What changes with this bill?

The bill does not eliminate the monopoly of the departments but sets out requirements to make the market more transparent and the tax burden between imported and domestic spirits more equitable. This project seeks to increase COP 200 for all alcoholic spirits and a tax of 25 per cent ad valorem.

Currently in Colombia drinks with less than 35 per cent of alcohol pay US$297 in taxes for each unit of 750 cubic centimetres. For bottles over 35 per cent alcohol, there is a fee of US$487 for every 750 cubic centimetres.

Complexity lies in the fact that most foreign spirits contain over 35 per cent alcohol, while nationals are below that measure. Domestic products ultimately pay less tax than imported ones.

In short, the concern revolves around the negative impact that could affect the health and education sectors to prevent centralisation of resource products of alcoholic beverages' income. At the end of the day, the tension between free market practices envisaged in all free trade agreements entered into by Colombia in the past few years and the Constitutional right to hold monopolies in the alcohol industry will most likely result in the prevalence of free market practices given the country's political will to follow the path of OECD membership.

Notes

1 Andean Court of Justice, Proceedings No 03-AI-97, 28 January 1999.
2 Draft Bill No 152 presented to Congress by the National Government, 4 November 2015.

Significant market power in food retail

CZECH REPUBLIC

Arthur Braun
bpv Braun Partners, Prague
arthur.braun@bpv-bp.com

Act No 50/2016, amending Act No 359/2009 entered into force on 6 March 2016, which creates significant risks for (all foreign) food retailers

Act No 395/2009 on Significant Market Power in the Sale of Agricultural and Food Products and the Abuse thereof (the 'Act'), has been little enforced since it was brought into law on 1 February 2010. Long political discussion at first seemed to lead to a certain unwillingness of the Office for the Protection of Competition (the 'Office') to enforce it. At least during the early years of the Act, the Office seemed to be happy simply gathering facts. The first major fine (Kaufland) of about €800,000 for longer payment terms to suppliers than provided for by law was issued but only by the fall of 2013. Similar to the Competition Act, penalties for breaching the Act are up to ten per cent of the annual turnover of the guilty party.

In view of problems in the application of the Act and ambiguities within it, as well as recognising European trends, on 9 December 2015, Czech lawmakers approved an amendment that came into force on 6 March 2016. Apart from formalities, the whole structure of the Act has been changed considerably and the content in the greater part made worse.

As to clarification of provisions, the first aspect that was clarified was the subject matter of the Amendment. The Act is intended to prevent abuse of significant market power with respect to the sale of food. Similar to the effects in principle in competition law, it now stipulates that the Act applies also in the case of abuse of significant market power abroad, provided that the consequences of significant market power have occurred or may occur in the Czech Republic. The definitions of a supplier and a buyer were clarified and the definitions of purchase alliances and food were introduced.

In addition, the definition of significant market power has been clarified. According to Article 3 of the Amendment, significant market power shall be deemed to be a market position of the buyer, in which they can enforce without just cause individual advantages against a supplier, in connection with the purchase of food or services related to the sale or purchase of food – antitrust

lawyers know of similar definitions in abuse of dominance provisions.

One clarification was welcomed by many: to fall within the Act, annual net turnover must exceed CZK 5bn (about €18.5m) in respect of food only.

The Act had originally an annex that listed prohibited behaviour in detail, such as listing fees or payment terms longer than 30 days. Now the annex has mostly been replaced by general clauses such as 'agreeing contractual conditions that create a clear imbalance in the rights and obligations of both sides'. Such wording leaves the whole interpretation open to the Office, which – unlike competition cases – cannot look to decades of decisions by the European Commission or other competition authorities.

Another change of paramount importance and particular reason for alarm for food retailers, is the removal of the former requirement triggering any penalty that the abuse of the significant market power must have taken place on a repeated and consistent basis. Now a single case of abusing significant market power, such as agreeing on a 45-day payment term instead of the prescribed 30 days, will be sufficient proof.

On the other hand, the Office now has the possibility to stay proceedings where the abuse is not deemed to be of a serious nature – similar to the rules where cartels with an insignificant effect on competition will not be prohibited.

One can look at this Act from different angles. Free market supporters will argue that there is no specific reason why one business sector has any greater protection than another. Anyone familiar with modern supply chain relationships, in the automotive industry, for example, with often much tighter provisions for the supplier, will support such a view. Why is only the food retailer under strict rules of the Act and not food processors such as dairies or bakeries who are usually the direct contractual partners of the agricultural sector to be supported and who actually have larger market shares and therefore a better bargaining position than most retailers? It is also worth noting that according to the reasoning of the amendment, the Act affects only eight retail chains, all in foreign ownership.

The Czech Republic has, in addition, a special political situation concerning the present Minister of Finance who already has considerable control rights in the tax sphere. His companies (which are also strong in the media business) are by far the largest businesses in the agricultural sector – which raises some concerns with retail chains that this Act and additional regulations will be used to reduce their so-far profitable business model. This comes of course together with additional regulations such as opening hours and the transposition of European consumer protection rules enacted in 2016.

On the other hand, one cannot deny that in many respects unfair practices were common in the food business in the past and this is in a country that in the 1990s still did not know such practices as listing fees in supermarkets. Many competition law principles so far could not help in a small country with extremely strong regional market positions of individual chains.

As a competition lawyer, one can in any case watch with interest to what degree the amended Act will be enforced and whether other principles of competition law will be used by the Office in the application of the amended Act.