Act. However, since the enforcement of the SMPA falls into the scope of the activities of the Czech Office for Protection of Economic Competition (in Czech *Úřad pro ochranu hospodářské soutěže*, UOHS), the concerns and doubts of the business community continue to grow whether this form of regulation is appropriate after the modification of the concept.

Résumé

La Loi sur les pouvoirs de marchés significatifs («SMPA») adoptée en 2009 réglemente l'évaluation et la prévention de l'abus de pouvoir de marché dans la vente de produits agricoles et alimentaires. Cette loi a provoqué de nombreuses controverses dès le début, a survécu les propositions législatives pour son abolition pour être finalement modifiée en 2016. Cependant, cette législation non seulement n'a pas réussi à résoudre la plupart des problèmes, mais a provoqué des controverses supplémentaires. Le nouvel amendement a simplifié le langage du «SMPA» par la transposition de ses nombreuses annexes antérieures, qui ont contenu la liste exemplaire des abus interdites de «SMPA» au texte de la Loi. Il a également amélioré la transparence et la clarté par rapport à la terminologie vague et ambiguë antérieure du «SMPA». En même temps, l'amendement a modifié sérieusement la portée et la philosophie principale du «SMPA» par la suppression de notion de «préjudice substantiel à la concurrence économique» qui a constitué précédemment une condition préalable de l'application de la Loi. Toutefois, vue que l'application du “SMPA” entre dans le cadre des compétences de l'Autorité de la concurrence tchèque (en tchèque: *Úřad pro ochranu hospodářské soutěže*, UOHS), les préoccupations et les doutes du business si cette réglementation est appropriée après la modification du concept continuent à monter.

Key words: significant market power; retail chains; protection of suppliers; antitrust.

JEL: K23; K42

I. Introduction

The regulation of so-called “buying power” of large retail chains, especially in the agro-food sector, has been a topic of lively debate in the Czech Republic both in the political and legal-theory field for quite a long time now. Discussions on the need for some regulation of retail chains began before the

year 2000, and eventually resulted in the adoption of the Act on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof (hereinafter, SMPA or Act) in September 2009 and its subsequent coming into force in February 2010¹. The Act was openly politically motivated – it was enforced by deputies of the Social democratic party with the support of communist and green MPs yet against the scepticism of governmental law experts and the veto of the President of the Czech Republic. In light of such origins, the final form of this Act was not only ideologically questionable but also flawed in technical legislative terms, even supposedly anti-constitutional due to its ambiguity and uncertainty. The SMPA became therefore the target of much critical legal analysis and comments (Bejček, 2012, p. 16–18; Bejček, 2015, p. 2). Practically from the moment of its entry into force, the SMPA had to cope with continued efforts aimed at its revocation, replacement, or at least major amendments. After six years, these efforts finally led to a major change effective as of 6 March 2016. However, before analysing the new content of the SMPA, it is necessary to focus on the initial wording of the Act in order to illustrate its original shortcomings that necessitated the recent change.

II. Protection of competition or of small local suppliers?

The SMPA, as a novel piece of market regulation, was problematic from the beginning because of its fundamentally unclear purpose and objective. There certainly was a social demand for such a law expressed by the Food Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic, acting as representatives of local suppliers. Complaints of suppliers against large retail chains are commonplace elsewhere in Europe as well as in the USA. They are substantiated by empirical data testifying to regular payment delays for deliveries, charges imposed for the introduction of products into distribution, marketing contributions as well as other questionable practices used by retail chains that squeeze out suppliers². At the same time, it is very unlikely that the negative effects of such an asymmetry in customer-supplier relationships can be effectively solved by instruments of private law such as actions against unfair competition or damages actions. This is clear, for instance, from the fact that suppliers frequently refused to speak up to

¹ Act No. 395/2009 Coll. can be accessed in English at: <https://www.uohs.cz/en/legislation.html>.

² For a summary identification of such practices see the 2009 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A better functioning food supply chain in Europe, COM/2009/0591 final.

the Czech Office for the Protection of Competition (hereinafter, Office or National Competition Authority, NCA) against retail chains during general sector investigations (Úřad, 2010). Their refusal to complain about the practices of retail chains was based on the fear of reprisals in the form of a termination of cooperation. This situation attests to the need for public intervention also because of its supposed wider societal impact – suppliers may be forced to make savings that have a negative impact on product quality, they may be pushed out of the market if an individual supplier defends its interests, the diversity of local supplies can be replaced by international brands or own brands of the retail chains, the local agricultural production and food industry, especially in smaller countries, may be severely compromised and so on.

