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Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
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9th Amendment to the Czech Competition Act

by

Robert Neruda*, Lenka Gachová**, Roman Světnický***

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* Robert Neruda, partner in Czech-Slovak law firm Havel, Holásek & Partners; Faculty of Law, Masaryk University; robert.neruda@havelholasek.cz.

** Lenka Gachová, legal expert in Havel, Holásek & Partners, specialising in competition law; lenka.gachova@havelholasek.cz.

*** Roman Světnický, junior associate in Havel, Holásek & Partners, specialising in competition law; roman.svetnicky@havelholasek.cz.

I. Introductory Summary

On 9 October 2012, the President of the Czech Republic signed Act No. 360/2012 Coll., amending Act No. 143/2011 Coll., on the Protection of Competition, as amended (the 'Competition Act'), and Act No. 40/2009 Coll., the Criminal Code, as amended (the 'Criminal Code'). The Amendment became effective on 1 December 2012.

The main objective of the Amendment Act is to improve the effectiveness of detecting cartel arrangements by the Czech Office for the Protection of Competition (the 'Office'). Many of the legal tools covered by the Amendment were already in use before its promulgation – either on the basis of existing soft laws of the Office or in fact, without any legal backing. Their introduction directly into the Competition Act is expected to increase legal certainty and thus make their use more effective. They include, most of all, the leniency programme and the settlement procedure. Seen as novel is the introduction of certain material consequences of both instruments particularly with respect to the range of potential penalties and criminal law consequences associated with them.

The Amendment also expressly regulates the Office's right to refrain from taking action against anti-competitive practices because of their minor harmful effects. The purpose of such 'prioritisation', which is a manifestation of the opportunity principle, is to free up the Office's sparse resources in order to enable it to investigate more serious violations. Although this should be seen as a legitimate goal, it also entails risks which are addressed in this paper.

Last but not least, the Amendment introduces a new power into the Competition Act which allows the Office to supervise public administration bodies in order to determine whether their activities restrict competition. This is quite a controversial step which could ultimately create the impression that the principles of competition protection take priority in the Czech legal order over all other national interests. This impression is strengthened by the general wording of the relevant provision.

Each of these major amendments is described and thoroughly commented on in a separate section of this paper. The final part presents other changes introduced by the aforementioned Amendment Act relating mainly to jurisdictional and technical issues that might also be of interest.

FIVE KEY CHANGES

- Leniency application as protection against criminal liability
- Settlement – only a 20% fine reduction
- The Office is entitled to decide which cases to pursue
- Public administration bodies may not distort competition
- New penalty – ban on public contracts and concession agreements

II. Leniency Programme

1. New Rules

All over the world, the leniency programme seams to represent the most effective tool for detecting secret agreements between competitors – most cartels detected by competition authorities in developed countries are reported by a leniency applicant.

The leniency programme consists of immunity from fines or a fine reduction granted to a leniency applicant if it ceases the illegal conduct, confesses to the competition authority, and provides the latter with information and evidence enabling other participants to be caught and punished. All this is subject to the assumption that the competition authority has not yet been informed about the existence of the illegal agreement or that the new information supplied by the leniency applicant brings significant added value to existing findings. Only the first undertaking to submit a leniency application can gain total immunity from fines. The Czech competition authority has been using leniency for years based on soft laws formulated and published by the Office on its website[1]. Intense discussions are underway surrounding the issue whether, and if so what protection a 'whistle-blower' has from criminal prosecution and private damages claims from affected customers or competitors.

The Amendment introduces new basic rules for the leniency programme directly into the Competition Act increasing legal certainty for market participants. Defined therein is type I leniency (total immunity) and type II leniency (fine reduction), while upholding the existing granting conditions. Detailed provisions on the leniency programme will continue to be governed by relevant soft laws, the updated version of which will be made available on the Office's website.

The fact that the newly introduced competition law penalty, consisting of a ban on public contracts or concession agreements (see below), will not affect a successful leniency applicant (for both types), constitutes the first of the major changes introduced by the Amendment to the existing leniency framework.

