

## Competition czar gives chase to sins, not peccadilloes

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*By: Adéla Vopěnková, 26. 11. 2007*

On taking the reins of the Office for the Protection of Competition (ÚOHS) two years ago, chairman Martin Pecina declared that his priority was to pursue the "big fish."

In the wake of last week's ÚOHS confirmation of a Kč 113.1 million (€ 4.2 million) fine imposed on the country's four largest pharmaceutical distributors—**Alliance Healthcare** (Kč 23.859 million), **Gehe Pharma Praha** (Kč 16.831 million), **Pharmos** (Kč 18.638 million), and **Phoenix Lékárenský velkoobchod** (Kč 53.736 million)—*CBW* spoke to Pecina at his organization's Brno, South Moravia, offices, questioning how much real progress is being made against cartels, monopolies and public tender abuses that distort the country's market economy.

ÚOHS, whose record fine up to now is a Kč 240 million sanction levied against gas supplier **RWE Transgas**, faces a demanding task in complying with evolving European Union and domestic legislation. "Frequently we come across individuals or groups that ask for their private interests to be protected. But that is not our aim. We have been established to protect the public interest and not the impaired subjects," Pecina said, adding that all the fines collected by the ÚOHS end up in the state purse.

**Q: ÚOHS acted last week against four major pharmaceutical distributors, ordering them to collectively pay fines amounting to Kč 113.1 million. What problem do these fines address?**

**A:** They started coordinating their steps against their debtors. As a result, all of a sudden, they announced they were halting their supplies to certain hospitals. The office, naturally, and I repeat this every time, does not oppose the will to collect claims. The distributors could have [individually] put in place possible forms of drug supply suspension that would have been legitimate, but any mutual agreement among major competitive suppliers is absolutely unthinkable. And that was that case. Instead of, for example, applying different due date strategies, the four competitors that hold 95 percent of the market decided to act as partners and stopped the deliveries all at once. In addition to this, they arranged the due dates so that they fell in the same periods and unified the business conditions. Such practices cause extensive damage to the balance of the market, so the office had to step in. It was a crystal clear case of a horizontal trust deal and there was absolutely no discussion about it.

**Q: Whose impulse led you to decide to solve the situation?**

**A:** We started the investigation pursuant to a press conference organized by the distributors themselves. We contacted all parties concerned—the hospitals, distributors and the Ministry of Health—immediately after the distributors announced their plan, and we required an explanation. The distributors started pleading that they had not actually stopped the deliveries but in the end we found out they had indeed done so. Their action was coordinated and had an impact on the market. In principle, one cannot proceed like this. Whenever I hear an objection on why the distributors could not do a deal in coordination to obtain their payments from the hospitals that had not been servicing their debts or on why they cannot defend themselves, I always say that it is necessary to appreciate that they are market competitors and that it is not common that competitors, if they are really rivals, have such deals. Once we let them proceed in this way they will start coordinating due dates and if we wait a little bit longer they will one day arrive at the same price policies and partition the market. If this type of approach is deemed possible then we might as well close the office and go home.

**Q: Sure. But why would they organize a press conference to spotlight what they are doing? How come they did it openly, when, as you say, it amounted to a crystal clear case of trust dealing?**

**A:** Because they were so sure that nothing could happen to them. I do not have any better explanation than that. I think it was a mistake that until now such companies [as drug distributors and producers] supplying the public health service were untouchable. No one has cared that they have turnovers of billions of crowns every year and enormous margins.

**Q: And how do things stand following the ÚOHS decision on the fines? Are the companies saying they will take the case to court?**

**A:** Yes. We are used to this though. Our sanctions in the field of protecting market competition are sued against 100 percent. However, the courts usually respect our decisions. If they don't, we appeal. We do not lose in the vast majority of cases. At the moment we have to appeal against a regional court verdict that ÚOHS has no right to fine the legal successors of a firm [Aral] that was found in breach of regulations [regarding a cartel of gas station companies]. We assume this is nonsense. If the verdict was seen as possible it would mean any firm that committed a breach might shift from limited company to joint-stock status in order to become a new subject, and everything would be perfectly all right and in accordance with law. Such a decision might become a dangerous precedent that would also touch on other subjects. ... We have also protested against the court decision in the case of sanctions imposed on [gas supplier] RWE Transgas. The regional court interpreted the sanctions as not legal because we applied both the Czech and the EU laws at the same time. The court said we cannot apply these concurrently. Unfortunately, not doing so is against our internal rules.

**Q: What rules do you deploy in assessing the financial level of sanctions?**

**A:** Going back just a short time, there were no methods for setting competition fines. This was one of the first things to be fixed. Since 2006, we have been applying methods based on [the European Commission] Directorate General's official guidelines. These are very detailed so they only offer a limited and small space for ranges of sanctions. This is very practical since it prevents inobjectivity.