Despite such compelling arguments in favour of regulation, it is undeniable that the SMPA-style regulation of customer-supplier relationships equals a restriction of the freedom of contract. Moreover, it is an intervention into the self-regulatory capacity of the market, which has always been seen as fundamentally unacceptable for supporters of liberal concepts in economics and law. To make matters worse, the SMPA focuses on retailers buying agricultural and food products only. In other words, it completely ignores similar practices in other sectors of fast-moving consumer goods such as cosmetics or stationery or, for example, the construction sector. There, the same type of behaviour of non-dominant customers remains free of similar public regulation. This has, among other things, provoked a debate about the constitutionality of a differentiated treatment of arbitrarily selected business entities. However, an unconditional acceptance of these “conservative” arguments would rather mean to do nothing to solve the existing problems since hardly anyone believed that classic antitrust (namely the prohibitions deriving from Articles 101 and 102 TFEU) could offer an effective and easy solution.

Antitrust, that is public law protection of competition, exists to protect competition as a “public good” against distortions of structural nature that threaten to foreclose the market and damage consumer welfare. Therefore, antitrust fights cartels and abuses of dominance. Competition law fights also against such consequences of mergers and takeovers, which could lead to a significant impediment of competition. Such a focus clearly does not correspond to a task that should have been fulfilled by the SMPA. The top 10 retail chains in the Czech market hold together a 66% share in the total turnover of fast-moving consumer goods. The key top five retail chains represent 46% of this market (Incoma, 2014, p. 1) showing that the average market share of any single retail chain stands between 6% and 12%. Acting unilaterally *vis-à-vis* their suppliers none of them can structurally affect competition as such, and thus the law against abuse of dominance cannot be applied. Allowing for just a bit of a simplification, it could even be argued that

most of the bilateral relations of the retail chains with their suppliers would have enjoyed the benefit of the *de minimis* safe harbour. As such, antitrust would not notice them at all (Slanina and Škrabal, 2014, p. 116). On top of that, it has to be mentioned that the SMPA's impact on competition could also be negative if it helps to maintain inefficient suppliers on the market, or if it leads to an increase in retail prices for consumers without adequate improvements in the quality of the goods sold³.

Unfortunately, the SMPA has not solved the dilemma of its purpose, as its text did not mention any objective of the rules contained therein. The Explanatory Memorandum⁴ insisted that “the aim of the bill is to define, for the purpose of protection of competition, the merits of abuse of market power and to create tools to assess and prevent its abuses” (para. 2). Moreover, the terminology employed and the chosen institutional setting incorporated the SMPA into the antitrust field. It used terms such as: competitor, market structure, substantial distortion of competition and entrusted the Office with oversight over the compliance with the requirements of the SMPA.

However, as for its actual content, the SMPA tried to regulate the relationship between a retail chain and a supplier (in singular, in Section 3 of the Act). Its six Annexes contained quite detailed lists of rules applicable to invoicing, general contractual terms and conditions, individual contractual terms and conditions of sale, as well as prohibited certain habitual practices in customer-supplier relations. The question of how to prove and prevent “significant distortions of competition” through a close examination of the state of the invoicing and pricing policy of a retail chain with an about 10% market share, practiced *vis-à-vis* its smaller (usually, but not necessarily) supplier, apparently hardly crossed the mind of the SMPA proponents. The general clause contained in Section 4 of the SMPA, prohibiting the misuse of market power “towards all suppliers”, simply referred in all its paragraphs to the six Annexes, that is lists of unfair practices, attached to the Act. The SMPA thus summoned the Office to detect abusive payment terms, unequal sale conditions etc. in contracts “imposed” by retail chains upon each of their suppliers. Moreover, only if similar abusive clauses and practices were found in contracts with several suppliers, then the requirement set by the last sentence

³ Results of a study conducted by researchers from the University of Economics in Prague among suppliers of retail chains in the Czech Republic after 3 years of the application of the SMPA showed that their overwhelming majority (about 80%) did not notice any qualitative changes in their customer-supplier relationships and that their bargaining position *vis-à-vis* the retail chains remained without substantive changes (Filipová, Mokrejšová and Zeman, 2014).