The Amendment changes also the procedural provisions relating to access to case files that contain leniency applications. The Office is apparently

[1] Leniency programme on imposition of fines in accordance with the Article 22 of the Act No. 143/2001 Coll. on the Protection of Competition and on amendment to certain Acts (Act on the Protection of Competition) as amended, on prohibited agreements distorting the competition, on condition that certain additional requirements are fulfilled the parties to the cartel can be granted immunity from a fine or a reduction of a fine (the Leniency programme). Available at: http://www.uohs.cz/en/competition/antitrust/new-leniency-programme.html.

convinced that the failure to protect such documents or, more precisely, failure to protect the applicants, could jeopardise the utilisation of the leniency programme and hence the investigative capability of the Office.

Thus, information about the fact that a leniency application was submitted at all and the identity of the applicant can be held by the Office outside the administrative file. That is so up to the time of the issue of the statement of objections. Afterwards, the parties to the proceedings will be able to access leniency applications but they will not be entitled to make any copies of, or extracts from these documents.

The Amendment has introduced an ambiguous solution to the problem of availability of leniency applications to civil courts conducting damages proceedings. Upon request, the Office will refer the protected documents to the given court. However, it is up to the court to specify under what conditions will access to the documents contained in leniency applications be provided or denied to third parties (the plaintiff in particular)[2].

Answered by the Amendment were also the calls of the practitioners to give leniency applicants not merely immunity from administrative fines but also immunity from criminal prosecution. For that purpose, the Amendment has changed the Criminal Code to incorporate a new, special provision governing 'active repentance' with respect to the criminal offence of a breach of competition rules. In substantive criminal law, active repentance must relate to an individual – perpetrator of a criminal offence – whose own activity will contribute to the successful result in the application of the leniency programme. In other words, an employee or representative of a cartel member should avoid criminal sanctions if he/she later actively cooperates with the Office within the leniency program.

2. Commentary

Although the Office was bound by its own rules on leniency even when they we only a soft law, their incorporation into the Competition Act certainly contributes to guaranteeing the rights of leniency applicants.

The Amendment has in this respect one clear primary goal: to motivate undertakings as much as possible to take part in the leniency programme. As a result, the intention to deliver maximum protection possible for leniency applicants takes precedence over the interests of other parties, be it other parties to the administrative proceedings (those denied access to leniency applications) or third parties (those that cannot be sure if they will be able to rely on leniency applications in civil disputes).

[2] Cf. C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161.

A parallel could be drawn between the Czech provisions and the rules applicable to proceedings before the European Commission. It is disputable, however, to what an extent are the latter consistent with the principles of Czech administrative proceedings or, more precisely, its administrative sanctioning. Experience shows extensive difficulties faced by a party to cartel proceedings when denied, for a significant proportion of the procedure, the opportunity to familiarize itself with allegedly key evidence against it, or to verify its authenticity and credibility. Even after the leniency application is incorporated into the file, such party must rely on its memory being precluded from making copies of, or excerpts from, the documents. Such provisions considerably limit the possibility of building an effective procedural defence.

Moreover, the Office declares that its objective is to put into practice, for the time being, a rather technical threat of criminal sanctions. It should be noted in this context that individuals involved in cartel arrangements face a prison sentence of up to eight years under the Czech Criminal Code. The introduction of criminal immunity for a leniency applicant's employees and representatives, alongside the expected growth in activity by the Police and prosecution services, is likely to increasingly motivate cartel members to consider the use of leniency. This will be true all the more in cases related to public procurement and tenders, which offer a leniency applicant the additional benefit of being exempt from the danger of facing a new sanction – a ban on public contracts and concession agreements.

NEW RULES REGARDING THE LENIENCY PROGRAMME

- Higher legal certainty for leniency applicants
- Limited access to leniency applications by other parties to the proceedings and third parties
- Successful leniency applicant will protect its employees from criminal sanctions and itself from facing a ban on public contracts and concession agreements

III. Settlement

1. New Rules

Another important change brought about by the Amendment Act is the introduction of the concept of settlement directly into the Competition Act. Settlement allows the Office to reduce penalties for those who acknowledge responsibility for committing an infringement, as defined and legally qualified

by the Office in a statement of objections. The new provisions explicitly require the offender to confess to committing the conduct at hand.

