

Act No. 395/2009 of 9 September 2009

**the Act on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof**

The Parliament has enacted the following Act of the Czech Republic:

**SECTION I**

**INTRODUCTORY PROVISIONS**

**Article 1**

**Introductory provisions**

This Act regulates

- a) assessment of and prevention of abuse of significant market power in the sale of agricultural and food products (hereinafter referred to as “significant market power”), and
- b) supervision of adherence to this Act.

**Article 2**

**Definition of certain terms**

Under the Act

- a) a supplier shall be deemed to be an undertaking<sup>1</sup> who supplies a customer with goods and services for further sale,
- b) a buyer shall be deemed to be an undertaking who purchases goods and services for further sale.

**SECTION II**

**ABUSE OF SIGNIFICANT MARKET POWER**

**Article 3**

**Significant market power**

- (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 billion.

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<sup>1</sup> Article 2 (1) of the Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts (Act on the Protection of Competition), as amended.

## **Article 4**

### **Prohibition to abuse significant market power**

An abuse of significant market power towards suppliers is prohibited. Among the forms of abuse of significant market power are primarily systematic

- a) infringement of rules applied to invoicing, stated in Attachment No. 1 of the Act;
- b) infringement of general trading terms stated in Attachment No. 2 of the Act;
- c) infringement of obligations resulting from an agreement between a supplier and a buyer; such obligations primarily include conditions stated in Attachment No. 3 of the Act;
- d) non-observance of sale conditions stated in Attachment No. 4 of the Act;
- e) exercise of practices prohibited in supplier-buyer relations stated in Attachment No. 5 of the Act;
- f) infringement of other practices in supplier-buyer relations, particularly of practices stated in Attachment No. 6 of the Act;

which have as their object or effect the distortion of competition in the relevant market.

## **SECTION III**

### **SUPERVISION OF THE 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 competence of the Office is governed by a special legal regulation<sup>2</sup>.

#### **Article 6**

- (1) If the Office finds out 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 for the future.
- (2) Instead of a decision pursuant to paragraph (1) the Office shall decide on the termination of the proceedings on condition that parties to the proceedings jointly proposed commitments in favour of restoration of effective competition, which are sufficient for the protection of competition and the harmful situation is eliminated by their fulfilment, and on condition that the abuse of market power did not result in substantial distortion of competition. In such decision the Office may set forth conditions and obligations necessary to ensure the fulfilment of these commitments. Should the Office find such commitments 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. The statement shall inform the parties of the

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<sup>2</sup> Act No. 273/1996 Coll., on the Scope of Competence of the Office for the Protection of Competition, as amended.

basic *res gestae* of the case, their legal assessment and reference to main evidence on the file (hereinafter referred to as “statement of objections”). Any proposal made after this period shall be taken into account by the Office only in cases worthy of special attention. The parties to the proceedings shall be bound by their proposal vis-à-vis the Office, as well as mutually, or vis-à-vis 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 way the Office objected to.

- (4) Following the termination of the proceedings pursuant to paragraph (2), the Office may re-open the proceedings pursuant to paragraph (2) where
- 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.

## **SECTION IV**

### **FINES**

#### **Article 7**

Provisions of a special legal regulation<sup>3</sup> shall be appropriately applied to the proceedings on abuse of significant market power conducted by the Office, as well as to the Office’s investigatory powers.

#### **Article 8**

##### **Administrative offences by legal persons and natural persons-entrepreneurs**

- (1) A legal person or a natural person-entrepreneur commits an administrative offence if he
- a) abuses his significant market power contrary to Article 4 of the Act,
  - b) does not fulfil a commitment pursuant to Article 6, paragraph (2) of the Act,
  - c) does not fulfil a remedial measure imposed by the Office pursuant to special legal regulation or other obligation stated in the Office’s decision, or
  - d) breaks a seal placed during the course of investigation pursuant to special legal regulation.
- (2) The Office may impose a fine up to CZK 10 mil. or 10 % of the net turnover achieved by the undertaking in the last accounting period for an administrative offence pursuant to paragraph (1) a), b), c), and up to CZK 300 000 or 1 % of the net turnover achieved by the undertaking in the last accounting period for an administrative offence pursuant to paragraph (1) d).