⁴ *Důvodová zpráva* (Explanatory Memorandum) No. 395/2009 Dz. Retrieved from: <https://www.beck-online.cz/bo/chapterview-document.seam?documentId=onrf6mrqga4v6mzzguwta> (10.06.2016).

of the general clause of Section 4 – that the practice concerned must have as their object or effect the significant distortion of competition in the relevant market – was finally satisfied.

The meaning and the purpose of the SMPA was, therefore, *de facto* individually protectionist – the protection of small and medium enterprises acting as suppliers (Bejček, 2012, p. 16). Rather than to the rules of antitrust, the SMPA would thus be more similar to public protection of consumers (used to balance knowledge and information asymmetries) or even to the protection granted to employees (based on the “dependent” nature of the status of the weaker party). The daunting task of applying such an ambivalent legal Act fell to the NCA, even though the Office was established by law as a “central administrative body, its purpose is to maintain and protect competition against its prohibited restriction”⁵ and not as an inspectorate of bilateral customer-supplier relationships in the agro-food sector.

III. Practical application of the SMPA and its pitfalls

Less than three weeks after the SMPA entered into force, the Office opened a sector enquiry among retail chains in the agro-food sector to take stock of the situation in its newly attributed field of competence. A Department of SMP (Significant Market Power) was then set up at the end of 2010 to supervise compliance with the Act; it was staffed with five employees. In addition, in order to answer questions posed by nervous buyers of agricultural and food products, the Department endeavoured to apply the SMPA opening six administrative proceedings in the second year of the Act’s applicability. The results of the sector inquiry revealed the reality of long payment terms as well as of the unilateral enforcement by retail chains of discounts for early repayment of supplies. The Office solved some of these cases through competition advocacy and the acceptance by retail chains of commitments. The very first decision on the violation of the Act, which alone could clarify the problems of its interpretation, was taken against Kaufland Czech Republic in July 2011⁶. However, the retail chain brought an appeal against the original decision and the Chairman of the Office quashed it due to formal defects in

⁵ See Section 1 of Act No. 273/1996 Coll. Act on the Scope of Competence of the Office for the Protection of Competition.

⁶ Decision of the Office for the Protection of Competition of 19.07.2011, ref. number ÚOHS-S160/2/10-11017/2011/460.

May 2012⁷. A new first instance decision was subsequently issued in April 2013⁸ and confirmed by the Chairman in October 2013⁹. Kaufland proceeded to file an administrative action against this decision with the Regional Court in Brno which delivered its verdict in April 2016¹⁰. The “Kaufland story” proved to be the only case where the competent authorities repeatedly addressed the issue of the interpretation and application of the SMPA in its original form.

It has already been pointed out that the SMPA suffered from several contradictions and ambiguities (for example, it even failed to define what exactly it meant by agricultural and food products). However, the absolutely key issue for its practical application – a fact confirmed by the *Kaufland* judgment – was the interpretation of Section 3 in which “significant market power” was defined as follows:

- (1) Significant market power shall be deemed to be a relation between a buyer and a supplier in which, as a result of the situation in the market, the supplier becomes dependent on the buyer with regard to a possibility to supply own goods to consumers, and in which the buyer may impose unilaterally beneficial trade conditions on the supplier.
- (2) Significant market power shall be assessed particularly with regard to market structure, barriers to entry, market share of the supplier and the buyer, their financial power, size of the customer’s business network, and size and location of their individual stores.
- (3) Unless proven otherwise it shall be deemed that a buyer has significant market power if his net turnover exceeds CZK 5 billion¹¹.

Paragraph 1 of this Section pushed for the interpretation of SMP as a relative concept, which would mean that the specific parameters of the relationship between a retail chain and a supplier in a dependent position must be investigated to detect the existence of such power. In order to establish that a retail chain holds SMP, it would thus be necessary to first analyse its relationship with each individual supplier and only then, to identify those suppliers that are really threatened due to an unequal bargaining power. This would, therefore, mean that an abuse of SMP could happen only *inter partes*.

However, paragraphs 2 and 3 of the same Section suggested that SMP is an absolute concept which depends on the state of the market and on the position

⁷ Decision of the Chairman of the Office for the Protection of Competition of 29.05.2012, ref. number ÚOHS-R169/2011/TS-2901/2012/320/RJa.

⁸ Decision of the Office for the Protection of Competition of 24.04.2013, ref. number ÚOHS-S160/2010-7578/2013/460/Apo.

⁹ Decision of the Chairman of the Office for the Protection of Competition of 21.10.2013, ref. number ÚOHS-R146/2013/TS-20430/320/RJa.