The fine reduction is considered to act as compensation for simplifying the procedural situation of the Office. It is legally set at a fixed rate of a 20% discount on the amount of the fine indicated in the statement of objections. Hence, the Office is not able to reduce the penalty by any more than the statutory 20%.

The Amendment also regulates the period during which the parties to the proceedings can submit an application for settlement. In principle, they can do so within 15 days from the day of the delivery of the statement of objections. A settlement application that has already been filed can be withdrawn no later than 15 days after the lapse of the period available for the original submission (i.e. within 30 days since the delivery of the statement of objections). The withdrawn application and the documents and information attached thereto shall not be taken into account during the on-going administrative proceedings. Thus, if the party to the proceedings confesses to the conduct in its settlement submission but subsequently withdraws it, the Office should not take into account the information provided by that party in its application for the forthcoming decision.

If the Office reduces the fine for a settlement applicant, the new type of sanction associated now to competition law infringements – a ban on public contracts or concession agreements – cannot be imposed on that undertaking in the same case.

2. Commentary

The main advantage of settlement procedures is that parties may actively influence the length of the administrative proceedings and the content of the resulting decision. Experience shows that the latter are usually short and do not contain details relating to the anti-competitive behaviour. This fact alone limits their use in future disputes concerning compensation of damage caused by anti-competitive behaviour.

However convinced one might be that settlement might be a practical solution for both the parties and the Office, it has not been clear for some time now whether the offer of a 20% fine reduction in exchange for acknowledging responsibility for a competition law violation is a sufficient motivator for such step in the Czech Republic. Undertakings will always consider the advantages and risks associated with a confession as part of settlement, on the one hand, and the judicial review, including the likelihood of the Office's decision being annulled, on the other.

While the European Commission applies settlement to cartels only, the Czech Competition Act permits its use with respect to all types of infringements,

including vertical agreements and the abuse of dominance. It is understood that one of the reasons for limiting the amount of the discount to 20% is to avoid obstructing the effectiveness of leniency (if the fine reduction was comparable, it would be more rational to use settlement). However, these arguments do not apply to non-cartel cases, abuse and vertical agreements in particular, which cannot benefit from leniency. It can be argued that the discount could and should in such cases be even higher – 50% – as it used to be the case in the past.

In accordance to the Amendment, the Office is able to apply settlement in cases where it considers reduced punishment to be adequate to the nature and severity of the infringement. The Office would clearly like to reserve a certain level of discretion in deciding when to apply the settlement procedure. However, the criterion of severity is not relevant in this context. In particular, settlement should not be limited to lesser cases only (in other words, it should not exclude agreements among competitors). Indeed, the Office has applied settlement to such a case in the past[3]. The option of concluding a settlement agreement even in cartel cases should thus be kept open.

As already mentioned, the Office has been using settlement even before the Amendment. Future will show whether, and to what an extent, the Office is actually willing to deviate from its established decisional practice. The announced soft law could eliminate existing doubts. It is regrettable that these guidelines were not issued prior to the entry into force of the Amendment so that undertakings could more thoroughly acquaint themselves with the new settlement framework.

SETTLEMENT IN THE CZECH REPUBLIC

- Only a 20% discount on the fine
- Settlement available for cartels, abuse of dominance and vertical agreements
- Protection against bans on public contracts and concession agreements but not against criminal liability

IV. Prioritisation

1. New Rules

The Amendment gives the Office a new statutory power whereby it can decide, after a preliminary investigation, that no administrative proceedings will be opened in a given case. Such decision can be taken due to lack of public

[3] Cf. decision of the Office No. ÚOHS-S169/2008/KD-368/2011/850/KNe of 10 February 2011 in the case Cartel of detergent manufacturers.

interest in conducting a further investigation because of the minor scale of the anti-competitive effects of the preliminarily scrutinised practice. This situation reflects the so-called 'prioritisation' of the competition authority's activity and/or the enforcement of the principle of opportunity.

Enacting the prioritisation principle should allow the Office to avoid having to extensively deal with infringements which affect the functioning of competition only to a very limited extent. The Office alleges that it will use the freed resources for cases where the violation has more serious consequences for the entire economy.

