Compatibility of Terminology of Competition Law and Electronic Communications Law

Eva Zorková*

Summary: Due to rapid technological developments, the sector of electronic communications law is very specific. In many aspects, electronic communications law is strongly linked to the application of competition law rules. The aim of this paper is to evaluate the terminology used in the Czech Act on Electronic Communications and its compliance with the terminology used in the Czech Act on the Protection of Competition, as well as its compliance with the EU terminology. Problems may be caused by inconsistencies in the terminology used, for example when defining the relevant market and subsequently identifying a competitor/an undertaking with a significant market power.

Keywords: Electronic communications law – competition law – competitor – undertaking – legal terminology – the Office for the Protection of Competition – the Telecommunication Office – European Commission

1. Introduction

Due to rapid technological developments, the dynamically developing electronic communications sector is very specific, for example in terms of its nature and sectoral regulation of public law. Electronic communications law is strongly interrelated in the application of competition law rules as well. The aim of this paper is to evaluate the use of the term *"competitor"* on a wider range of sectors than "just" the competition law. The first question is whether the terminology used in the Czech Electronic Communications Act is consistent with the terminology used in the Czech Competition Act. While the second question is whether the terminology used in the Czech Electronic Communications Act is consistent with the EU terminology.

* Mgr. Eva Zorková, Ph.D. student, the Department of International and European Law, Faculty of Law, Palacký University Olomouc, the Czech Republic. Email: eva.zorkova@upol.cz

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Indeed, inconsistency in legal terminology that is used could cause practical problems, for example in defining the relevant market and subsequently identifying a competitor or an undertaking with a significant market power. Defining the relevant market may, in factm be different from the perspective of the Czech Telecommunication Office, as well as from the perspective of the Czech Office for the Protection of Competition, and ultimately from the perspective of the European Commission.

In order to answer the above questions, we will briefly mention the definitions relevant to the addressees of competition law, including the terminology used by EU and Czech competition laws (section 2). Subsequently, we will characterize the area of electronic communications law, including its interconnection with competition law (section 3). In the fourth chapter, we will focus on the EU regulatory framework for the electronic communications market and its terminology (section 4). We will also evaluate the terminology used in Czech law and the Electronic Communications Act (section 5) We will try to find out whether the inconsistently used terminology have any (negative) impact on practices, such as differentiating between the relevant market and the undertaking with significant market power, as it occurred in the Czech Republic within the division of companies O2 and CETIN in 2015 (section 6).

2. A competitor in EU and Czech legislation – definition and terminology used

While EU law refers to *"an undertaking"* or *"an association of undertakings"* as the addressees of competition law, the terminology of Czech competition law uses the term *"competitor"* in the same meaning. However, the term *"competitor"* is used in EU law in a slightly different meaning. Inaccurate translation often leads to illogical formulations, for example in official Czech translations of EU law.[1] It is therefore clear that the terminology of Czech legislation at the first glance differs from EU law, although it can be inferred from application practice and academic publications[2] that the Czech definition of a competitor is compatible with the EU definition. The mutual compatibility of two terminologically different concepts at the level of Czech and EU law has been discussed many times

[1] For comparison see the official Czech translation of Commission Regulation (EU) No 330/2010 of 20.4.2010 on the application of Article 101 (3) TFEU to categories of vertical agreements and concerned practices, Article 1 paragraph 1, letter (a) or (c).

[2] KINDL, J., MUNKOVÁ, J. *The Act on Protection of Competition. Commentary 3rd Edition.* C. H. Beck, 2016, p. 51, and also the judgment of the Czech Supreme Administrative Court of 29 October 2017, case 5 As 61/2005 (called ČESKÁ RAFINÉRSKÁ).

within variou publications,[3] as was the use of the Czech term *"competitor"* (in Czech *"soutěžitel"*) for the term *"undertaking"* (in Czech *"podnik"*) in the EU.[4]

