

The antitrust amendment brings welcome adjustments to competition law. However, it neglects those who buy and pay.

The amendment to the Act on Protection of Competition came into force in December 2012, introducing two new instruments to deal with cartel issues in the Czech Republic – the leniency program and settlement.

Both instruments enable participants in cartel agreements to avoid sanctions, or a significant portion of a sanction, in exchange for cooperation with the Office for the Protection of Competition (OPC).

Under the leniency program, the first competitor to approach the OPC and provide information and documents on secret cartel agreements will be exempted from a full potential penalty, which can be up to CZK10 million or 10 percent of the net sales for the most recent full fiscal period. The next competitor to approach the OPC will also be awarded up to 50 percent of the sanction, provided that this party submits documents that add significant evidentiary value to the information the OPC already holds.

Under settlement, a competitor may be exempted from up to 20 percent of any sanction even when the OPC has already revealed anti-competitive behavior. In this instance, the competitor must admit such behavior within 15 days of being notified of the OPC's reservations. The amendment requires the OPC to disclose the value of the penalty to be imposed on the relevant competitor, which may encourage them to admit their behavior based on the figures presented by the OPC.

The leniency program and settlement have previously been used by the antimonopoly office in practice. However, until now, they have not had strong legislative backing. For example, last year the OPC granted a complete pardon to a company within the Henkel Group in the case of a cartel agreement concluded in the detergent market. A company that is a part of the Procter & Gamble group was granted a reduced penalty for making use of the leniency program and settlement, from the original amount of nearly CZK60 million to approximately CZK24 million, and the third, not so significant party to the agreement had its fine decreased by approximately CZK1.4 million.

Previously, statutory bodies and other natural persons acting on behalf of cartels could be held liable for negotiating anti-competitive agreements under criminal law, with the threat of up to three years' imprisonment. The amendment changes the rules regarding this, stating that if the competitor succeeds in receiving a pardon or a reduction of penalty, the criminal liability of the natural persons involved will be waived.

Claims Too Low?

It is certainly possible that the measures above are a step in the right direction for combatting cartel operations. The leniency program is an incentive for those operating cartels to disclose their agreements and, additionally, will affect cartel relations and may contribute to exposure.

Its express inclusion in the law removes concerns relating to the lack of legal binding power of these OPC methods and, if the requirements stipulated by the law are met, ensures cartels should be legally entitled to a pardon or reduction of penalty. In addition, the removal of the criminal liability is a favorable signal for natural persons involved. Settlement also facilitates the work of the OPC, removing demanding legal battles where parties to cartel arrangements admit to guilt and accept penalties.

One possible criticism of the amendment is that it ignores those significantly affected by protection of competition, i.e., the consumers. In effect, this leaves ordinary buyers and payers to supplement the increase in products prices as a result of cartel agreements.

While it is likely consumers will pay for any anti-competitive conduct, their individual claims resulting from the violation of these rules will amount to very little. As a result, it is unlikely they will be able to individually assert a claim against a cartel. However, the total value of these claims can be substantial and ultimately benefit the participants of the cartel agreement, particularly if a cartel successfully negotiates proceedings with OPC. Though the leniency and settlement instruments may create an efficient, enforceable antimonopoly law, the results may not be acceptable for individual consumers.

Inspiration from the West

One solution may be the introduction of a "class suit", where individual claims are operated as a joint action, with a qualified entity distributing any awarded sum between the injured parties. Unfortunately, such legal action requires thorough legislative regulation. We would definitely find inspiration west of our border. As the regulator for anti-competition conduct affecting trade between member countries, the European Union must play a significant role in the introduction of class suits into Czech regulation. Although legislative works have not brought the desired result in this area so far, Czech legislators should not ignore this issue, enforcing only the easy stuff.

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