#### **Article 9**

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<sup>3</sup> Act No. 143/2001 Coll., as amended.

## **General provisions for administrative offences**

- (1) A legal person shall not be held responsible for an administrative offence provided it proves that it made every effort required to prevent violation of a legal obligation.
- (2) When setting a fine for a legal person the seriousness of the administrative offence shall be considered, particularly the manner of the commission of the administrative offence and results, and the circumstances under which the administrative offence was committed.
- (3) The responsibility for the administrative offence shall cease to exist if the administrative authority initiates administrative proceedings no later than 5 years following the day on which it learned of the administrative offence, however, no later than 10 years after the administrative offence was committed.
- (4) Administrative offences pursuant to this Act shall be dealt with by the Office in the first instance.
- (5) Provisions of the act on responsibility and sanctions of a legal person shall be applied in relation to the responsibility for the activity of a natural person during the course of business<sup>4</sup> or in direct connection to it.
- (6) The responsibility of a legal person for an administrative offence shall pass on to a legal successor of this person only in the case the legal successor knew no later than at the moment of creation of legal succession, or could have known with regard to the circumstances and his relation that prior to the creation of legal succession the legal person committed conduct that showed positive signs of an administrative offence.
- (7) Provided the defunct legal person shall have more legal successors, each of them is responsible for the administrative offence. When setting a fine, the extent in which incomes, benefits and other advantages from the committed administrative offence passed on to the legal successor shall also be considered, as well as whether any of the legal successors continue in the activity within the performance of which the administrative offence was committed.
- (8) Provided the legal person who committed the administrative offence ceased to exist after the decision imposing the fine for the administrative offence came to force, the obligation to pay the fine shall pass on to the legal successor of the defunct legal person. In the case of more legal successors, they shall be liable for the payment of the fine jointly and severally.

## **Article 10**

### **Disciplinary fine**

- (1) In the case an undertaking fails to fulfil an obligation pursuant to a special legal regulation<sup>5</sup> it shall be imposed a fine of up to CZK 300 000 or 1% of the net turnover achieved by the undertaking in the last accounting period.
- (2) The fine may also be imposed repeatedly. The total of repeatedly imposed penalties may not exceed CZK 10 000 000 or 10 % of the net turnover achieved by the undertaking in the last accounting period.
- (3) The fine may not be imposed later than 1 year following the day on which the obligation was violated.

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<sup>4</sup> Article 2 par. 2 of Commercial Code, as amended by act No. 85/2004 Coll.

<sup>5</sup> Article 21e par. 1 or Article 21f par. 3 of Act No. 143/2001 Coll.

## **SECTION V**

### **ENTRY INTO FORCE**

The Act shall enter into force on the first day of the third calendar month following the day of its publication.

## **Attachment 1**

### **RULES FOR INVOICING**

1. Each purchase of products shall be subject to invoicing. The invoice consists of basic requirements pursuant to other legal regulation.
2. The invoice shall include the required date of payment. Furthermore, it shall include detailed conditions for a deduction which may occur in case of payment made later than on the date resulting from general trading terms, as well as the amount of the fine to be claimed on the day of payment following the date of payment stated in the invoice. The date of payment is the date the buyer provides the supplier or his legal successor with the appropriate amount.
3. The invoice shall include any price reduction granted on the day a product was purchased or a service directly connected with this purchase was provided, with the exception of unpredictable deductions.

