

Kluwer Competition Law Blog

No More Dawn Raids in the Czech Republic

Arthur Braun (bpv Braun Partners) · Tuesday, November 18th, 2014

For a few weeks now, the Czech Antitrust Office has stopped its dawn raids. The reason for this stems from the surprising decision of the European Court of Human Rights in Strasbourg (ECHR) dated 2 October 2014 (DELTA PEKARNY a.s., complaint number 97/11). In this case, the Czech Republic was held to have violated Art. 8 of the European Convention on Human Rights and Fundamental Freedoms in course of a 2003 dawn raid. The court ordered the state to pay 5.000 EUR compensation.

Even though the decision was taken with only a 4:3 majority, with strong dissenting opinions given by the three opposing judges and the decision does not yet have binding legal force, the Czech Antitrust Office has decided not to perform any further dawn raids until it (and possibly the lawmakers) have had the time to consider the implications of the decision.

The outcome of the decision may be also be felt in other member states of the Convention, in particular those that allow for dawn raids without prior court approval. According to the decision, only 14 of the EU member states have the obligation to obtain prior court approval when performing antitrust dawn raids.

The decision dealt with a 2003 dawn raid performed by the Czech Antitrust Office. The date, to be noted, was before EU accession but of course many years after the Czech Republic became a member of the European Convention for the Protection of Human Rights. Even though further breaches of the Convention were alleged (and held not to have occurred), a breach of Art. 8 – the right to respect for private and family life – was made out.

The facts: The Czech Antitrust Act 143/2001 Coll. provides for dawn raids in Article 21 to be performed with the prior approval by the President of the Antitrust Office. The legal cause and the aim of the investigation had to be made clear in approving any dawn raid. DELTA PEKARNY, one of the large bakeries in the country, was under investigation for allegedly having been a member of a price-fixing cartel. During dawn raids in two of DELTA's offices, certain access to electronic information was denied by the persons present representing DELTA and they took back two documents claiming privacy. DELTA was fined the maximum applicable procedural penalty of CZK 300.000 (about 11.000 EUR) at that time. During the administrative appeal, the administrative complaint at first degree court, the appeal procedures at the Highest Administrative Court and finally the Constitutional Court, the fine was upheld.

The ECHR reiterated that the *ratione personae* was given in the present case, even though no employees of the complainant claimed violation of privacy. The ECHR based its reasoning largely

on the 2002 decision of Colas. If a country did not provide for prior court approval and supervision by an independent body before an investigation, effective ex post facto control by independent court must be stronger.

The ECHR examined compliance with the Czech law, the question of legitimate aim and whether the interference was necessary in a democratic society. Neither the then applicable Czech laws, nor the following court proceedings did, in the opinion of the majority of judges, show sufficient independent control of the dawn raid itself as to proportionality. Also the lack of rules providing for destruction of documents obtained showed a lack of protection. The fact that the employees of the Antitrust Office were under professional secrecy was not a sufficiently strong counter-argument.

Interestingly enough, the ECHR did refuse to deal with an alleged breach of Art. 13 of the convention – the right to an effective remedy because it had already applied this in its decision relating to the violation of Art. 8.

The consequences of this decision on Czech antitrust practice as well as potentially on all investigations by authorities are considerable. It will be interesting to see – should the decision enter into legal force – how future dawn raids will have to be structured.

A change of the law, which would introduce the concept of obtaining prior approval (even if not required but probably the safest way) would probably mean a year without dawn raids in the Czech Republic.

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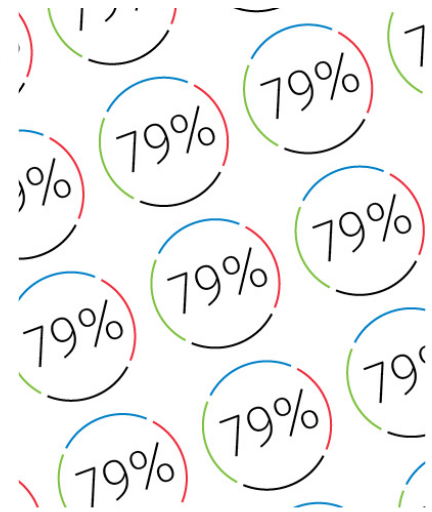
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