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RPM in the Spotlight of the Czech Competition Authority: Risk of Severe Fines

In recent months, the Czech Competition Authority (the "CCA") has attached great importance to the detection and punishment of resale price maintenance ("RPM") in supplier-buyer relationships. For instance, the CCA imposed fines on a children's product company (*Baby Direkt*), an e-cigarette distributor (*RITCHY*), and on a sports equipment manufacturer (*Abistore Sport*). Publicly available sources indicate that the CCA is currently investigating the practice in question in a number of other sectors of industry and trade, *e.g.*, garden care equipment.

Milestone in the Determination of Fines

The CCA's decision in *Baby Direkt* is a milestone. For the first time in history (considering all types of infringements), the CCA imposed a fine in the maximum possible amount under the Czech Competition Act, *i.e.* 10% of the company's annual turnover. Originally, the CCA calculated the fine at over CZK 150 million (ca. EUR 5.9 million). Due to the existence of the statutory 10% fine cap, *Baby Direkt* was eventually fined only CZK 40.7 million (ca. EUR 1.6 million).

Petr Mlsna, the Chairman of the CCA, commented on the decision: "*The fine should have been much higher than it is, due to the nature of the conduct, which took place for more than seven years and concerned most of the company's products.*"

New Guidelines for Setting Fines

The decision in *Baby Direkt* is the first notable evidence of impacts on market players resulting from the new CCA's guidelines for setting fines of 2018. Under the previous soft law, the fine for *Baby Direkt* would amount to CZK several million (EUR lower hundreds of thousands) at worst.

The modification of the fining guidelines has brought a significant tightening of the rules and signaled that the CCA intends to impose higher fines for anticompetitive conduct in the future. It obviously impacts *inter alia* distribution relationships to a considerable extent.

The statutory 10% fine cap of the undertaking's net turnover achieved in the last accounting period can be reached relatively easily within the framework of RPM cases. Despite the fact that the new guidelines classify RPM to be of moderate (middle) severity, such vertical restraints are often imposed on distributors by single-product manufacturers/importers (*i.e.* sales of high value are affected) over a long period of time (*i.e.* a high

coefficient of time is attributed by the CCA).

What does the Future Hold?

According to the public statements of its representatives, the CCA is well-aware that fines imposed for RPM can often be capped by the statutory 10% limit. It may appear that the CCA has become a hardliner, which was recently confirmed by Kamil Nejezchleb, the Vice-Chairman of the CCA, who stated that: "*The CCA fines will increase. Violation of competition should not pay off for anyone.*"

Therefore, the relatively high fine imposed on *Baby Direkt* should not be considered by stakeholders as a one-time excess. It is likely that the CCA will impose similar fines reaching up to the 10% cap for RPM soon. All this even though fines for RPM cases calculated in accordance with the new guidelines for setting fines are much higher than those for bid-rigging cartels or horizontal price-fixing, which is striking for practitioners.

The new fining guidelines will be soon subject to a judicial review. The dramatic change of the fining policy has not been justified by the CCA in any way and there was no transitory period, which may be problematic from the perspective of the right to a fair trial and the principle of legitimate expectations.

The CCA's representatives declared at the *St. Martin's Conference* in November 2021 that they perceive the problematic nature of the fining guidelines in the context of RPM cases against single-product manufacturers. They hinted that there may be a revision of the soft law in the coming months to avoid excesses in the form of imposing disproportionately high fines.

In any case, it is expected that substantial fines for RPM will be a common phenomenon in the future in Czechia. The question remains whether these fines will be unreasonably high or justly severe.