

395/2009 Coll.

ACT

of 9 September 2009

on Significant Market Power in the Sale of Agricultural and Food Products and Abuse Thereof

Amendment: 50/2016 Coll.

Amendment: 104/2017 Coll., 183/2017 Coll.

Parliament has enacted the following Act of the Czech Republic:

Heading deleted

Article 1

Introductory Provisions

(1) This Act regulates

- a) The method of assessment and prevention of abuse of significant market power in relation to the purchasing of food for the purposes of resale in the Czech Republic or services associated with such purchases or sale of food;
- b) Supervision of adherence to this Act.

(2) Abuse of significant market power, which has been conducted abroad, is assessed under this Act if its effects occurred or may occur in the territory of the Czech Republic.

Article 2

Definition of Certain Terms

For the purposes of this Act

- a) Supplier shall mean an undertaking that sells food for the purposes of its further resale or receives or provides services associated with such purchases or the sale of food;
- b) Buyer shall mean an undertaking or a buyers' alliance under item c) if they buy food for the purposes of its further resale or receive or provide services associated with such purchases of food; a buyer is also an entity or person who secures such purchases or services for another buyer under a mandate contract;
- c) Buyers' alliance shall mean a group of buyers established under a contract, another legal act or another legal fact, engaging in collaboration between the buyers in relation to the purchasing of foods for the purposes of resale or receiving or providing services associated therewith, or a group of buyers

established for the purposes of such collaboration, regardless of whether this group is or is not a legal entity;

d) Food shall mean an ingredient or product defined as food in a directly applicable legal provision of the European Union¹⁾.

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Article 3

Significant Market Power

(1) Significant market power is the position of a buyer, due to which the buyer may enforce an advantage provided by suppliers in connection with the purchase of food, or receive or provide services related to the purchase or sale of food without justifiable cause.

(2) Significant market power is assessed primarily with regard to the market structure, market entry barriers and financial strength of the buyer.

(3) If the buyer is an undertaking which arranges the purchasing of food or services associated with food purchases or sales for another buyer under a mandate contract, its significant market power is assessed together with the position of the buyer for whom they carry out such activities.

(4) It is deemed that the following entities have significant market power:

a) A buyer whose net turnover in the sales of food and related services in the Czech Republic exceeded CZK 5 billion for the last accounting period of 12 months;

b) A buyer, who is a controlled entity, whose net turnover in the sales of food and related services in the Czech Republic did not exceed CZK 5 billion for the last closed accounting period of 12 months, if their net turnover in the sales of food and related services in the Czech Republic together with the net turnover in the sales of the controlling entity of food and related services in the Czech Republic exceeded CZK 5 billion for the last closed accounting period of 12 months; or

c) A buyers' alliance whose members' total net turnover in the sales of food and related services in the Czech Republic exceeded CZK 5 billion for the last closed accounting period of 12 months.

Article 3a

Particulars of a Contract

The contract between the buyer with significant market power and the supplier must be made in writing and, in addition to the substantial parts, it must also include:

a) The method of payment of the purchase price and the time for its payment, the amount of discount from the purchase price or the method of its determination, if granted, while the maturity of the purchase price must not exceed 30 days from the date of delivery of the invoice, the amount of all payments of the supplier, whose total amount must not exceed 3% of the supplier's annual net turnover

for sales for the last closed accounting period of 12 months for food delivered to individual buyers in the year in which the payment occurred;

b) The time or method of its determination for the delivery of the purchased item and the determination of its quantity for the set period, or the determination of the quantity of individual deliveries of the purchased items;

c) In the event that services related to the purchase or sale of food are received and provided, the method of cooperation in their receipt and provision in terms of the subject-matter, scope, method and time of performance, the price or the method of its determination shall be included;

d) The period of the guaranteed validity of the purchase price, which may not exceed 3 months from the date of the first delivery of the food for which the purchase price was negotiated;

e) The method of assignment of the receivable, which is governed by the Civil Code.

Article 4

Prohibition of Abuse of Significant Market Power

(1) Abuse of significant market power is prohibited.