The Office will determine the types of behaviour which pose a limited threat to competition upon the consideration of several criteria:

- nature of the behaviour: the Office will check whether competition was completely excluded as a consequence of the given anti-competitive behaviour, in particular if exclusion was intentional;
- form of the anti-competitive behaviour: the Office should primarily examine whether the anti-competitive effects result from enforcement by an individual undertaking or from an agreement or whether the investigated undertakings applied controls and sanctions aimed at securing the execution of the prohibited agreement;
- importance of the market: the Office will favour the initiation of proceedings in cases where the breach has a nation-wide impact as opposed to those having local effects only while taking into consideration the importance of the given market for downstream economy sectors and for consumers;
- number of affected consumers: in accordance with the legislator's intention, public interest in conducting full competition law proceedings will exist, as a rule, if the behaviour affected thousands of consumers.

The Office is obligated to make a written and reasoned record of its decision to not commence proceedings in its file.

Alongside the introduction of the principle of prioritisation into the Competition Act, the Office issued a working version of a Notice on the definition of proceedings without public interest and on an alternative solution to competition-related problems[4]. It elaborates therein on the criteria considered in this context and gives examples of behaviour considered of marginal impact on effective competition. For the sake of enhanced transparency and predictability, the Office shall publish an annual list of cases which ended in a decision to not proceed with the investigation and where the identified competition problem was remedied without the commencement of full proceedings. Moreover, if a court that conducts civil proceedings (e.g. for

[4] Available at: www.uohs.cz/cs/hospodarska-soutez/aktuality-z-hospodarske-souteze/1490-verejna-diskuse-o-vymezeni-rizeni-na-jejichz-vedeni-neni-verejny.html.

compensation of damage caused by anti-competitive conduct) submits an inquiry concerning such case, the Office may answer that competition law has indeed been breached despite the fact that it chose not to investigate it fully.

2. Commentary

Contrary to many opinions, the use of prioritisation is to be supported, in principle – the Office should be able to concentrate its resources on the investigation of most serious violations. However, the manner in which the Office will proceed and the lack of effective review of its decision remains a concern.

The Amendment requires that a mere note is to be made in the administrative file on the Office's decision not to proceed with a given case. However, in accordance with the Code of Administrative Procedure, an appeal cannot be filed against this type of decision. Czech courts are very restrictive as far as allowing third parties (typically complainants) to challenge any outputs of the Office. It can thus be assumed that an undertaking or a consumer affected by anti-competitive behaviour that was not pursued has nowhere else to go to have the Office's conclusion concerning the minor importance of a case re-evaluated.

In accordance with established decisional practice, neither the investigated nor the complainant can have access to the file before the actual opening of formal proceedings. The complainant will thus have no chance to review the reasons why the Office considered the challenged practice as behaviour that poses a low degree of threat for the economy.

The impossibility to duly review the Office's decision cannot be seen as a favourable legal solution as it can facilitate an arbitrary approach including even the dismissal of difficult cases, for whatever reason. There is no need to stress that a decision not to proceed with complex or sensitive cases would sharply contradict the purpose of prioritisation or the role of the competition authority as the guardian of fair competition.

Point 15 of the draft Notice indicates that it is possible to decide not to proceed with a full investigation if it is not necessary to provide extensive evidence to conclude that the law has indeed been breached. It is unclear why the Office would wish to forfeit the possibility to punish anti-competitive behaviour that has been proven or which can be proven with minimal effort. Thus, the situation of injured parties is generally complicated. Although the Office confirms the possibility of answering a court inquiry as to whether a given practice amounts to a breach of competition rules, it is not clear whether it will be possible to force the Office to make such a statement.

Moreover, the potential impact of such an expert opinion remains questionable since it is not preceded by fully evidenced formal proceedings.

Finally, incorporating the prioritisation principle may lead to a situation where the Office does not deal with 'minor' cases. Such an approach could put smaller entities under the impression that they will not face any negative consequences for breaching competition law.

Having previously decided not to proceed with 'less serious violations' in order to investigate more severe offences, and having subsequently dealt with the latter, one has to wonder if the Office will subsequently tackle cases that were previously not proceeded with for lack of resources. Such an approach would certainly contradict the principle of legal certainty and equal treatment.

