

THE COMPARATIVE STUDY OF THE STATE ENTERPRISES IN THE CZECH AND EUROPEAN LAW

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Abstract

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The subject of this paper concerns the state enterprise in the Czech and European Law. In this paper the attention is paid especially to the primary law arrangement, involved in the Treaty on the Functioning of the European Union. These problems are tightly connected with the area of the Competition Law in the EU single market. There is very important the comparison of public enterprises and the state monopolies in the European Law with the legal arrangement of the state enterprises in the legal order of the Czech Republic. The focus is then on finding similarities or differences in both legal regulations that might cause problems. The point is to suggest a regulation enabling to overcome possible discrepancies. At the end we summarize the results drawing respective conclusions and formulating subjects for discussion.

state enterprise, public enterprises, state monopolies, EU, state intervention, Competition Law

State enterprise poses in the Czech Law and scientific literature relatively omitted area.

First, it is necessary to point out that the main *raison d'être* of the state is not enterprising, the private sector being the basis of business in the modern market economy. In spite of that state enterprises represent a significant part of the national economy (e.g. approximately 17% GNP in Austria¹).

The main aim of this paper is to analyze in detail the legal regulation of public enterprises, especially in the primary legislation of the EU, and to compare it with the respective legislation of the Czech Republic. The focus is then on finding similarities or differences in both legal regulations that might cause problems. The point is to suggest a regulation enabling to overcome possible discrepancies.

In the first part we deal with the regulation of state enterprises (with the state participation or influence) in the legal order of the Czech Republic. The regulation of state enterprises and state monopolies under the Treaty on the Functioning of the European Union is the subject of the next part. At the end we summarize the results drawing respective conclusions and formulating subjects for discussion.

MATERIALS AND METHODS

This paper is based from the methodological point of view on the principle of the complementarity of scientific explanation and hermeneutic understanding in the process of the interpretation of legal texts. Further important methodological instruments are scientific description and comparison. The scientific comparison is applied

1 Tichý, L., 2000: Veřejné podniky v Evropě a v České republice z hlediska soutěžního práva [Public enterprises in the Czech Republic as viewed by competition law]. In: Acta Universitatis Carolinae – Iuridica, 1. vydání. Praha: Karolinum, pp. 5–42, ISBN 80-246-0091-9.

in the case of the comparison of legal orders in the Czech Republic and the European Union. The paper stems from the synthesis of the pieces of knowledge from the various branches of law and the other scientific disciplines, especially economics and economic politics.

The main materials are scientific publications, articles, legal orders of EU (especially from the area of the primary legislation, involved in the Treaty on the Functioning of European Union) and the Czech Republic, concerning state enterprises as well as the judgements (especially European Court of Justice).

RESULTS

State enterprises in the legal order of the Czech Republic

The property of the state in the Czech Republic includes institutions fully funded from the State Budget, state funds and state enterprises. The position and legal situation of state enterprises are regulated at present by the Act 77/1997 Coll. on state enterprise as amended (hereinafter ZSP). State enterprise is defined as a legal entity doing business with the state property and at its own risk. It is filed with the national registrar of companies. The enterprise is entitled to manage the state property having not a property of its own.

It is necessary to distinguish the state enterprise in the proper sense of the word from the cases where the state possesses all shares or their part in a joint-stock company. In that case it is a company which disposes of its own property and different rules apply for it. Also the way of managing these companies is different.

The basic regulation concerning management and disposal of the state property is the Act 219/2000 Coll. on the property of the Czech Republic and the Czech Republic's acting in legal relationships (hereinafter ZMS). ZMS regulates the ways and conditions of the managing of the property of the Czech Republic, the acting of the State in legal relationships as well as the status, the establishment and the dissolution of organizational bodies of the State. An organizational body of the state is not a legal entity. Organizational bodies of the state are then accounting units if it is provided for by a special legal regulation or directly by the ZMS.

ZMS also regulates the participation of the state in other legal entities and associations. The state may set up a company or participate in the establishing of it only in the form of a joint-stock company provided the government has agreed with that previously. The State may also become a shareholder of the company which was set up without its influence.