(2) Abuse of significant market power includes, primarily,:

a) Negotiating and implementing contractual terms which create a significant imbalance in the rights and obligations of the Parties;

b) Negotiating or obtaining any payment or other performance for which no service or other consideration was provided, or is disproportionate to the value of the actual consideration;

c) Implementing or obtaining any payment or discount, the amount of which, or the purpose and scope of the provided consideration for this payment or discount, was not agreed in writing prior to the delivery of the food or provision of services, to which the payment or discount relates;

d) Negotiating and implementing any pricing conditions due to which the tax document for the payment of the purchase price for the delivery of food does not contain the final purchase price after all agreed discounts on the purchase price, with the exception of pre-negotiated volume discounts;

e) Negotiating and making payments or other considerations for the receipt of food for sale;

f) Negotiating and implementing the maturity of the purchase price for food longer than the time specified in [Article 3a, item a\)](#);

g) Negotiating and exercising the right to return purchased food with the exception of a substantial breach of contract;

h) Seeking compensation for sanctions imposed by the control authority from the supplier without the existence of its fault;

i) Discrimination against the supplier consisting of arranging and implementing different contractual terms for the purchase or sale of services related to the purchase or sale of food with comparable performance, without justifiable cause;

j) Conducting an audit or another form of control of the supplier by the buyer or a natural person or legal entity authorised by the buyer at the cost of the supplier, including demands for food analyses at the cost of the supplier; or

k) The buyer's failure to respect the results of official inspections of food conducted by the state surveillance authority.²⁾

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Supervision of Adherence to the Act

Article 5

Supervision of adherence to the Act shall be carried out by the Office for the Protection of Competition (hereinafter referred to as the "Office"). The scope of the Office's competence is governed by a special legal provision²⁾.

Article 5a

Sector inquiries

(1) In cases where the Office establishes facts indicating infringements of the Act, it shall conduct an investigation focused on market situation and relations between buyers and suppliers (hereinafter referred to as "sector inquiries") and it shall issue reports on the outcome of the inquiry, which shall contain in particular recommendations on best practices.

(2) When conducting sector inquiry, the Office shall proceed appropriately pursuant to Article 21c, 21e, 21f and 21g of the Act on the Protection of Competition. The Office may initiate proceedings ex officio on the basis of the facts established within the sector inquiry.

Article 6

(1) If the Office discovers in the course of ex-officio proceedings that significant market power has been abused, it shall state this fact in a decision and prohibit such behaviour in the future.

(2) Instead of a decision pursuant to [paragraph \(1\)](#) the Office shall decide to terminate the proceedings provided that the party to the proceedings proposed commitments to the Office, the fulfilment of which results in the elimination of the harmful situation, and provided that the abuse of significant market power was not qualified as being serious by the Office. In such a decision the Office may set forth conditions and obligations necessary to ensure the fulfilment of these commitments. Should the Office find such commitments to be insufficient, it shall communicate the reasons to the parties to the proceedings in writing and it shall continue with the proceedings.

(3) The parties to the proceedings may propose the commitments pursuant to [paragraph \(2\)](#) in writing to the Office within 15 days following the day on which the Office delivered the written statement to them in which the Office provides the basic *res gestae* of the case, their legal assessment and reference to the main evidence in the file (hereinafter referred to as the “statement of objections”). The parties to the proceedings shall be bound by their proposal towards the Office, as well as mutually, or towards third parties, and, in the period between the submission of the proposal and the Office’s decision pursuant to [paragraph \(2\)](#), they may not proceed in the manner the Office objected to.

(4) Following the termination of the proceedings pursuant to [paragraph \(2\)](#), the Office may reopen the proceedings pursuant to [paragraph \(1\)](#) when

- a) There has been a substantial change in circumstances on which the decision pursuant to [paragraph \(2\)](#) was based;
- b) The parties to the proceedings act contrary to their commitments pursuant to [paragraph \(2\)](#); or
- c) The decision was issued on the basis of incorrect or incomplete documents, data or information.

Article 6a

If a violation of the prohibition set out in [Article 4](#) is detected, the Office may decide to impose remedial measures, the purpose of which it is to eliminate the illegal situation and set a reasonable time limit for its fulfilment.

Heading deleted

Article 7

(1) The provisions of the Act on the Protection of Competition shall be appropriately applied to the exercise of supervision and proceedings conducted by the Office pursuant to the Act, as well as to the Office’s investigatory powers.

(2) Legislation on control⁶⁾ shall not apply to the procedure of the Office pursuant to this Act, with the exception of Article 21c (3) and Article 22b (7) and (9). Article 38 (6) part of the first sentence after semicolon of the Administrative Code shall not apply.

Article 7a

Public Administration Information Systems’ Data Usage

(1) When exercising its powers under this Act, the Office shall use the following data from the Residential Register:

- a) surname;
- b) name or names;
- c) address of residence;

d) date, place and district of birth; for persons born abroad the date, place and country of birth;

e) date, place and district of death; if the data subject died outside the Czech Republic, the date of death, place and country, in whose territory the death occurred; if the person has been declared dead by a court, the date, which is indicated in the decision as the date of death, or the date, which the person declared dead did not survive, and the date of entry into force of the decision;

f) citizenship or enumeration of more citizenships(s).