PRIORITISATION

- The Office shall be authorised to decide not to proceed with a case of flagrant breach of competition law if low public interest exists therein
- Unclear or disputable criteria defining public interest
- Complainants cannot defend themselves against an unfounded decision not to proceed with their case

V. Supervision over Public Bodies

1. New Rules

The Amendment extends the supervisory powers of the Office to also cover public administration authorities, both on the national and local level. All public bodies are now subject to a ban on distorting competition whether by providing preferential support to a particular undertaking or otherwise. Pursuant to the new Section 22aa(2) of the Competition Act, the Office may impose a fine of up to CZK 10,000,000 (up to EUR 390,000) for a competition law violation committed by a public body.

If a local government body distorts competition, the Office shall send a final and binding decision to that public entity's supervisory agency under the Act on Municipalities, Regions and the City of Prague. It shall subsequently transfer the entire administrative file to that agency at its request.

Interestingly, the Senate of the Czech Republic introduced here a change into the draft Amendment. According to the general substance of Section 19a (1), public administration authorities are prohibited from distorting competition by providing preferential support to a particular undertaking or

otherwise. The wording set by the Senate is more stringent than the original proposal, which prohibited public administration authorities from distorting competition by 'evident' support or aid. This change clearly indicates the legislators' efforts to make the language of the Act more rigorous. Based on the final wording of the Amendment, public administration bodies may not distort competition by way of any support or aid (not just its evident form) that would give an advantage to a particular undertaking.

2. Commentary

Public administration authorities and local government bodies have broad competencies that enable them to interfere with business sectors making them potentially also able to inappropriately interfere with, and distort, the market. Deliberate interference with the primary aim of giving an advantage to a specific undertaking (or group of undertakings) is undesirable. Experience shows that competition advocacy as applied by the Office, embedding competition principles into the policies of other public administration bodies through comments and public proclamations, is not always efficient.

The wording of the Amendment under which the Office is able to proceed against any measure that distorts competition evokes the notion of superiority of competition policy (protection of competition) over other policies and interests of a democratic state (such as health care and welfare policies). The Office, if it were to use this new power wisely, would have to always apply the proportionality test and consider each time whether a measure that distorts competition is in fact necessary to achieve the aim of another state policy (and whether a less restrictive measure exists that would enable the achievement of the same goal). Otherwise, the Office would probably have to assess the declaration of Prohibition based on the protection of public health[5], from the competition law perspective; as such prohibition would undoubtedly result in competition restrictions.

It follows from the experiences of the Slovak Antimonopoly Office, which has a similar supervisory power, that its application makes sense in certain cases. For example, the Slovak Antimonopoly Office imposed a fine on the Bratislava Nové Mesto Borough Authority for having issued a binding opinion precluding the opening of a new pharmacy in a building of an outpatient clinic. The given explanation was that 'a functional pharmacy already exists in

[5] Please note that the Czech government declared a Prohibition (a prohibition to sell alcohol) in 2012 as a response to several cases of alcohol-poisoning. It is an example of the competition restriction due to the conduct of public body. On the other hand, the Prohibition was declared in order to protect citizens' health until the investigation is finished.

the building of this outpatient clinic, which, together with other pharmacies in the vicinity of the outpatient clinic sufficiently guarantees medical care to the people who live in the area in question'[6]. Thus, anti-competitive support was provided in this particular case to the operator of the already functioning pharmacy in the form of a negative decision that prevented new entrants from entering the market and engaging in effective competition.

It appears that the new legal provisions amount to the prohibition of any financial subsidies and advantages given by the state and local governments to particular undertakings if such subsidies and advantages could distort competition. Importantly, this rule applies even if such preferential treatment does not amount to state aid within the meaning of Article 107 TFEU, that is, even if it is not capable of affecting trade between Member States. It is worth considering whether the legislator was actually aware of the wide extent of the prohibition it created and its consequences.