For readers of this article, it is surely not important to discuss in detail the definition of a competitor within competition law, but for the sake of clarity, we would like to make a very brief excursion as an introduction. An undertaking is the addressee of the competition law rules defined by EU case-law as *"an entity engaged in an economic activity, regardless of its legal form or method of financing"*.[5] The Court of Justice of the European Union has repeated this definition in other judgments as well. The first conceptual feature of the term *"competitor"* is *"a unit"* or *"an entity"*, which means an economic entity, not a legal entity, i.e. a unit comprising of several separate legal entities, which implies that a unit may be composed of several persons, either natural or legal[6]. Moreover, according to EU case law, even if these units act as single economic units on the relevant market (for example a parent company and its subsidiaries), they shall be considered as one economic unit on the relevant market.[7]

Czech law does not use the term *"unit"* but speaks rather of natural and legal persons and various forms of association which are not legal persons themselves.[8] In some Czech judgments, the term *"entity"* is used instead of the term *"unit"*, which might be confusing for its readers.

The second conceptual feature of the term *"competitor"* is (according to the EU case law definition) the *"economic activitym"*, i.e. offering goods or services on the relevant market.[9] Gaining any profit is not a prerequisite for an economic activity,[10] which means that a competitor might not be necessarily an undertaking. Compared to the Czech term *"entrepreneurship"*, which by definition is an activity pursued for the purpose of making a profit, the pursuit of an *"economic activity"* is defined more broadly. Thus, the Czech competition law does not use the term *"economic activity"*. According to the Czech competition legislation, it is essential for a competitor to *"participate in the competition"* or to be *"able to influence the competition by competitor's activities"*. And so, any participation

[3] PETR, M. Definition of a Competitor for the Purposes of Competition Law and Unfair Competition. *Antitrust. Review of Competition Law*, 2019, no. 2, pp. 44–51.

[4] MUNKOVÁ, J. An Undertaking as an Addressee of the Law within Competition Law. *Právní rozhledy*, 2004, no 17, pp. 625. and also PELIKÁNOVÁ, I. A Competitor and an Undertaking in the Czech law. *Antitrust. Review of Competition Law,* 2016, no. 1, p. 7.

[5] Case CJEU, C-41/19 Höfner, Article 21.

[6] Case CJEU, 170/83 Hydrotherm, Article 11.

[7] Case CJEU T-11/89 Shell, Article 312.

[8] Article 2, paragraph 1 ofAct No. 143/2001 Coll., of 4 April 2001, Act on the Protection of Competition.

[9] Case CJEU 118/85, Commission v Italy, Article 7.

[10] Case CJEU C-67/96 Albaešny, Article 85.

in a competition means not only an *"entrepreneurship"*[11] which, by its definition is a run for profit, but also any other activity capable of affecting the relevant market (whether it is a profit-oriented activity or not).

3. Electronic communications law and its relation to competition law

The term *"electronic communications"* similarly to the term *"competitor"* or the term *"undertaking"* is not directly defined in EU law. Its definition is based on the definition of the term *"electronic communications networks"*. It is interesting that even the European Commission itself is not strictly consistent in the use of terminology and in its official publications sometimes uses outdated terminology or incorrect and confusing terminology.[12] As far as the definition necessary for understanding the issue is concerned, the term *"electronic communications networks"* means transmission systems as well as switching or routing equipment and other means which enable transmission of a signal over a line (s) by radio, optical or other electromagnetic means, including satellite networks, fixed, circuit-switched or packet-switched networks, including the Internet, mobile terrestrial networks, power distribution networks in the signal transmission range, radio and television networks and cable television networks, regardless of the type of information transmitted.[13]

For the purposes of this article, it is essential to note that only communication networks and services of a public nature are subject to regulation and protection, namely those networks and services that are publicly available and so capable of affecting the proper functioning of effective competition in the relevant electronic communications market. By their nature, telecommunications have always represented the strategic interest of states due to the need for protection of public security, public orders and the security interests of states in general. The specificity of the electronic communications sector also lies in the fact that, for objective reasons of a technical nature, agreements between undertakings may be required, for example, to ensure the interconnection of networks and services. That is why, in the area of electronic communications general competition rules

[11] The definition of an entrepreneur is based on Act No. 89/2012 Coll., The Czech Civil Code, Article 420.

[12] KOUKAL, P. Protection of Competition in the Field of Electronic Communications. *Antitrust. Review of competition law*, 2010, no. 3, p. 2.