## **Attachment 2**

### **GENERAL TRADING TERMS**

1. A buyer shall be obliged to provide a supplier with general trading terms if a supplier requests so. Such general trading terms constitute the basis for business transactions.
2. General trading terms include:
  - purchase terms;
  - price terms;
  - price reductions;
  - payment terms.
3. General trading terms may contain differences between the categories of suppliers. In such a case an obligation to provide a supplier with general terms of sale pursuant to point 1 concerns general trading terms which are applied to suppliers belonging to the same category.
4. Each supplier may negotiate special trading terms with the buyer, to which an obligation stated in point 1 does not apply.
5. With the exception of different provisions stipulated in trading terms or negotiated among the sides in accordance with paragraph 6 of the Attachment, the time-limit for payment of the amount due shall be the 30<sup>th</sup> day following the day the goods were received or the day the requested performance was fulfilled.
6. Term of payment for every supplier shall not be longer than 30 days following the day of the delivery.
7. Payment terms shall contain invoice conditions and interest for delayed payment, due on the day following the date of payment stated on the invoice in case the amount is paid after this date. Sanctions for delayed payment are due without reminders.
8. Provision of information stipulated in the first paragraph may be conducted by all means commonly used in the given branch of business.
9. Companies, whose annual accounting is subject to audit, shall publish information about their suppliers' terms of payment.

## **Attachment 3**

### **CONTRACT CONDITIONS SPECIFIED BETWEEN A SUPPLIER AND A BUYER**

1. The contract between a supplier and a buyer shall contain obligations the parties accepted in order to establish a price when the business negotiation is over. The

agreement shall be in writing and it is not possible to change it without the consent of both parties in writing.

2. The contract shall be either one document or a set consisting of an annual framework agreement with attachments.
3. The contract shall state:
  - conditions for the sale of a product which resulted from a business transaction, while observing general trading terms;
  - conditions the buyer undertakes to provide to the supplier while selling the products to his consumer, or to a dealer for further sale, every service supporting the sale of the products, and which does not result from sale and purchase obligations, whereby necessary to state the subject, expected date of performance, the form of realization, reward and products to which it refers;
  - other obligations which are part of the business relation between a supplier and a buyer, while it is necessary to state the expected day and way of realization for any subject;
  - a time-limit for submitting proposals for price changes;
  - conditions and time-limits for a change in agreed quantity, quality or design of supplied products.
4. Obligations resulting from the above mentioned influence the agreed price.

#### **Attachment 4**

#### **SALES CONDITIONS**

1. A buyer may not sell or may not announce the sale of a product as it was acquired, for a price lower than its original purchase price.
2. The original purchase price is the net price per unit stated on the purchase invoice reduced by all other financial incomes approved by the supplier and increased by turnover taxes, or by other taxes relevant to the sale to consumers, and by a transport price if conducted at the expense of the buyer.
3. The above provisions do not apply in the case of:
  - voluntary or forced sales, the reason of which is the termination or change of business activity;
  - products with the same characteristics, the supplies of which were executed for a lower price and the original purchase price was then replaced by the price stated in the new purchase invoice;
  - products with a date of expiration, from the instance the quality may start to deteriorate, on condition that the offer for a lower price is not subject to any advertising outside the place of sale;
  - distinctive seasonal products during the final period of the season and in between two seasons.