(2) When exercising its powers under this Act, the Office shall use the following data from the information system of population register:

a) name or names, surname; surname at birth;

b) date, place and district of birth;

c) birth identification number;

d) address of permanent residence;

e) citizenship(s) or enumeration of more citizenships.

(3) When exercising its powers under this Act, the Office shall use the following data from the information system for foreign nationals:

a) name or names, surname; surname at birth;

b) date, place and country of birth;

c) citizenship or residency;

d) type and address of place of residence;

e) commencement of residence, and date of termination of residence if applicable.

(4) Out of the data pursuant to paragraphs 1 to 3, only data that are necessary for performance of the task assigned may be used in a particular case.

(5) Data that are kept as reference data in the basic register of inhabitants shall be used from the information system of population register or the information system for foreign nationals only if they are in a form preceding the current status.

Article 8

Offences by Legal Entities and Natural Persons-Entrepreneurs

(1) A buyer with significant market power commits an offence if the buyer

a) Abuses significant market power contrary to [Article 4](#) of the Act;

- b) Does not fulfil a commitment pursuant to [Article 6\(2\)](#);
- c) Does not fulfil a remedial measure imposed by the Office pursuant to [Article 6a](#) or other obligations stated in the Office's decision, or
- d) Fails to arrange a mandatory particular of a contract under [Article 3a, items a\)-e\)](#) or fails to arrange a contract in writing.

(2) A legal entity or a natural person-entrepreneur commits an offence by

- a) Breaking a seal placed in the course of investigation pursuant to this Act; or
- b) In contradiction to this Act, fails to provide complete, accurate and truthful documents or information to the Office, including business books, other business records or other records that may be relevant to clarify the subject-matter of the proceedings.

(3) The Office may impose a fine of up to CZK 10 million or 10 % of the net turnover achieved by the buyer in the last closed accounting period for an offence pursuant to [paragraph \(1\)](#), and a fine of up to CZK 300 000 or 1 % of the net turnover achieved by the buyer in the last closed accounting period may be imposed for an offence pursuant to [paragraph \(2\)](#).

(4) If a fine pursuant to [paragraph 3](#) is imposed on

- a) A buyer, who is a controlled entity, it shall be calculated from the total net turnover of the controlled and controlling entities for the last closed accounting period; or
- b) A buyers' alliance or its members, it shall be calculated from the total net turnover of its members for the last closed accounting period.

(5) If a fine is imposed on a buyers' alliance, its members shall be liable for payment of any fine imposed jointly and severally.

(6) Should the Office find a buyer guilty of an offence pursuant to Article 8 (1), it shall reduce the fine, the amount of which was notified the parties to the proceedings in the statement of objections, by 20%, provided that the buyer pleads guilty of the offence and if the Office considers such sanction sufficient with respect to the nature and seriousness of the offence.

Article 9

General Provisions on Offences

(1) The liability for an offence committed within the territory of the Czech Republic by a buyer with a registered office in the Czech Republic or with an enterprise or a branch within the territory of the Czech Republic, or at least entity performing its activities or having assets within the Czech Republic, shall be assessed pursuant to this Act.

(2) The liability for an offence committed abroad by a legal entity or a natural person-entrepreneur, who does not have a registered office in the Czech Republic, in case the offence has been committed in favour of a buyer with significant market power having registered office in the Czech

Republic or at least an enterprise or a branch within the territory of the Czech Republic, or performing its activities or having assets within the Czech Republic, shall be assessed pursuant to this Act as well.

(3) Offences pursuant to this Act shall be dealt with by the Office.

(4) Should a person mentioned in Article 2 (2) (a) provide the Office with a confidential information and documents related to the offence (hereinafter referred to as “confidential information”), it shall have the right of secret identity in connection to these information. This applies before the initiation of the proceedings as well as after that and even when the proceedings has ended, as long as its legitimate interests could be threatened or damaged without secret identity and it requests it simultaneously with provision of confidential information; the request for secret identity shall be excluded from the access to the file. Identity of the person shall be secret also in requests and notifications sent by the Office to the person in connection to such confidential information as well; such requests shall be excluded from the access to the file until the deadline for submitting the information and documents. The information and documents provided by the person with secret identity shall be excluded from the access to the file until the statement of objections is published. After that, the Office shall disclose such documents to persons entitled to the access to the file only in a form which does not threaten the purpose of the secret identity of the person who provided these documents, and the protection of the business secret.

(5) The Office may decide to take no further action in the case after preliminary investigation without initiation of proceedings, provided that there is no public interest due to degree of gravity of the conduct; while doing so, it shall consider particularly the nature of the conduct, the manner of its implementation and the number of affected subjects.