[13] For comparison see Article 2 (a) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

can only be applied but the objective specificities of the relevant markets, their complexity and their dynamic nature have to be taken into account.[14]

Unlike other regulated areas, in the case of electronic communications, it is not possible to rely solely on general competition regulation (ex post regulation). The current Czech Electronic Communications Act, unlike its predecessor, abandons ex ante regulation and aims to protect competition in the electronic communications sector ex post, all in order to ensure the development of a competitive market. The interconnection of competition law with the law of electronic communications can be seen for example in conducting the analysis of the relevant markets (in defining the relevant markets) for electronic communications. In the case of the Czech Republic, analyses of relevant markets are carried out by the Czech Telecommunication Office and are based on the transposed legislation.[15]

The Czech Telecommunication Office (hereinafter referred to as "CTU") analyses the markets in order to determine whether these markets are effectively competitive. Market analysis are issued in the form of general scope measures, while ex ante regulation is to be performed principally on the basis of market's results analyses carried out by the CTU at regular intervals.[16] The analysis is carried out within a period of 1 to 3 years but may also be carried out as required by the market situation. Market analyses provide basic substantive, as well as argumentative support for regulation, as it is essential that ex ante regulatory obligations are imposed only in the absence of effective competition.[17] If the market in the area of electronic communications is not effectively competitive, then the CTU may determine (for undertakings with significant market power operating in inefficient markets), a proposal for measures that are exhaustively laid down by law.[18] There is a rule that in the context of the analysis of relevant markets, the CTU consults its findings with the Office for the Protection of Competition (hereinafter referred to as the "UOHS"), incorporates its comments and finally requests its final opinion.[19] The UOHS opinion is also required by law when

[14] Explanatory Memorandum to Articles 51, 52 and 53 of Act No. 127/2005 Coll., On Electronic Communications (herein after the "Electronic Communications Act").

[15] Specifically Articles 51, 52 and 53 of the Electronic Communications Act.

[16] Up to now, the CTU has conducted in total 4 analyses of relevant markets. Relevant markets were defined as follows: (1) wholesale fixed call termination services in public telephone network; (2) voice wholesale termination services on mobile network; (3a) fixed location wholesale access services; (3b) wholesale services, and (4) wholesale services with high quality access provided at a fixed location.

[17] The procedure for analyzing the relevant markets is defined in Article 16 of the "Framework Directive". The procedure for defining the relevant markets is defined in Article 15 of the "Framework Directive".

[18] Commentary on Article 51 of the Electronic Communications Act.

[19] Specifically according to Article 52 of the Act on Electronic Communications.

defining relevant markets in the area of electronic communications and evaluating significant market power. The UOHS therefore, plays an important role in commenting and consulting. It can be said that the regulatory activities of both the CTU and the UOHS are very influenced and it has always been very important to define the correct division of tasks and find an effective way of communication between the CTU (as a regulator) and the UOHS (as a competition authority). In practice, it may be problematic that the CTU's legal evaluation is completely (or in partly) different from the legal evaluation of the UOHS.[20]

The European Commission also plays an important role in the analysis of relevant markets for electronic communications. The EU regulation of relevant market analyses can be found in the Framework Directive. After the onsultation, the European Commission is empowered to issue recommendations on relevant product and service markets and to define product and service markets within the electronic communications sector. The European Commission shall define all relevant markets in accordance with the principles of competition rules. Subsequently, within the meaning of the Framework Directive, national regulatory authorities carry out regular analyses of the relevant markets defined, taking into account, to the maximum possible extent[21] the European Commission's guidelines while carrying out the analysis in cooperation with the national competition authorities. If the relevant market is not effectively competitive, the national regulatory authority will designate the undertaking (or undertakings) with significant market power and will impose specific regulatory obligations or maintain or amend existing regulatory obligations.[22]

4. The EU regulatory framework for the electronic communications market and its terminology

The area of electronic communications is regulated by several directives of the European Parliament and the Council of 2002.[23] This so-called regulatory framework for electronic communications was further revised in 2009.[24] The regulatory

[20] KOUKAL, P. Protection of Competition in the Field of Electronic Communications. *Antitrust. Review of Competition Law*, 2010, no. 3, p. 9.

[21] In accordance with Article 7, paragraph 7 of the Framework Directive.

[22] KOUKAL, P. Protection of Competition in the Field of Electronic Communications. *Antitrust. Review of Competition Law*, 2010, no. 3, p. 8.