¹⁰ Judgment of the Regional Court in Brno of 21.04.2016, ref. number 30 Af 125/2013–191.

¹¹ Approx. EUR 180,000,000.

held by the retail chain on it. Paragraph 3 even introduced a legal presumption of the existence of SMP for all retail chains trading in agro-food products with a turnover of at least CZK 5 billion (without specifying their product, geographical and temporal boundaries!). It could therefore be concluded that these two paragraphs understood SMP as if it were a kind of sub-dominance held, and potentially abused, by a retail chain *erga omnes*.

The duty to apply this contradictory definition of SMP put the Office between the rock and the hard place. On the one hand, it was clear from a practical viewpoint that the choice to interpret the SMP as a relative concept would turn the effective application of the SMPA into “mission impossible”. The Office would have to examine the extent to which each individual supplier really depends on the scrutinised retail chain, reviewing one by one each commodity. Only then would the NCA be able to tell whether SMP existed, and could be abused against a given supplier in a given commodity. Finally, in all individual SMP cases, the existence of unfair contractual terms would have to be inspected and summed together in order to demonstrate the magnitude of the retail chain’s practices that amounted to a “significant distortion of competition”. Such an approach would confirm the individually protective purpose of the SMPA, which would nevertheless contradict the Explanatory Memorandum to the Act, as well as the mission of the Office.

However, on the other hand, the SMPA did not give explicit and sufficient support for the interpreting SMP as an absolute concept. It may be rightfully claimed that both a “relative” and an “absolute” interpretation were equally possible, and that none was anti-constitutional. In such a situation, a state administration body should – in accordance with numerous decisions of the Supreme Administrative Court and the Constitutional Court – apply the rule *in dubio pro mitius* and adhere to the interpretation more favourable to the investigated and potentially sanctioned private entity (Slanina and Škrabal, 2014, p. 114). The Office would then be driven, in conflict with the effectiveness of the SMPA’s enforcement, towards the interpretation of SMP as a relative concept. This way, it would very likely come to a conclusion that the number of really dependent, and thus potentially damaged, suppliers of a retail chain was limited and the resulting offence less serious.

In the *Kaufland* decision, the Office chose to interpret the SMP as an absolute concept, which gave it the chance to effectively penalize the retail chain. The Chairman of the Office confirmed in his second appeal decision that Kaufland should be fined CZK 22,130,000 for a systematic negotiation of longer than 30-day payment terms of received invoices as well as for several provisions of its general contractual terms and conditions that had been unilaterally disadvantageous for its suppliers. The Office justified the choice of the absolute concept of SMP by both grammatical and teleological

interpretation of the Act. The Office pointed out in its decision, among others, that should the retail chain have had been able to differentiate against whom it had SMP; it would probably have led it to end its relationship with these dependent suppliers. Therefore the interpretation of SMP as a relative concept would have completely denied the motives that stood behind the adoption of the Act. The Office even compared quite explicitly its preferred interpretation of SMP to the definition of a dominant position, which is also determined on a certain relevant market *erga omnes* rather than towards individual business partners or consumers¹². Thus the Office brought the concept of SMP even closer to classical antitrust standards.

However, a panel of three judges of the Regional Court in Brno was quite ruthless toward the SMPA ruling on the administrative action brought by Kaufland against the decision of the Office. According to the judgment, the original SMPA suffered from major weaknesses and shortcomings as it failed to expressly declare its meaning and purpose – hence it was actually questionable what exactly it was meant to do. The dual purpose and the resulting double interpretation of the SMPA were recognized in the Court’s ruling: “If the real purpose of the Act is to protect competition, i.e. its institutional (existential) protection, then SMP should be understood as an absolute concept and vice versa if the purpose of the Act is to protect the weaker party – small or medium-sized suppliers, i.e. to provide an individual protection, then it suggests that the SMP is a relative concept”¹³. Both interpretative variants were thus equivalent according to the Court and so the rule *in dubio pro mitius* had to be applied. The Court endorsed the interpretation favourable to the retail chain – the relative concept of SMP. Regarding the problem of the Office’s difficulty in analysing each individual customer-supplier relationship, the Court emphasized that this was not a reason for refusing an interpretation more favourable to the entity under investigation. On that ground, the Regional Court annulled the Office’s decision against Kaufland.