Shares of such a company may be acquired by the State in all ways allowed to the State when acquiring property, i.e. by contract or by operation of law, by will, etc.

Apart from the joint-stock company, the State, including a state organization, cannot set up any other company or participate in its establishing.

However, the State may also become a member in another company, not only a joint-stock company, which was established independently. It may gain an interest in another than joint-stock company, for example, by gratuitous transfer.

ZMS requires a previous consent of the government for putting the state assets into companies or for the disposing of property interests of the State in those companies.

Another type of state enterprise in the Czech Republic is represented by the still existent enterprises arisen pursuant to the now cancelled Act 111/1990 Coll. as amended; these have been mostly in liquidation.²

Besides "ordinary" ones there are also special types of state enterprises. As state enterprises *sui generis* we may consider e.g. some enterprises in the area of water management or railroad transport. A specialty of its kind is Act 305/2000 Coll. on river basins (coming into force on 1 January 2001) which spawned five new state enterprises, i.e. the Labe River Basin, the Morava River Basin, the Odra River Basin, the Ohře River Basin and the Vltava River Basin that had been joint-stock companies until then. These companies arising directly by operation of law are special state companies subject to a regulation which differs even from the State Enterprise Act.³ Instead of the state organization named Czech Railways which, strictly speaking, was not a state company but in fact it was a state organization of enterprise type⁴ there appeared the state organization named the Railway Infrastructure Administration established under the Act 77/2002 Coll. on the joint-stock company Czech Railways. Its status and legal situation is regulated adequately by the Act on State Enterprise if not provided otherwise.

In Czech competition law the state enterprises (or enterprises with state participation) are regulated by the Act on Protection of Economic Competition 143/2001 Coll. as amended (ZOHS) but only under certain conditions. A state enterprise is considered a competitor in the sense of Section 2, Para 1, ZOHS. In that sense the law does not make a difference between private and public legal persons involved in competition law. But the competitors that provide services of general economic interest pursuant to a special Act or a Decision made on the basis of

² Havlan, P., 2006: *Majetek státu v platné právní úpravě* [Property of state in the existing legal regulation]. 2. vydání. Praha: Linde, ISBN 80-7201-578-8.

³ Ibid, op. cit.

⁴ Ibid. op. cit

a special Act are regulated by ZOHS only when its application does not impede providing of these services. Neither this Act regulates protection of economic competition in providing public support pursuant to the Act on Public Support 59/2000 Coll. Public legal persons have then a special position in that area.

In the Czech Republic there are 420 state enterprises (as of 31 December 2009)⁵ and approximately 40 joint-stock companies with the state participation of 40–100% shares (as of 31 December 2010)⁶.

Public enterprises and state monopolies pursuant to TFEU

Unlike the legal regulation in the Czech Regulation which is based on the concept of state enterprise the EU legislation uses the concept of public enterprise.

Within the EU single market public enterprises are rather a foreign element, though. Their economic potential being influenced by state interventions provides them with a special position in comparison with other competitors, thus possibly disrupting free competition. Risks involved in the position of the State, or the public sector, have been taken into consideration since the very beginning of European Communities.⁷ The key question is whether state interventions are compatible with the conception of competition on the common market. Various limits imposed on enterprises and member states result especially from Articles 37 and 106, TFEU.

The number of public enterprises in individual member states varies. Traditionally, they have an important position in France, Italy or Austria whereas in the Benelux their role is negligible.⁸

The legal regulation of public enterprises included in Article 106, TFEU (the former Article 86, TEC) follows the basic principle of equal position of private and public enterprises. An exception is specific and for member states' economies important branches (see hereinafter).

The concept of public enterprise is a category of European law derived from the French "a public enterprise" having more an economic than legal content.⁹ The basis of the concept is an enterprise

of competition law including activities of economic nature.¹⁰ A peculiarity of public enterprise is the influence of the public sector (i.e. the public or state power), or its deciding processes.