It is likely that the Office believes that the Amendment will provide it with a new, more effective tool in its combat against 'tailor-made' public contracts and corruption. The question remains, however, whether a threat of a fine of up to CZK 10 million is a sufficient deterrent considering that public contracts are often worth billions of crowns. It is also questionable whether imposing a fine will make any sense as its recoverability will, as a rule, be problematic. Transfers of money from one state administration authority to another do not appear to be meaningful either.

Thus, although the new provisions should principally be welcomed, it is likely that its success will largely depend on how the Office will handle them, that is, whether it will promote the competition principles actively, but proportionately, and whether its decisions will actually be accepted by other public administration authorities.

SUPERVISION OVER PUBLIC ADMINISTRATION AUTHORITIES

- A very broad ban on any competition distortions by the state, counties and municipalities
- State aid is prohibited, even if not capable of distorting trade between Member States
- Fine up to CZK 10 million
- Will it be applied by the Office at all? Will it be applied in a proportionate manner?

[6] Decision of the Slovak Antimonopoly Office no. 2007/39/1/1/083 of 9 October 2007 in the case of *Městská část Bratislava Nové Mesto* (District Bratislava – New City).

VI. Other Changes Relating to the Competition Act

In addition to the above-covered new provisions incorporated into the Competition Act, the Amendment brings about a number of partial changes and additions also. Their purpose is to eliminate logical inaccuracies in the text of current legislation and/or to clearly define the rights and duties of the Office and other entities.

1. Statement of Objections

A statement of objections is a written declaration of the Office (not a decision) by which the parties to the proceedings are informed that a particular behaviour of theirs is regarded by the Office as unlawful, about its legal qualification, and evidence on the basis of which the Office arrived at this conclusion. Further procedural steps of the Office and the parties shall be developed upon delivery of a statement of objections.

As a consequence of the Amendment, the Office is now obligated to inform the parties to the proceedings in the statement of objections of the amount of the fine to be imposed upon them. This change helps strengthen the rights of the parties to the proceedings and to enhance the transparency and predictability of the subsequent steps taken by the Office. At the same time, knowing what amount of fine to expect makes it possible for undertakings to better assess the advantage of using fine reduction mechanisms embedded in the settlement and leniency procedures.

2. Providing Information to the Office

The Amendment introduces a general duty to provide the Office with complete, accurate and truthful materials and information. This obligation applies irrespective of whether they are submitted on the basis of a prior written request from the Office or whether they are provided on a voluntary basis. A breach of this duty may be sanctioned by the Office with a procedural fine. Thus, under the new provisions, a fine may also be imposed on those who provide the Office with incomplete, incorrect or false information on their own initiative such as undertakings notifying a concentration, applicants for an exemption from the ban on concentrations between undertakings or third parties (e.g. complainants).

3. New Type of Sanction

The Amendment reflects also the Czech government's strategy to combat corruption by giving the Office a new power – the right to impose a ban on public contracts and concession agreements. The ban lasts a period of three years and can be imposed if the scrutinised infringement was committed in connection with a contract-award procedure or a tender for a concession. The ‚period of three years', to which the rule referrers to, indicates that the sanctions will not be imposed in a flexible manner at the administrative discretion of the Office. Instead, it will always cover the exact statutory period of three years. This provision will have an impact mainly on cases involving bid-rigging.

The Amendment introduced therefore into the Competition Act a ban similar to that contained in the Public Procurement Act and in the Concessions Act. This new and stringent power could spark a significant inflow of leniency applications by parties to bid-rigging and cartel agreements. Indeed, the introduction of this new sanction may prove to have a greater impact on undertakings than the usual fines as it can lead to a major loss of profits (especially for those whose activities depend on their participation in public contracts), customers, and ultimately even market share.

4. Legal Succession

The Amendment also changes the conditions for the transfer of liability for an administrative infringement from a legal entity to its legal successor. Before the Amendment, liability was passed on to a legal successor only if the latter knew or could have known that the other legal entity had committed an act that possessed an elements of an anti-competitive infringement.

Under the Amendment, liability for anti-competitive conduct of a legal entity that ceased to exist passes to its legal successor automatically. Thus, the Amendment objectifies the criterion for the transfer of liability for an administrative violation as the cessation of the existence of a legal entity causes the transfer of that liability automatically without the need to prove knowledge or awareness of the violation by the legal successor.