[23] Explanatory Memorandum to the Government Bill, Parliamentary Press 768/0, Chamber of Deputies, www.psp.cz.

[24] The revision of the regulatory framework took place with the adoption of two revising Directives, namely Directive 2009/136/EC of the European Parliament and of the Council of 25 November

framework for electronic communications also forms the basis of legislation in all EU Member States. The most important role plays the Framework Directive,[25] another important directive in terms of the competition is the Competition Directive.[26] The Framework Directive is followed by four other Directives, that is the Authorization Directive, the Access Directive, the Universal Service Directive and the ePrivacy Directive.[27]

For the purposes of this article, we have focused on the terminology used in all Directives mentioned above. In the English language versions of all Directive is used almost exclusively the term *"undertaking",* which is the Czech language version is translated flawlessly as "*an undertaking*". The term *"competitor"* appears sporadically in the text of all English language versions and is always translated correctly as *"a competitor"* (in Czech *"soutěžitel"*).

5. The addressee of law in the Czech Electronic Communications Act

The relevant provisions of the Electronic Communications Act[28] define an undertaking with significant market power as *"a natural or legal person who, alone or in conjunction with other entities, has a position in the relevant market or closely related market that allows to behave largely independently on other competitors, end-users and consumers"*. If the position mentioned above has one *"person"*, then it is an undertaking with independent significant market power. As it is clear the terminology of the Czech Electronic Communications Act differs from terminology of the Czech Competition Act, which uses the term "*competitor*". Thus, although the areas of electronic communications and

2009 and Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009. Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) also forms the framework for electronic communications.

[25] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a commonregulatory framework for electronic communications networks and services.

[26] Directive 2202/77/EC of the European Parliament and of the Council of 16 September 2002 on competition in the markets for electronic networks and services.

[27] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to networks Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and user rights relating to electronic communications networks and services and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communication ssector.

[28] Articles 51, 52 and 53 oftheElectronic Communications Act.

competition are clearly linked, the inconsistency in the used terminology could cause practical problems, for example in defining the relevant market and subsequently in defining a competitor/ an undertaking or a person with significant market power.

In the following chapter, we will try to explain how such a definition may differ from the position of the CTU, from the position of the UOHS and from the position of the European Commission.

6. The Czech case law – division of companies O_2 and CETIN

As mentioned above, the area of electronic communication networks is a specific area in which it is necessary to distinguish between the infrastructure, ie "*networks*", and "*services*", which are mediated through the infrastructure. Although it is usually difficult to create any additional competitive infrastructure, mainly due to financial or technical impossibility, it is still desirable to create healthy competitive conditions in the market of provision of services. That is why the concept of separating infrastructure (ie the concept of separating networks) from business activities (ie from the provision of services) has been gradually developed within the EU.[29]

In the Czech Republic, a voluntary division of companies CETIN and O^2 has occurred. In April 2015 O^2 's shareholders voluntarily agreed to split the formerly vertically integrated operator with significant market power into two separate companies. The separation requested the transfer of O^2 's physical telecommunications network and previous wholesale offers to a new wholesale entity, CETIN. The split entered into force on 1st of June 2015. The CTU's opinion on the division of companies was that both companies, although majority-owned by the same investment fund (called PPF group[30]), are considered as two legally and economically separate companies (entities) with separate management and supervisory structures, separate headquarters, staff, systems IT and accounting records. CTU perceived the division of companies as a measure to support competition, since CETIN did not grant O^2 any preferential treatment and O^2, therefore, had to compete equally with other retail operators using CETIN's wholesale inputs. Therefore, according to CTU, the removal of vertical links between O^2

[29] KOUKAL, P. Protection of Competition in the Field of Electronic Communications. *Antitrust. Review of Competition Law*, 2010, no. 3, p. 3.

[30] PPF Group acquired by O2 in January 2014. PPF is a Czech investment group operating in various sectors in Europe, Asia and the USA.

and CETIN had led to the situation in which imposing of certain remedial measures was not appropriate.

The CTU defined two relevant product markets as follows: 1) relevant product market for wholesale services with local access at a fixed location, [31] and 2) relevant product market for wholesale central access provided at a fixed location for widespread consumption products.[32] The geographical relevant market was defined for both relevant product markets mentioned above as a national market that covers the whole territory of the Czech Republic.