The term "public enterprise" includes any enterprise in which the public power may directly or indirectly exercise a decisive influence through its ownership of such an enterprise, through its financial participation in it, or through rules by which that enterprise is managed. The decisive influence of public power manifests itself (directly or indirectly) if:

- a) it holds the majority of the subscribed capital of such an enterprise,
- b) it controls the majority of votes linked with shares issued by that enterprise,
- c) it may appoint more than half of the members of the board of directors, board of managers or supervisory board.¹¹

It does not matter if the enterprise is independent of the State or if it considered public under domestic laws. The EU law is neutral in relation to the form of ownership of these enterprises.¹² Public enterprises operate for example in services, transport, supplies, post services, radio and TV broadcasting, hospital insurance, etc.

If public enterprises meet certain preconditions the TFEU guarantees a special position for them. Competition rules cannot be applied, under certain circumstances, to financial monopolies and enterprises of general economic interest but this exceptional position must not jeopardize the development of trade to the extent that it would be in conflict with the interests of the Community.

The first precondition for an enterprise to be exempt is that it provides services of general economic interest or has a fiscal monopoly; the second precondition is that applying the rules in Treaties would make it impossible to fulfill special task which were imposed on such an enterprise. The third precondition is that the development of trade is not affected to the extent that it would be in conflict with the EU interests. All three preconditions must be fulfilled at the same time.¹³

The concept of economic interest is understood quite broadly and courts refrain from defining it in

5 The 2009 statistical yearbook of the Czech Republic- retrieved from the website of the Czech Statistical Office, www.czso.cz.

6 Retrieved from the website of the Ministry of Finance of the Czech Republic, www.mfcr.cz.

7 Tichý, L. a kol., 2011: *Evropské právo* [European law]. 4. vydání. Praha: C. H. Beck, ISBN 978-80-7400-333--2.

8 Tichý, L., 2000: *Veřejné podniky v Evropě a v České republice z hlediska soutěžního práva* [Public enterprises in Europe and the Czech Republic as viewed by competition law]. In *Acta Universitatis Carolinae – Iuridica*, 1. vydání. Praha: Karolinum, pp. 5–42, ISBN 80-246-0091-9.

9 Tichý, L. a kol. *Evropské právo* [European law]. Op. cit.

10 See the ECJ decision 155/73 *Sacchi*.

11 See the Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

12 See Article 345, TFEU.

13 Syllová, J. a kol., 2010: *Lisabonská smlouva. Komentář* [Lisbon Treaty. A commentary]. 1. vydání. Praha: C. H. Beck, ISBN 978-80-7400-339-4.

any way. From some judgments of ECJ (C-320/91 *Corbeau*, C-340/99 *TRT Traco*) it may be inferred that what is meant is services for the benefit of all users within the territory of a member state (the so-called universal service).¹⁴ The Commission defines services of general economic interest as activities on the domestic market that are carried out in the interests of larger units and therefore they are connected with special duties of member states to ensure the general well-being (Official bulletin 1996, C-281/3). "Giving" special tasks to an enterprise means defining them by a legal act, a statute or an administrative act.

TFEU prohibits member states to take any measure against public enterprises that would contravene the Treaty. The word "measure" is understood quite broadly involving any form of legal or real influencing of public enterprises from the part of member states.¹⁵ The legal form of such influencing is not decisive. It may be private-law methods, i.e. contracts, or public-law forms that may include statutes and other sources of law, unilateral acts or decisions of state or public authorities. Prohibited measures include, among others, license terms.¹⁶ A precondition is that the given measure has a special relation to the public enterprise.¹⁷ On the contrary, prohibited measures pursuant to TFEU do not include a generally binding, statutory or any other legal regulation applying to all enterprises.¹⁸

The Commission is entrusted with supervision over application of Article 106. It is entitled to make decisions concerning member states (not individual enterprises) and to issue directives without participation of the other EU institutions.¹⁹

The internal EU market may also be disrupted through activities of state monopolies. State monopolies are regulated by Article 37, TFEU (the former Article 31, TEC). State monopoly is an institute through which the State legally or really, directly or indirectly, controls or substantially influences imports or exports among member states. Such a person need not necessarily control the whole market with certain commodities; it suffices when it plays an "effective role" on the relevant market.²⁰

