

Czech Republic

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The principal rules regarding cartels are laid down in Act No. 143/2001 Collection of Laws, on the Protection of Economic Competition (the Act), which came into effect in June 2001. The agency responsible for the enforcement of the Act is the Office for the Protection of Economic Competition (the Office). The organisation of the Office and its scope of competence are set out in the Act and in Act No. 273/1996 Collection of Laws on the Competences of the Office. For the purpose of further implementing the Act, the Office may issue decrees. The head of the Office is appointed by the president of the Czech Republic for a period of six years. The same person can be appointed head of the Office twice only. At the time of writing the head of the Office is Martin Pecina.

2 What is the substantive law on cartels in the jurisdiction?

Under Article 3 of the Act, the following agreements are prohibited: agreements between entities, decisions by associations of entities, and concerted practices (hereinafter referred to as 'agreements') which result or may result in the distortion of competition. This refers to both horizontal as well as vertical agreements. The Act provides for the following examples of prohibited agreements:

- the direct or indirect fixing of prices or other business terms and conditions;
- limiting or control of production, sales, research and development or investments;
- the division of markets or sources of supply (market allocation);
- making the conclusion of a contract subject to the acceptance of further obligations, which by their nature or according to commercial usage and fair business practices have no connection with the subject of such contracts (tying);
- the application of different conditions to identical or equivalent transactions with other entities, thereby placing them at a competitive disadvantage; and
- an obligation of the parties to an agreement to refrain from trading or other economic cooperation with entities that are not parties to the agreement, or to otherwise harm the same (group boycott).

Pursuant to the Act, such prohibited agreements are null and void unless exempted by the Act itself or in a decree issued by the Office.

A general statutory exemption is provided for in the Act in case of an agreement which contributes to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- impose on the competitors concerned restrictions that are not indispensable to the attainment of the above objectives; and
- afford such competitors the possibility of eliminating competition in respect of a substantial part of the products in question.

For an agreement to be excluded from the prohibition of cartel agreements, all of the conditions must be observed.

Agreements satisfying the above conditions will be automatically valid ab initio without having to be notified. The currently applicable system is the so-called 'self-assessment system' where it falls upon the competitors to evaluate whether or not their agreement fulfils the criteria set out by the Act. The Office only exercises subsequent control over whether agreements between competitors meet the criteria for application of the statutory exemption. If the Office discovers a breach of the Act in the course of its supervisory activities, it will bring proceedings against the competitor in question relating to the breach of provisions of the Act.

In addition, section 6 of the Act stipulates that the following agreements are exempt from the general prohibition on restrictive agreements stipulated under section 3 of the Competition Act:

- horizontal agreements, if the aggregate market share held by the parties to the agreement does not exceed 10 per cent of any of the markets affected by the agreement; and
- vertical agreements, if the market share held by each of the parties to the agreement does not exceed 15 per cent of any of the markets affected by the agreement.

Even if the agreements meet all conditions for the statutory exemption to apply, the exemption does not apply to the following agreements, the so-called 'hard-core' restrictions:

- horizontal agreements on direct or indirect price fixing, division of markets or sources of supply;
- vertical agreements on direct or indirect price fixing to a purchaser for the resale of goods or granting the purchaser full protection for such resale in a defined market; and
- individual agreements forming part of a network of agreements pertaining to identical, comparable or substitutable goods, provided that:
 - the aggregate share of the relevant market of the parties to the agreements forming such a system, where at least one and the same competitor is party to the same,

exceeds 10 per cent of the relevant market (horizontal agreements) or 15 per cent of the relevant market (vertical agreement); or

- the network of vertical or mixed agreements restricts access to the relevant market for competitors not party to such agreements and competition on the relevant market is significantly restricted by the cumulative effect of parallel networks of similar vertical or mixed agreements concluded for the distribution of identical, comparable or substitutable goods.

3 Are there any industry specific offences/defences?

In addition to the general exemptions set out in the Act such as the de minimis exemption and the exemption of agreements that fulfil certain statutory criteria (the positive effects of the agreement in question is considerable even from the perspective of the consumers, the agreement does not impose unnecessary restrictions on other participants in the market and does not eliminate or threaten to eliminate competition in the market), the Act stipulates that block exemptions applicable under EC legislation are also applicable to agreements without an EU dimension to which Czech law applies.

4 Does the law apply to individuals or corporations or both?

The Act applies to all natural or legal persons, associations thereof, associations of such associations and other groupings, including where such associations and groupings are not legal persons, provided that they take part in competition or may influence competition by their activities.

5 Does the regime extend to conduct that takes place outside the jurisdiction?

The Act applies to agreements entered into by entities outside of the Czech Republic which may distort or do distort competition in the Czech Republic, provided, of course, there is no EU dimension to the pertinent agreement.

6 Are there any current proposals for change to the regime?

There is no publicly available information relating to any possible proposals for change to the regime.