The judgment was delivered at the time when the new wording of the SMPA was already known and effective. The judges even quoted it as one of the supporting arguments stressing that the newly amended Act clearly opted for the absolute concept of SMP as the legislature sought to remove the persisting doubts arising from an equally legitimate dual interpretation of the SMP concept¹⁴. As a result, even if the *Kaufland* appeal case ultimately ends up before the Supreme Administrative Court with a different outcome, it will prove of limited practical importance due to the legislative changes undertaken in the meantime. Since a major amendment of the SMPA has

¹² Decision of the Office, 2011, paras 53–64.

¹³ Judgment, 2016, p. 14.

¹⁴ Judgment, 2016, p. 12.

now come into force, primary attention should be attributed to whether this new legislation is free from the shortcomings that burdened its predecessor.

IV. 2016 amendment of the SMPA

After controversial discussions, the long-awaited amendment of the SMPA was finally adopted and became effective as of 6 March 2016 (Act No. 56/2016 Coll.). The new amendment focuses mainly on the extension of the scope of the applicability of the Act, a new definition of SMP, modifying the list of forms of SMP abuse, providing more precise mandatory requirements of supply contracts, as well as specifying new procedural rules emphasizing the preventive function of the Act together with more effective tools in relation to holding structures and entrepreneur alliances.

The aforementioned original version of the SMPA made the legislation rather longwinded and lacking in transparency. It only contained 11 sections and left a substantial part of its content to numerous annexes listing a large amount of different exemplary forms of prohibited conduct. The new wording of the SMPA is more systematic and compact – it incorporates the earlier annexes into the main body of the Act as well as substantially simplifies their content. Moreover, the vague and unclear definitions contained in the original text were abused by procedural parties, which frequently submitted numerous objections in order to delay administrative proceedings. This practice negatively affected the efficiency of state control over the SMPA and resulted in extremely long proceedings and an uncertain basis for decision-making. To counteract this practice, the new wording utilizes the long experience of the NCA especially in the field of abuse and cartels and the SMPA agenda since 2009.

However, despite the modifications, the main purpose and aim of the Act remains unchanged, including the fact that it only applies to the rather narrow category of the agro-food market. The new extensions of the applicability of the SMPA did not enlarge the defined sectorial scope of the regulation, leaving most of the argumentation unanswered concerning the potential need of adequate regulation in industries such as the construction, sanitary or stationary business. Similarly, the amendment failed to address the aforementioned objections concerning the arbitrary and non-systematic nature of this type of legislation.

V. New scope of the regulation

Extending the scope of the Act was among the priorities of the 2016 amendment. The scope of its application was enlarged by the adoption of new rules whereby not only the abuse of buyer's power in the purchase of food is subject to the SMPA regulation, but also that of services rendered relating to such purchases¹⁵. Typical services of this kind include: marketing support as well as transport or logistics. On the other hand, services such as energy supplies or rent are not considered to fall into this category. An important extension of the applicability of the Act lies also in a new rule regulating prohibited activities falling into the category of SMP abuse committed outside the territory of the Czech Republic that actually or potentially result in consequences manifesting themselves on a Czech local market. The new provisions specifically target holding structures of food retail chains with mother companies located outside the Czech Republic and directly or indirectly affecting the Czech food market. Such effect can take place by way of reverse bonuses, listing fees and similar contractual clauses, reached typically between local suppliers and foreign mother companies of holding structures as well as specific contracts concluded among foreign mother companies¹⁶.

A further extension of the scope of the SMPA is based on the fact that the 2016 amendment included alliances of purchasers into the definition of a "purchaser". The sole term "alliance" is in the practice of the Office interpreted extensively, covering various forms of groupings, not limited to legal entities, and regardless of the contractual or other nature of its origin. The legal definition of an alliance provided by the SMPA uses the general criteria of cooperation among purchasers in the process of the acquisition of food products for the purpose of its future sale. Alliances of purchasers in the aforementioned sense are thus, according to the new legislation, also subject to financial sanctions for a breach of the SMPA and jointly responsible for the payment of fines imposed by the Office.

A further extension of the applicability of the SMPA is provided by the enlargement of the scope of the regulated contracts. It used to be common to use agents of food chains in the negotiation and execution process of contracts in order to avoid public control and potential sanctions. To counteract this practice, the 2016 modification of the SMPA introduced an explicit rule whereby all agreements executed by agents acting on behalf of purchasers or suppliers are now subject to the SMPA.