6.1. A brief reflection on the comments of the European Commission and the UOHS opinion

The European Commission, as well as the UOHS, have expressed several reservations within their comments and opinion, for the purposes of this article we will focus on three main areas:

1. The European Commission explicitly proposed to include an alternative platform to the definition of wholesale product market and if CTU will not include solutions based on CATV and Wi-Fi in the relevant market, the European Commission required to justify such a decision properly.[33] Such an assessment also corresponds to the opinion of the UOHS which states that the interchangeability of WiFi and CATV technology with xDSL/FTTx at the retail level and their indirect influence at the wholesale level was not sufficiently demonstrated.[34] In view of the future competitive development of alternative platforms at the retail level, the European Commission recommended assessing the ability of these platforms to exert sufficiently strong indirect pressure at the retail level and highlighted CETIN's ability to act independently of its competitors at the wholesale level. This should have led CTU to eventually include these platforms in the relevant wholesale market.[35]
2. The European Commission also commented on the definition of the geographic relevant market. In the light of the future infrastructure (including

[31] Also referred to as "market number 3a".

[32] Also referred to as "market number 3b".

[33] Comments from the European Commission pursuant to Article 7 paragraph 3 of Directive 2002/21/EC of 26. 6. 2017 on Commission Decisions in Cases CZ/2017/1985 and CZ/2017/1986: wholesale local access provided at a fixed location and wholesale central access provided in a fixed location for products for wide consumption in the Czech Republic, pp. 11–14.

[34] UOHS Opinion No: ÚOHS-D0036/2017 OS-/TU-05499/2017/830/JVj of 13. 2. 2017.

[35] Comments from the European Commission pursuant to Article 7 paragraph 3 of Directive 2002/21/EC of 26. 6. 2017 on Commission Decisions in Cases CZ/2017/1985 and CZ/2017/1986: wholesale local access provided at a fixed location and wholesale central access provided in a fixed location for products for wide consumption in the Czech Republic, pp. 11–14.

various alternative technologies) the relevant markets seem to be developing more dynamically in some geographical areas of the Czech Republic than in others. The European Commission suggested collecting data at a more detailed level in favour of defining sub-geographic markets of wholesale services. The UOHS stated that CETIN, as an undertaking with a significant market power, has sufficient freedom to set the price of the wholesale offer, since there is no WiFi or CATV wholesale offer (nor is it expected to be submitted within the relevant market). The provision of services on these technologies is therefore only of a local nature and the size of the networks providers does not reach the size of CETIN network.

3. Concerning the assessment of the application of excessive prices, the European Commission pointed out using the economic replicability test as a minimum protection against the risk of excessive prices.[36] This procedure was again in line with the UOHS opinion, which also recommended to execute the economic replicability test soon.

7. Conclusion

As it is clear from the previous chapter, in the case of division of companies CETIN and O^2, the CTU defined the relevant markets differently from the requirements set out in the UOHS opinion and the European Commission comments. In general, the UOHS opinion corresponded to the Commission's comments. The CTU was criticized for failing to carry out a sufficiently detailed analysis, for insufficient justification of taken (or not taken) measures, or for an inappropriate way in which the consumer survey was carried out. For sure it is clear necessary to cooperate and coordinate all procedures, mainly in a situation in which the regulatory activities of the CTU and the UOHS overlap and influence each other. In some ways, it may be problematic to define the division of tasks of both authorities. An effective communication between these two regulators can be a difficult task as well, but it is crucial to prevent hidden competence disputes. In our opinion, the different definitions can be attributed to the communication problems between these two regulators rather than the different terminology used within legal regulations. Whatever the reason for the different approaches is, it can certainly be agreed on the fact that such a situation is not beneficial for the relevant market itself, regardless

[36] Comments from the European Commission pursuant to Article 7 paragraph 3 of Directive 2002/21/EC of 26. 6. 2017 on Commission Decisions in Cases CZ/2017/1985 and CZ/2017/1986: wholesale local access provided at a fixed location and wholesale central access provided in a fixed location for products for wide consumption in the Czech Republic, pp. 11–14.

of the companies concerned. Last but not the least, such a situation is not beneficial for consumers and social welfare.

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