Investigation

7 What are the typical steps in an investigation?

The Office undertakes the supervision of the entities with regard to the fulfilment of their obligations under the Act and the implementing legislation. Entering into prohibited agreements and acting in accordance with such agreements, thus breaching the Act, are also subject to the Office's supervision. In the course of its supervisory activities, or upon notice, the Office may informally begin to collect evidence of a prohibited agreement.

If the Office considers there is sufficient evidence of a breach of the provisions of the Act, it commences formal proceedings and informs the relevant parties that it has done so. The Office may only open proceedings by a formal decision. Proceedings in regard of these issues cannot be opened based on a request for review filed by a competitor or third party; it is at the discretion of the Office to initiate the proceedings. Should the Office receive information from a third party regarding a potential breach of

the Competition Act, it shall make a preliminary examination and if appropriate, it will open proceedings by its decision. The Office must notify the informing third party of the results of its preliminary examination and the decision taken. However, third parties cannot intervene in proceedings before the Office.

The proceedings are commenced on the day the Office takes the initial act against a competitor that is allegedly in breach of the Act. Such initial act is usually delivery of the decision to open proceedings.

The Office must proceed in cooperation with participants to the proceedings. The respondents are entitled to submit evidence, make proposals and suggestions and give statements as to any and all facts and evidence to be used as a basis for the issuance of the Office's decision. The Office is obliged to ascertain in a safe and reliable manner the substance of the matter and issue its decision based only on such findings. For this purpose, the competitors must submit to an investigation conducted by the Office. The Office is not required to order an oral hearing. Nevertheless, in matters concerning prohibited agreements the Office usually does conduct an oral hearing. The Office must order an oral hearing upon a respondent's request. Oral hearings before the Office are held in closed session. In the event that the Office establishes that a prohibited agreement has been entered into, it shall declare such fact in its decision together with a prohibition of further performance under such agreement.

8 What investigative powers do the authorities have?

The Office may base its decisions upon evidence obtained from filings, proposals, suggestions and statements of the participants in the proceedings, evidence, affirmations and other generally known facts or facts known to the Office due to its official activities.

For the purposes of an investigation, the Office has powers to request from competitors, administrative bodies and state agencies documents and information necessary for rendering a decision. The Office must be provided with complete, accurate and truthful documents and information. During the proceedings and investigation in respect of a relevant matter, the Office is not bound by proposals or suggestions made by the participants.

To ascertain the actual state of the matter, the Office is entitled to enter any premises, land and means of transport of the competitors, examine books and other business records, take copies or extracts therefrom and ask for an oral explanation on the spot. In case there is a justified suspicion that the business records, books or other documents are kept somewhere other than the relevant business premises, such as the dwellings and apartments of natural persons, ie, the statutory bodies, members or employees of the target of an investigation, the Office representatives may conduct a search of such premises, if so approved by the court in advance. No deadline is provided for the court to make a decision on whether to grant the Office access to premises other than the business premises of a competitor.

When requesting documents and information, the Office must state the subject matter and purpose of the investigation and advise that failure to comply with the Office's requests may be subject to a fine imposed by the Office in accordance with the Act.

Persons may refuse to give testimony if it could expose them or their family to criminal prosecution. Furthermore, a person may refuse to give testimony if it would lead to disclosure of a state, economic or official secret or breaching a duty of confidentiality.

International cooperation

- 9 Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

The Office is a member of the International Competition Network, in which various members from around the world share experiences and information regarding the protection of competition.

The Office also cooperates with EU member states' competition authorities and the European Commission within the European Competition Network and is also a member of the European Competition Authorities association.

The Office may: (i) ask the European Commission for copies of documents necessary for a review of a particular case; (ii) consult on any case with the European Commission; (iii) request that the European Commission add a relevant case to the agenda of the Advisory Committee for Restrictive Practices; (iv) submit statements to the courts on issues concerning application of articles 81 and 82 of the EC Treaty; and (v) ask a competent court for any and all documents necessary for a review of the case.

The Office is also obliged to: (i) provide the European Commission with any and all necessary information to carry out the powers granted by Regulation No. 1/2003; (ii) provide the European Commission with any necessary assistance; (iii) notify the European Commission and other pertinent national competition authorities in writing of the opening of proceedings based on articles 81 or 82 of the EC Treaty; and (iv) within 30 days prior to the issuance of a decision, send to the European Commission a summary of the case, its proposed decision and other documents necessary for review. The Office is also required to provide such assistance to other national competition authorities within the EU.

The Office may also appoint a representative to the Advisory Committee for Restrictive Practices and, upon request of the European Commission or other pertinent national competition authority, conduct an investigation.

- 10 How does the interplay between jurisdictions affect the investigation, prosecution and sanction of cartel activity in the jurisdiction?

See question 9.

Adjudication

- 11 How is a cartel matter adjudicated?