¹⁵ See Section 1a) of 2016 SMPA.

¹⁶ See Section 1 para. 1b) of 2016 SMPA.

The new legislation removed some of the past uncertainties by adopting new terminology that avoids the danger of direct analogies with antitrust provisions. The 2016 amendment no longer uses the notion of competitor, replacing it by the concept of supplier and purchaser. The reasons for the new terminology were spelled out in the Informační List 2/2016 to the new legislation issued by the Office, hereinafter, Infolist (Brom, 2016, p. 6). The originally used term “competitor” was borrowed from the Act No. 143/2001 Coll. on protection of economic competition (hereinafter, APEC), the primary task of which is not the protection of any particular competitor but of economic competition *per se*. Regarding the fact that the concept of the SMPA is based on the protection of the weaker party in customer-supplier relationships in the area of agriculture and food supplies, it was necessary to implement new terminology to avoid potential misleading connotations. The described difference is even more significant in light of the fact that both legislative acts are implemented and enforced by the same public body – the NCA. An improvement was also achieved thanks to the adoption of more precise legal terminology referring to EU normative definitions such as the key term “food” (which replaced the original vague term of “agriculture and food products”) referring to the definition provided by relevant EU legislation¹⁷. On this basis, pet food, cosmetic products, medical or tobacco products can now not be considered to fall within the scope of the Act¹⁸.

VI. Amended definition of significant market power

The 2016 amendment of the SMPA has introduced a new definition according to which SMP shall be deemed to be a “(...) position of purchaser which could potentially without justifiable reason result to an advantage against suppliers in relation to the purchase of food; accepting or rendering services connected to the purchase of food”¹⁹. The new definition, replacing the old concept of SMP being “a relation between a buyer and a supplier”, is clearly based on objective criteria. It takes the status or position of the purchaser

¹⁷ I.a. Food Regulation No. 178/2002/EC of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

¹⁸ I.a. Cosmetics Directive No. 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, and Tobacco Directive No. 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products.

¹⁹ Section 2d) of 2016 SMPA.

into account, instead of the mutual relations among particular entities. Under the new definition, market position is assessed in regard to market structure, market access barriers and the financial strengths of the purchaser.

This definition completely removed the previously used legal criteria of purchaser's market share, size of the network, number of business premises and its location. The new objective criteria-based definition confirmed the earlier interpretation and application practice of the Office – that is, the absolute concept of SMP (albeit beforehand it was based on the rather confusing definition of the 2009 version of the SMPA).

The new legislation provides better formulated principles for the assessment of the purchaser's CZK 5 billion (approx. EUR 180,000,000) turnover threshold, as the criterion for the presumption of significant market power. According to the new rules, the threshold should be calculated with regard to the last completed fiscal year and is aggregated with regard to holding structures and informal alliances, if applicable²⁰.

VII. Restricted forms of behaviour

The new concept and wording of the amended SMPA retains the legislative technique of an exemplary list of restricted forms of market behaviour. At the same time, the Office in its explanatory Infolist emphasised the exemplary nature of this list (Brom, 2016, p. 7). It stated that the relevant circumstances must be taken into account in the application process on a case-by-case basis considering potential abuse of SMP in each given case regardless of the particular form of the practice. The scope of the list is interpreted in an expansive manner by the Explanatory Memorandum (Úřad 2016a, p. 3). The Memorandum is using the absence of information on the total amount of goods and the absence of information on the time frame of discount actions as exemplary practices which must also be considered to be restricted forms of market behaviour even if not explicitly mentioned by SMPA. Based on this example, the NCA has set out more general explanatory criteria concerning the balance of business risks. Accordingly, one-sided attempts to shift the burden of business risk for unsold goods to suppliers, or the uncertainty surrounding sales actions, must also be seen as falling into the category of prohibited behaviours that infringe the rules of the SMPA.

²⁰ Section 3 para. 3c) of 2016 SMPA.

The exemplary list of forms of conduct explicitly defined as SMP abuse by the 2016 amendment was simplified. In its present form, it includes the negotiation or application of contractual terms and conditions resulting in a significant imbalance of rights and duties of contractual parties; any kind of payment or other fulfilment without an adequate performance by the other contractual party; making payments or discounts not part of the written contracts executed prior to the supply of food; invoicing practices not including the final purchase price calculating all agreed discounts; application of any kind of payments related to the acceptance of the goods by the purchaser (listing fee); use of the “return back of unsold goods to the supplier” mechanism; invoicing practices using longer than 30-days payment terms; discriminatory application of different contractual terms to suppliers of goods or services of similar nature and quality.

