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Slovakia: Cash Incentives to Whistleblowers?

Arthur Braun (bpv Braun Partners) · Friday, March 22nd, 2013

At the end of 2012 the Slovak Antimonopoly Office presented its future plans for public discussion. Various aspects such as the announced prioritisation of antitrust enforcement, the incentives for settlement of antitrust cases, the establishment of a division of Chief Economist, the introduction of the leniency program into law, are all fully in line with international practice in antitrust law. One aspect, however, is quite interesting should it lead to a region wide development: the introduction of incentives to be paid to whistleblowers.

A new section, Section § 38f, is proposed to be introduced into the Act on Protection of Economic Competition law giving natural persons a financial incentive. A cash payment is to be given to persons who as a first comer inform the Antimonopoly Office of a horizontal cartel agreement in the production or distribution of goods and provide proof in electronic or paper form of such a cartel. If they do not provide the proof together with the information, they must provide information which is sufficient to justify a dawn raid that leads to decisive information proving of a cartel. A further condition is that he is not a party participating in the cartel, applying for leniency, nor is employee of such applicant who already filed for leniency.

Such a whistleblower is to receive a payment of 1 % of the penalties levied in the matter, up to a maximum EUR 100.000,-. A further condition is that the decision on such penalty, being in force, shall be paid by the parties to such a cartel agreement. Interestingly enough, there is an element of risk sharing: should the penalties not be paid within a certain date set, the whistleblower`s claim is reduced to half the amount but up to a maximum of EUR 10.000. Protection of the identity of the whistleblower is also provided for if wished.

The Office in its explanatory notes to the amendment expressly points to similar concepts in Hungarian and British antitrust law. The Hungarian antitrust law, since 2010, indeed also gives incentives of 1 % of the fine as imposed by the Hungarian Competition Council with a cap of 50 Mio HUF (about 160.000 EUR). Different from the Slovak example it actually allows several whistleblowers in one case to be remunerated. Another difference from the Slovak example is that if a court decision later overturns the decision imposing the fine, the whistleblower may keep the money. The Hungarian authority does not give numbers on whistleblowers and proceedings are marked by very long durations so that we cannot tell the percentage of investigations started by such information, nevertheless, in informal talks the casehandlers there consider the incentives for whistleblowers to be a success already now.

Looking at the proposed Slovak changes one may, however, still be quite critical, whether the

incentive is sufficient enough to result in whistleblowing or rather it is thought of as additional deterrent to enter into cartel agreements.

It is still subject to the decision of the Office whether the proof provided actually is to be considered to be the decisive proof for the decision of the Office – the same requirement as for the applicability of the leniency program.

In modern times, it has been quite rare to actually have a smoking gun – for instance written proof of an illegal cartel in one document. Would an employee actually risk not only his job in a country marked by some 15 % unemployment and also risk the obligation to bear damages to his employer arising when defending a cartel accusation that turned out to be unfounded? Would Slovak citizens who usually do not have too high trust into state institutions` ability, to keep secrets actually believe, their identity will be protected effectively?

Nevertheless, should the proposed whistleblower provisions actually be transformed into law, in particular when preparing leniency applications in Slovakia in the future, one must calculate with the possibility that an anonymous employee tries to receive some extra cash and gives copies of documents to the Office before the application is completed.

The greyhound race for the first leniency application therefore will not only involve the other participants in a cartel but also insiders within the own organization. Even more speed and secrecy will therefore have to be used.

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