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## Czech Republic: Amendments to the Antitrust Act – Leniency Policy Becomes Law and Additional Changes

Arthur Braun (bpv Braun Partners ) · Thursday, July 5th, 2012

The government proposal of the new amendments to the Antitrust Act reflect practical concerns of the Czech Antitrust Office. The amendment has been passed in the first and second readings in the Lower House of the Czech Parliament in spring 2012. It may be expected to become law in the second half of this year and ought to clarify certain issues that have come up in recent years.

The Czech Republic has already several years of experience with a modern leniency policy. A first leniency programme was published as soft law as early as in 2007 and the Antitrust Office has so far kept to its commitment in this area in all known cases. Since then, it has been put into practice in various cases, even though sceptics point to the fact that most (maybe even all) applications were related to antitrust proceedings underway at the EU level (relating to cartels before EU-Accession in 2004) or other international cartel investigations with potential Czech implications and might have saved some cartel members money and the Antitrust Office some work – but did not bring completely unknown cartels to light.

One of the major problems in advising in leniency programs in purely a Czech context is that certain horizontal cartels were criminalized in 2010 meaning that an attorney advising his client to file a leniency application could expose his client's management or employees to criminal proceedings. The state prosecutor had issued a statement that he would consider favourable participation of the employer in a leniency application as mitigating factor, nevertheless this provided no real security concerning a criminal court decision. Such a possibility certainly frightened off several cartels from filing for leniency – unless the persons in the cartels were foreigners without major fear of criminal prosecution by Czech authorities as in the cases known.

The amendment therefore logically includes a change to the Criminal Code granting the person filing for leniency, or reduction of fines, full protection from criminal prosecution. According to the notes to the amendment – not the text itself – this shall also apply if a legal entity for which the natural person acted filed for leniency/ reduction of fines.

The fact that the position of leniency proceedings has shifted from soft to hard law led to changes including the introduction of a new provision into the Antitrust Act. Now the first applicant can receive full leniency, the second up to 50 % reduction of fines if he provides proof of substantial evidential importance. Other members of a cartel may receive a reduction of 20 % only if they admit the cartel and such sanction is considered by the Office to be sufficient. Such application must be filed within 15 days from the date of delivery of the statement of objection.

Another important element and motivation for cartel members in practice is that any successful leniency applicant or entity who claims a reduction of fines shall not automatically be excluded from public tenders as would be the case for any sanctioned cartel member.

The amendment to the Antitrust Act does not, however, solve the issue of any other relationship that needs to be considered whenever thinking about filing a leniency application – that is the protection against private enforcement claims. On the other hand, this has in the Czech Republic so far been a rather theoretical threat. Still, leniency applications now, by law, become part of the file only after the statement of objections have been issued in a cartel case. Access to file of applications for leniency or reduction of fines are now by law permitted only to parties to particular proceedings, reducing the danger that a damaged party may use the information for private enforcement matters.

It remains to be seen whether after the amendment comes into law, leniency applications will be more frequent.

Turning to other matters, one clarification relating to dawn raids now puts into law the exact content of the order for a dawn raid which must now inter alia contain the detailed description of the premises to be searched as well the names of the officials performing the dawn raid.

Another small change, following long court proceedings, now states expressly that fines under the Antitrust Act shall – which is different to the general principles applicable in public law – also be binding on any legal successor.

A further amendment to the Antitrust Act has an interesting feature, which is that the Antitrust Office will not be required to prosecute cartels if the detrimental effect of a cartel on the market, and on consumers, is small and therefore there is no public interest in prosecution.

Generally, looking at the number of cartel proceedings the Czech Antitrust Office actually started (2 in 2009, 1 in 2010, 3 in 2011) and bearing in mind that in the past a large chunk of cartel proceedings were in the rather easy area of Resale Price Maintenance, the prosecution of cartels on the national level by the national authority is not well developed. A cynical viewpoint might be that again the changes might look nice but will not change much in practice.

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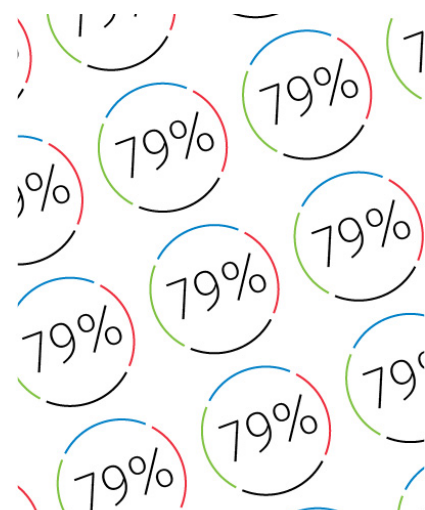
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