A significant change has also taken place because of the elimination of two essential pre-conditions which existed in the 2009 version of the SMPA. The previously required condition of “repeated and consistent” abuse no longer applies in the assessment process of potential SMP abuses. According to the 2016 amendment, a single case of SMP abuse constitutes now required and sufficient proof. The second condition completely removed by the amended SMPA is the general requirement that spoke of acts “which have as their object or effect the distortion of competition in the relevant market”. Critics of this change pointed out that the elimination of this requirement could potentially lead to an extreme extension of the scope of the applicability of the SMPA. Although it is necessary to assess this change in the light of the balancing modification of the new procedural rules, the exact interpretation and the future application practice is currently difficult to anticipate.

VIII. New procedural rules

The Office has been granted more discretion by giving it the option not to initiate proceedings if the actual act of abuse is not found to be of a serious nature. This discretionary power creates an important filter against “bullying” cases that frequently misuse proceedings before the NCA as an instrument of private fights among competitors. The new legislation puts also more emphasis on the preventive function of such proceedings by granting the Office the power to stop them if guarantees are provided, in the form of commitments offered by the offender, which would eliminate the detrimental market impact of the SMP abuse. In order to make the proceedings effective, the offender

has a short deadline of 15 days to submit such proposal. Its acceptance lies in the discretion of the NCA and if the proposed commitments are not found to be sufficient, the Office will not accept them and the normal procedure will apply. If the commitments are accepted however, the NCA will control compliance and in case of a breach, normal proceedings will continue. The latter would resume also if the decision of the Office will prove to have been based on incomplete or untrue information provided by the offender, or if the circumstances of the case significantly change. Similarly to the previous option, this procedure is not applicable for cases of serious nature (commitments are not possible for serious cases).

The new legislation provides only for general guidelines on the assessment of the seriousness of the nature of a case, it emphasizes the criteria of the nature of the behaviour, particular form of the abuse and the number of potentially jeopardized subjects. However, the final decision on the applicability of such procedures remains fully in the decision-making discretion of the Office. The removal of the requirement of the “repeated and consistent” occurrence of the abusive behaviour changed the position of the Office to a great extent in its investigating activities, especially in relation to the retail food chains. The body of evidence in procedures held at the Office has significantly decreased, and its proceedings are potentially quicker and more efficient now.

IX. Mandatory requirements of purchase contracts

One of the most problematic parts both of the original as well as the amended SMPA²¹ is its provision on mandatory requirements of purchase contracts in the food products and related services sector. Requirements concerning the form, payment terms, total amount of discounts or the formula used for the calculation of discounts were the main reasons that led, in practice, to great uncertainty and consequently resulted in the overburdening of the Office with an unmanageable number of requests for explanatory guidelines from the business community.

The new legislation, followed by the Infolist of the Office (Hanslianova, 2016, p. 9) removed most of the doubts thanks to a more precise formulation of the rules on the extent of the obligations with respect to: the duty to enter various types of payments into purchase contracts; the use of the proportional percentage form or the mandatory calculation of bonuses and reductions of the final purchase price, or the criteria for the calculation of the limit for

²¹ Section 3 para. 3a) of 2016 SMPA.

the mandatory requirement of complete disclosure of all payments made by the supplier of the amount which may not exceed 3% of the annual turnover threshold. The mandatory requirements of supply contracts, according to the new amendment of the SMPA, are not subject to review by the NCA from the perspective of the validity of the contract *per se*. The Office is limited in its decision-making power to findings concerning the fulfilment of the mandatory requirements of a particular contract without explicit reference to its validity, leaving this question to regular judicial review. This system defines a clear line between private and public law controls over supply contracts, leaving specific instruments and procedures in the above sense fully in the hands of the parties.