Although state monopolies disrupt the free competition environment they are not prohibited in

the EU law. Article 37, TFEU, only obliges member states to exclude discrimination among "nationals of member states". Thus the regulation prohibits discrimination on the basis of nationality confirming the general prohibition of such discrimination.²¹ State monopolies must be adjusted so as there is no discrimination concerning conditions of procurement or marketing of goods. The term "discrimination" includes not only considering identical situations in different ways; discrimination also occurs when products from other member states are subject to the same conditions as the domestic ones but in a concrete case the result is preferential treatment of domestic products.²²

State monopolies may be commercial monopolies, service monopolies or financial monopolies. The state commercial monopoly includes cases when the state participates in an entrepreneurial commercial activity within which it is a subject of turnover of goods, it takes place within free movement of goods and it concerns imports or exports among member states.²³ In the past there was a certain problem with commercial monopolies in the area of distribution of electricity and gas. It was only solved by an agreement of the highest representatives of member states at the meeting of the European Council in Barcelona on 16 March 2002.²⁴ Service monopoly means exclusive licenses granted by the State to enterprises or other persons in providing services. Service monopolies had importance in many member states. They included post, telephone, radio monopolies, etc. These are monopolies the function of which is primarily to ensure revenue of the state by another form of consumer tax.²⁵ Examples are monopolies on liquors or matches; in Italy and France it is primarily monopoly on spirits and tobacco. For fiscal monopolies there is an exception from competition rules in the case when their application would make the fulfillment of fiscal tasks impossible and difficult.

Pursuant to TFEU member states must also refrain from implementing any measures that would question prohibition of customs duties and quantity limits among member states. The purpose of this regulation is quite clear. It is supposed to prevent state monopolies from obstructing the free movement of goods.

14 Tichý, L. a kol. *Evropské právo* [European law]. Op. cit.

15 Ibid, op. cit.

16 Judgement in *Re. Bodson* (30/87).

17 Tichý, L. a kol.: *Evropské právo* [European law]. Op. cit.

18 Another typical example of prohibited conduct is public subsidy. The prohibition of public subsidies applies equally to private as well as public enterprises. However, this is regulated separately, especially in Articles 107–109, TFEU.

19 Syllová, J. a kol. Op. cit.

20 Judgment of ECJ 6/64 *Costa v. ENEL*.

21 Syllová, J. a kol.: *Lisabonská smlouva*. [Lisbon Treaty]. Op. cit.

22 Tichý, L. a kol.: *Evropské právo* [European law]. Op. cit.

23 Ibid, op. cit.

24 Janků, M., Janků, L., 2009: *Vybrané kapitoly z práva EU* [Selected chapters from EU law]. Ostrava: Key Publishing, ISBN 978-80-7418-049-1.

25 Tichý, L. a kol.: *Evropské právo* [European law]. Op. cit.

TFEU still emphasizes a special approach to considering the operation of state monopolies in agriculture.²⁶ In the case of state monopolies, the legal regulation of which is supposed to make the marketing or sale of agricultural products easier, equal guarantees of employment and life standards of respective producers have to be ensured when applying this Article.

If we wanted to find a certain leading idea of the whole regulation of public enterprises and state monopolies within the EU law then it would be the idea of a gradual integration of the public sector, especially public enterprises, into the economic competition.²⁷ The principle aim of the regulation of public enterprises is to prevent member states from breaking rules of the Treaty (and rules of economic competition on the common market) through their influence exercised on these enterprises.

CONCLUSIONS

When analyzing legal regulations concerning public enterprises and state enterprises we find a certain terminological disparity. While the EU legal regulation uses the term “public enterprise” and includes state enterprises in it, we do not find this term in the legal regulation of the Czech Republic. The Czech legal order uses the term “state enterprise” (within Act 77/1997 Coll. on state enterprise); then we have joint-stock companies with majority interest of the State which have no special designation and, finally, “special” types of state enterprises regulated in various separate statutes with no mutual connection. This categorization of state enterprises in the Czech Republic has more domestic than European importance. In the EU law, form of ownership of these enterprises does not have any significance and they do not even have to have legal personality of their own.²⁸

The EU legal regulation concerning public enterprises and state monopolies follows the principle of equal position of private and public enterprises. There are only minor exceptions to the principle concerning matters of general economic interest and agriculture.