**Q: Except for fines, are there any other tools ÚOHS has at its disposal?**

**A:** Basically, no. Our verdicts are not court verdicts. In the case that somebody does not respect a court verdict, he risks arrest, but we can only fine 'sinners.' If they continue, we cannot do much more than to penalize them again and set a restraint on the debtor. This can take a very long time sometimes.

**Q: What has changed since you were appointed chairman of the office?**

**A:** First, I have said that it is important to concentrate on 'big fish' in particular. A baker who has arranged for his cakes to be sold for the same price in each particular shop is intervening in the market system and is creating a vertical trust. Such things happen often and used to be discussed by the office on a daily basis. But that's ridiculous! What is the point of solving problems that cause only minor damage? Most cases of this sort are now solved through a censure. For a long time now, the number of registered cases in this area has been constant; it is usual for us to proceed with administrative steps in around 10 percent of them.

**Q: Was this the case with the food producers that recently announced price increases?**

**A:** So far there has not been any proof that these companies followed some mutual agreement on pricing policy. However, there is another problem. When the major players start loudly communicating their plans via the media, others are given the prompt to adjust their pricing policy. And then we have to ask ourselves whether this is the way it should be. Is it what these companies do normally or is it just absurd? If someone replies that it is decent to announce [the increases] to a customer [in this fashion] I strongly disagree. A decent approach would be to write a letter to him and to not communicate through the media, thereby creating a general panic.

**Q: Recently, TV Nova decided to increase its advertising prices by 10 to 18 percent. Other channels then instantly followed its lead. Is this not a similar case?**

**A:** It might be in a way. However, there is one difference. I am not aware that Nova demonstrated in the media in advance what its intentions were. I really did not register something like this.

**Q: Have you been working on resolving the situation in which retailers are dictating pricing policy to their suppliers on the Czech market?**

**A:** There is nothing we can do about it. If it was the case that the suppliers were dictating the prices to the retailers then we would be seeing a vertical cartel. But that is not the situation. Of course, it is true to say objectively that the supermarkets are massacring their suppliers. Many of them have become diminished. However, this is not our business, this is a natural market process and there haven't been any forbidden deals so far, so we are not authorized to hold someone liable for unfair competition practices. In certain states, the competition offices do monitor this area, but in the Czech Republic we don't. In my opinion, though, the situation has steadied. The suppliers have been emancipated, they have joined cooperatives and the supermarkets have started to experience losses, so I think that one day things could be the other way around.

**Q: How are forbidden deals usually brought to light?**

**A:** Generally, horizontal cartels are very difficult to uncover. But there are three basic ways. We can get indirect economic evidence—as happened with the gas distribution companies. They raised prices when the oil price was climbing and then when it began falling they started lowering the prices, then in a short time it was a case of 'Enough!' and everyone ended on the same price. From their actions it was evident that every step was coordinated.

Direct evidence can be obtained in two ways. We are authorized to make unannounced inspections of a company's place of business and secure evidence such as company correspondence with subjects of competition. We can also seize computers, documents and so on.

The other way is sourcing information from an informant, using either of two possibilities. First, there is the application of a leniency program. This can happen when a cartel is created by a couple of companies and then, all of a sudden one of them is sold to a new owner and that new owner reflects deeply [on what he has discovered] and decides to declare it. If there is leniency, the company is protected while the trust partners are punished. This happened with [engineering company] ABB. Second, a trust can be reported by an employee. In these cases we can be approached by lovelorn assistants who provide us with their boss' secret e-mails.

**Q: Are you personally an advocate of the leniency program?**

**A:** I must say we have not had very positive experiences with it. Even though it might seem efficient when we come to cases such as the ABB affair, this does not apply in general. I think that the leniency program's function is more geared to prevention. If it did not exist, each firm would feel assured that no one would talk. I do not expect that many cases will be uncovered because of the program, though. ... The usual course of events in unmasking cartels involves one of the partners losing the economic motivation to continue in the cartel.

**Q: But the leniency program has been applied here...**

**A:** It was an EU recommendation that we accepted in 2004. If we had not accepted it, it would have been difficult to make a decision where a company with business extending across more than one country is concerned. Now, when a single member of a trust brings us evidence that leads to a conviction, he can be sure that he will emerge unpunished. And sanctions for the second member providing further evidence are reduced. That is in accordance with the EU legislation.

**Q: Creating a horizontal trust is not defined as a crime in the Czech Republic. Would you be for making it a crime?**

**A:** It is a crime in many EU states. In this country, the necessary legislation does not exist, but we are trying to push some legislation through.

**Q: How do you influence the legislative processes applied to your field?**

**A:** ÚOHS is the guarantor of the economic competition law and we are obliged to monitor EU developments. The second field of law we are in charge of is the law on state aid. The law concerning public orders comes under the Ministry for Regional Development.