The Infolist of the Office (Hanslianova, 2016, p. 9) confirmed the extensive interpretation of the SMPA's mandatory requirements of supply contracts whereby the questionable 3% annual turnover (being the limit for the total amount of annual suppliers' payments) has to include all payments for services rendered, or certain benefits related to the purchase of food, the value of which can be individually evaluated and invoiced. Typically included in the above sense are payments made in connection with advertising services, secondary product placement or cash discounts. The 3% limit is not a bonus limit but a maximum threshold of payments made by the supplier for verifiable services provided by the purchaser. By contrast, price reductions resulting from annual price negotiations, seasonal price cuts or quantity price bonuses are all explicitly excluded from the calculation of the 3% threshold. The reasoning for this differentiation comes from the aforementioned definition of individual payments made by the supplier, which must meet the clear criteria of predictability of the payments pre-conditions. According to this definition, payments not directly related to the purchase of food are excluded from the mandatory 3% threshold. A distinctive criterion in this respect is the availability of such services on the market at a given time. Transport services provided by the purchaser are thus a typical example of this exemption, as long as they are rendered under normal market conditions. Each of the payments must be individually entered into the text of the purchase contracts in the form of a lump sum or percentage. Mixing prices of goods with prices of services rendered (such as marketing support, price of printed leaflets, etc.) in the invoicing practice was declared illegal. Transparency of invoicing, including the complete and accurate description of the character of services rendered, is in fact considered to be one of the fundamental principles of the new legislation. Any failure in this respect would result in a breach of the amended SMPA according to a strict interpretation of the new wording of the Act.

X. Sanctions

The threat of sanctions for a breach of the SMPA was significantly increased despite the fact that the basic formula for their calculation remains unchanged at the threshold level of CZK 10 million (approx. EUR 370,000), or 10% of the last fiscal year turnover of the entrepreneur. Regarding the fact that the 2016 amendment introduced new rules applicable to holding structures and different forms of entrepreneurial alliances, the 10% annual turnover threshold can now be calculated from the total aggregate turnover of the controlling and controlled entities or from the whole alliance, if applicable. In the case of fines imposed on particular members of the alliance, all members of the alliance would become jointly responsible for the payment of the fine according to the new provisions of the SMPA.

Responsibility for the breach of the SMPA passes without limitation to the legal successor of the infringing entity. The new legislation removed the earlier limitation of such transfer which took place through a rather vague requirement concerning the knowledge of the existence of a breach of the SMPA by the legal successor. In the case of multiple legal successors, responsibility shall now pass to them all. Having said that, the actual amount of the financial sanction will depend on the amount of assets of a given successor as well as the profits and other benefits gained in connection with the breach of the SMPA. The argument of continuation of the original enterprising activity by the legal successor must also be taken into account.

XI. Expected effects of the 2016 amendment of the SMPA

According to the interim provisions of the 2016 amendment of the SMPA, all contracts executed prior to 6 March 2016 must meet its mandatory requirements by 6 June 2016 at the latest. The three month implementation period provided by the Act has been subject to extensive criticism. Most of it relates to the fact that specific groups of especially mid- and small-sized suppliers may be jeopardized in the re-negotiation process of the many supply contracts affected by this amendment in the rather short time provided by it. According to the representatives of the Czech Business and Travel Association, which takes an active role in this process (Svaz obchodu a cestovního ruchu CR, 2016), the three month requirement will inevitably result in priority re-negotiations with dominant suppliers, leaving the rest in an uncertain position at the very least. This phenomenon can even potentially lead to a temporary elimination of large

groups of suppliers from the Czech food retail market, and in many cases to the economic liquidation of certain entrepreneurs. This situation was accelerated by an official announcement made by the NCA in May 2016 that a sector enquiry was launched into food chains focusing on the compliance of existing supply contracts with the mandatory requirements of the SMPA (Úřad, 2016b).

It will not be possible to assess most of the effects of the SMPA amendment until a longer decision-making and interpretational practice of the Office has been accumulated. Yet despite the fact that the legislation has entered into force only very recently, it is clear already that its improved text when it comes to legal definitions (including the objective approach to the concept of SMP), together with its overall more systematic and compact form, have a real potential to improve the regulation. By contrast, new doubts were created by the key change of the scope of the applicability of the SMPA that occurred by the removal of previous requirements of a “substantial detriment to economic competition” and of a “continues or repetitive nature” of the abusive attacks, which used to act as pre-conditions for the original Act. Leaving the principal aim and method of the legislation unchanged, the 2016 amendment would certainly not have satisfied liberal critics. Some fears of the business community concerning mainly the replacement of local products by imports and the increase of the price level in this regulated sector will remain (Svaz obchodu a cestovního ruchu CR, 2016). The reason for this can be found in the fact that the recent outcome of the legislative activity did not challenge the method and the sole *raison d'être* of this type of regulation. However, the aims and ambitions of the new legislation did not include such objectives, as they were formed and limited by the existing political paradigm.

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