#### **Attachment 5**

#### **PROHIBITED PRACTICES IN SUPPLIER-BUYER RELATIONS**

1. Every buyer bears the responsibility and shall settle compensation for damages caused by the fact that the buyer:

- gains or is trying to gain any benefit or payment from a supplier not corresponding to any service actually provided or is apparently inadequate in relation to the value of the service provided. Such (financial) performance primarily includes:
  - participation in financing unsubstantiated by joint interest and without an appropriate equivalent;
  - implementation of business promotion, purchase or investments, particularly in relation to restoring businesses or in relation to expanding a business network or building and operation of enlisting, accounting or purchase headquarters;
  - artificial accumulation of turnovers, or a request for adaptation to business conditions of other customers;
- subjects or is trying to subject a supplier under obligations which create a significant imbalance between the parties with regard to their rights and duties, particularly concerning penalties and sanctions;
- obtains or is trying to obtain, as a preliminary condition for submission of orders, any performance without an equivalent in the form of a written commitment to an appropriate purchase volume or, as necessary, in the form of a service requested by the supplier, which is the subject of the written agreement;
- obtains or is trying to obtain benefit under the threat of total or partial interruption of business relations, apparently abusing conditions concerning prices, time-limits for payments, forms of purchase or services not resulting from purchase or sale obligations;
- sudden or only partial, interruption in the stabilized business relation without a written notice taking account of the duration of the business relation while respecting the minimum notice period stated in the general trading terms based on the trading practice. In the case the business relation concerns the supply of products sold under a trademark of a retailer, the minimum notice period is twice as long as in the case a product is not sold under a trademark of a retailer. The preceding provisions do not prevent the possibility of notice without a notice period, in the case the second party does not fulfil its obligations. If the interruption of business relation results from competition via “remote auction” the minimum notice period is twice as long as a notice period resulting from implementation of this paragraph when the duration of the original notice period is shorter than 6 months and at least one year in other cases;
- exposes a supplier to payment conditions which do not respect the upper limit stipulated by the Act or which are apparently abusive with regard to fair business practices, and which, without an objectively justifiable reason and to the detriment of the creditor, deviate from the time-limit stipulated in the Act. Particularly abusing shall be deemed a situation when the debtor asks the creditor to change (postpone) the date of invoice issuance or to issue a new invoice with a different term of payment, due to formal deficiencies;
- refuses or returns the goods or automatically charges penalties or fees for non-observance of supply date or for unsatisfactory state of the goods. In the event such debt is not undeniable, expressible in numbers and enforceable, moreover when the supplier could not have double-checked whether the complaint is relevant;
- transfers sanctions imposed by a surveillance authority on a supplier without proven guilt. Particularly abusing shall be deemed the transfer of sanctions imposed in the case of goods not sold in original packing, with the exception of cases caused by the supplier, furthermore sanctions imposed on the sale of goods



- after expiration period, the sale of goods in damaged packing or otherwise devalued by improper storage, manipulation or discharge at a sales point;
- applies a shorter expiration period to the supplier than provided for by law;
  - performs clearing of mutual business debts without a prior written agreement by the supplier;
  - does not provide general trading terms under conditions stipulated in the Act to every purchaser of goods or every provider of services who requests them;
  - refuses to state the name and address of the producer on the product label sold under the trademark of a retailer, if this producer asks for it in compliance with the article;
  - conditions the sale of goods of a supplier with the production of goods under the trademark of a retailer;
  - demands an inspection of production facilities, either directly or by a third party, including analyses and examination of products within the scope of license validity for production issued by a relevant state authority or an accredited entity, with an exception of production under the retailer's own trademark, if this retailer takes over the responsibility of a producer and performs inspection at his own expenses.
2. The buyer must not
- a) benefit retrospectively from reductions, bonuses or business co-operation agreements;
  - b) collect enlisting fees prior to issuing an order;
  - c) have the possibility to return the goods prior to their expiration or after it (refunds), particularly in the form of re-purchase;
  - d) have the possibility to exchange goods, except for proven defects and complaints (reclamations);
  - e) prohibit cession of a claim the contracting party has towards the purchaser to third parties;
  - f) benefit automatically from more favourable conditions which the business partner provided to competitors.

## **Attachment 6**

### **OTHER PRACTICES IN SUPPLIER-BUYER RELATIONS**

#### **Auctions**

1. An agreement which bounds a supplier to a buyer with regard to a price quotation resulting from a remote Dutch auction implemented particularly through electronic communication is not valid if any of the following conditions are violated:
  - Prior to an auction a buyer, or a person who organizes the auction on his own account, must in a transparent and non-discriminatory way inform all potential participants of the determinants for products or services it intends to gain, the purchase conditions and forms, and its detailed selection criteria, as well as the rules according to which the auctions will be held.
  - At the end of an auction the identity of the selected participant shall be revealed to any participant who took part in the auction and requests it. If the submitter of the selected offer does not fulfil his duties, nobody is obliged to take over the given business operation either for the last price, or for the last bid.

2. A buyer, or a person who organizes the auctions on his own account, shall record the course of the auction. The record shall be stored for one year. The record shall be submitted, if the Office initiates investigation for abuse of significant market power.
3. Remote Dutch auctions organized by a buyer or his representative are prohibited for agricultural products mentioned in a list stipulated by the Office, as well as for food for daily consumption originating in the first-stage processing of these products.
4. For violation of provisions of the Attachment, the person who committed the violation is liable and shall be obliged to provide compensation for damages.