It is necessary to take into account sensitivity and peculiarities of the attitude of member states to their public enterprises and therefore the regulation has a special and major importance. Provisions of Articles 37 and 106, TFEU are compromises to a certain extent. The aim is to find a balance between the natural interest of member states to use some enterprises, especially in the public sector, as instruments of their economic and social policies and the interest of the EU to maintain the competitive environment and the single internal market. There is an apparent tendency to a larger implementation of public enterprises into the economic competition, i.e. an effort to maximally reduce exceptions.

With regard to the above mentioned fragmentation of the Czech legal regulation of enterprises with the State participation or influence it might be suggested that the universal term “public enterprise” be introduced, which would overcome the existing disparity. Moreover, such a term would correspond with the terminology of the EU law. In the area of competition law a concrete regulation of exceptions from competition rules for some branches of the national economy (e.g. agriculture) might be introduced. As proven by the wording of Articles 37 and 106, TFEU, a compromise between the interests of the EU and the interests of member states can be reached quite well. Legal orders of member states and the EU law are increasingly getting closer, anyway.

SUMMARY

The subject of this paper concerns the state enterprise in the Czech and European Law. This paper is based from the methodological point of view on the principle of the complementarity of scientific explanation and hermeneutic understanding in the process of the interpretation of legal texts. Further important methodological instruments are scientific description and comparison. The main materials are scientific publications, articles, legal orders of EU and the Czech Republic, concerning state enterprises as well as the judgements.

In this paper the attention is paid especially to the primary law arrangement, involved in the Treaty on the Functioning of the European Union. These problems are tightly connected with the area of the Competition Law in the EU single market. There is very important the comparison of public enterprises and the state monopolies in the European Law with the legal arrangement of the state enterprises (with the state participation or influence) in the legal order of the Czech Republic. The focus is then on finding similarities or differences in both legal regulations that might cause problems.

26 Syllová, J. a kol.: Lisabonská smlouva [Lisabon Treaty]. Op. cit.

27 Cf. Tichý, L. a kol.: Evropské právo [European law]. Op. cit.

28 Tichý, L.: Veřejné podniky v Evropě a v České republice z hlediska soutěžního práva [Public enterprises in Europe and the Czech Republic as viewed by competition law]. Op. cit.

The point is to suggest a regulation enabling to overcome possible discrepancies. At the end we summarize the results drawing respective conclusions and formulating subjects for discussion.

Although this paper is oriented especially to the branch of law, it applies also the pieces of knowledge from the various disciplines of science, especially economics and the economic politics. The instigations from this paper can be used for instance for the management and the decision processes in the enterprises in public sector, the application of experience from the branch of European Community Law for the legal arrangement in the Czech Republic and for the delimitation of the legislative area in which these enterprises exist.

REFERENCES

- SYLLOVÁ, J. a kol., 2010: Lisabonská smlouva. Komentář. [Lisbon Treaty. Commentary], 1. v. Praha: C. H. Beck, ISBN 978-80-7400-339-4.
- JANKŮ, M., JANKŮ, L., 2009: Vybrané kapitoly z práva EU. [Selected chapters from EU law] Ostrava: Key Publishing, ISBN 978-80-7418-049-1.
- TICHÝ, L. a kol., 2011: Evropské právo. [European law] 4. vydání. Praha: C. H. Beck, ISBN 978-80-7400-333-2.
- TICHÝ, L., 2000: Veřejné podniky v Evropě a v České republice z hlediska soutěžního práva. [Public enterprises in Europe and the Czech Republic as viewed by competition law]. In: Acta Universitatis Carolinae – Iuridica 2/2000, Praha: Karolinum, ISBN 80-246-0091-9.
- HAVLAN, P., 2006: Majetek státu v platné právní úpravě. [Property of state in the existing legal regulation] 2. vydání. Praha: Linde, ISBN 80-7201-578-8.

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