(6) Before issuing of a decision, the Office shall deliver a statement of objections to the accused entity, in which it shall stipulate a reasonable deadline for the accused person to become acquainted with the basis for the statement and to propose additional evidence; such deadline may not be shorter than 14 days and it starts on the day of the delivery of the statement of objections. The deadline pursuant to the second sentence may be prolonged only in cases worth special attention and consideration. The facts and evidence provided later shall not be taken into consideration; this does not apply if the party to the proceedings was not able to exercise such facts and evidence earlier.

(7) At least one authorized official involved in the proceedings for the offence conducted by the Office in each instance shall hold a university degree which corresponds at least to the master’s degree in the field of law at a university in the Czech Republic. Provisions governing offence proceedings concerning educational requirements of authorized officials shall not be applied on the proceedings to which the Office has jurisdiction to deal with pursuant to this Act.

(8) Provisions of Article 16, Article 17, Articles 24 to 27, Article 29 (c), Article 32, Article 35 (a) and (d), Article 39 (a) and (b), Articles 42, 43, 45, 48, and 49, Article 51 (b), Article 53, Article 54, Article 68 (b) and (c), Article 70, Article 71, Article 76 (1) (h) and (k), Article 76 (5), Article 79, Article 80 (2) and (3), Article 82 (1) first sentence, Article 87, Article 88 (1) and (2), Article 89, Article 93 (1) (d), (f), (g) and (h), Article 93 (3), Article 94, Article 95 (2), Article 96 (1) (b), Article 96 (2) and (3), Article 98 (2) and Article 99 (2) of the Act on the Liability for Offences and Proceedings relating thereto shall not apply to the Office’s proceedings pursuant to this Act.

Article 9a

Limitation Period, Suspension and Interruption of Limitation Period

(1) A limitation period for an offence pursuant to Article 8 (1) shall be 10 years.

(2) A limitation period for an offence pursuant to Article 8 (2) (a) and (b) shall be 3 years. Provision of the paragraph (4) (d) shall not apply.

(3) The duration of the proceedings conducted in relation to the offence proceedings before an administrative court shall not be included within the duration of the limitation period.

(4) The limitation period shall be interrupted:

a) by notifying the initiation of an offence proceedings,

b) by issuing the statement of objections,

c) by issuing a decision finding the accused entity guilty,

d) by the moment of transmitting the case by the Commission or by a competition authority of a Member State to the Office.

(5) A new limitation period shall begin to run by interrupting the limitation period.

(6) If the limitation period is interrupted, the liability for an offence ceases to exist no later than after a period of 14 years since it was committed and the liability for an offence pursuant to paragraph 2 ceases to exist no later than 5 years after it was committed. Such time period shall be extended by the period pursuant paragraph 3.

Article 10

Disciplinary Fine

(1) A disciplinary fine of up to CZK 300 000 or 1% of the net turnover achieved in the last closed accounting period may be imposed on a legal entity or a natural person-entrepreneur which contrary to the Act fails to provide the necessary cooperation to the Office during the investigation.

(2) A disciplinary fine may be imposed repeatedly. The total amount of repeatedly imposed fines must not exceed CZK 10,000,000 or 10% of the net turnover achieved by the legal entity or natural person-entrepreneur for the last closed accounting period.

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Article 11

This Act shall take effect on the first day of the third calendar month following the date of its publication.

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Annex 1

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Annex 2

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Annex 3

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Annex 4

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Annex 5

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Annex 6

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Selected Provisions of Amendments

[Art. II of Act No. 50/2016 Coll.](#)

Temporary provisions

1. Proceedings that have not been legally completed prior to the effective date of this Act shall be completed and the rights and obligations related thereto shall be assessed according to Act No. [395/2009 Coll.](#), as effectively amended prior to the effective date of this Act.

2. Contracts made prior to the effective date of this Act, which do not contain the particulars under [Article 3a of Act No. 395/2009 Coll.](#), as effectively amended from the effective date of this Act, shall be brought by the parties into compliance with [Article 3a of Act No. 395/2009 Coll.](#), as effectively amended from the effective date of this Act, within 3 months from the effective date of this Act.

- 1) Regulation (EC) No [178/2002](#) of the European Parliament and of the Council 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.
- 2) Act No. [110/1997 Coll.](#), on Foodstuffs and Tobacco Products, and on the Changing and Amending Certain Related Laws, as amended.
- 5) [Article 21e, para. 1](#) or [Article 21f, para. 3 of Act No. 143/2001 Coll.](#)
- 6) Act No. [255/2012 Coll.](#), Inspection Code.