Proceedings before the Office are concluded by issuance of a decision by the Office. If the Office determines that a violation under the Act occurred, it may impose a penalty in its decision or other remedial measures, or both, and set a deadline for performance. Otherwise it shall set forth in its decision that by their conduct the participants in the proceedings did not violate the Act.

In addition, the competitors may offer commitments by which they propose to eliminate the effects of their infringement and prevent their reoccurrence. Within 15 days of the commencement of the proceedings, the competitors may suggest to the Office how they intend to cure the defective situation brought about by their conduct. The offer of commitments by the parties to the proceedings cannot be revoked until the Office makes a decision on the issue. The Office is not obliged to accept the offered commitments and may only do so if the parties to the proceedings have not carried out a prohibited cartel agreement and where there has been no major distortion of competition. If the Office accepts the commitments offered by the participants

it shall terminate proceedings without determining whether their conduct violated the provisions of the Act. In its decision, the Office charges the participants with fulfilment of the commitments and duties suggested by them and accepted by the Office. Should the participants fail to comply with such commitments, the Office reopens the proceedings.

- 12 What is the appeal process, if any?

An appeal against a decision of the Office can be filed with the head of the Office. The appeal must be filed within 15 days of the date of delivery of the decision. The head of the Office reviews the decision of the Office in its entirety.

In addition to the regular appeal proceedings before the head of the Office, the entities have the possibility to have the appeal decision of the head of the Office reviewed in proceedings before the administrative court pursuant to Act No. 150/2002 Collection of Laws, on Judicial Administrative Proceedings (the Act on Judicial Administrative Proceedings). In such case, the defendant is the head of the Office who decided upon a regular remedial measure, ie, upon the appeal against the first instance decision of the Office. An action for court review must be filed within two months of the date on which the decision of the head of the Office on appeal was announced to the entity. Filing an action, however, does not generally have the effect of postponing or suspending the remedial measures.

- 13 With which party is the onus of proof?

As stated under question 7, the Office must ascertain in a safe and reliable manner the substance of the matter and issue its decision based only on such findings. The competitors are entitled to submit evidence, make proposals and suggestions and give statements as to any and all facts and evidence to be used as a basis for issuance of the Office's decision.

Sanctions

- 14 What criminal sanctions are there for cartel activity? Are there maximum/minimum fines/sanctions?

Natural persons (individuals) who engage in wilful behaviour resulting in a major violation of the Act with the aim of gaining significant unauthorised advantages for themselves or third parties may be imprisoned for up to two years or be prohibited from carrying out their professional activity connected to their criminal behaviour, or may receive a pecuniary punishment.

- 15 What civil or administrative sanctions are there for cartel activity?

There are administrative sanctions provided for by the Act. The Office may order the parties to a prohibited agreement to refrain from all prohibited activities under such agreement and ban enjoyment of rights and performance of obligations under such agreement. Furthermore, the Office may impose upon each breaching entity a fine of up to 10 million Czech koruna or 10 per cent of the net turnover for the preceding accounting period of the entity breaching the Act. Within the limits provided by the Act, the scope of sanctions and amount of the fine imposed by the Office upon the entities breaching the Act is at the discretion of the Office and it greatly depends on the nature of the breach and the impact or potential impact of the activity on economic competition in the Czech Republic.

16 Are private damage claims or class actions possible?

Third parties who have suffered damages as a result of activity under a prohibited agreement may claim damages against parties to such agreement in civil proceedings before the courts.

17 What recent fines or other penalties are noteworthy? What is the history of fines? What is the number of times fines have been levied? What is the maximum fine possible and on what basis are fines calculated?

With respect to the manner of calculating fines and their maximum amount, please see responses below.

The Chairman of the Office issued a final second-instance decision in which he reduced a fine imposed on the bakeries Delta, Penam and Odkolek over a cartel on prices from 2003 to 52.8 million Czech koruna from 66 million Czech koruna (24.8 million Czech koruna for DELTA PEKÁRNÝ, 14.8 million Czech koruna for ODKOLEK and 13.2 million Czech koruna for PENAM).

As mentioned above, rather than imposing fines, the Office's current policy is to prefer restoration of competition by accepting remedial measures in the form of offered commitments where possible and allowed by the law.

Sentencing**18** Do sentencing guidelines exist?

The Act stipulates that the Office may impose a fine of up to 300,000 Czech koruna or 1 per cent of turnover for the preceding accounting period on anyone who intentionally or negligently fails to provide the Office with requested information within the stipulated period of time, or provides incomplete, false or inaccurate information, fails to submit requested books and other business records or fails to allow them to be examined or otherwise refuses to submit to investigations of the Office. The Office may impose a fine of up to 100,000 Czech koruna on anyone who intentionally or negligently without a serious reason fails to appear at a scheduled oral hearing, refuses to testify or otherwise obstructs the proceedings. The Office may impose a fine on an entity breaching the provisions of the Act relevant to the prohibited agreements of up to 10 million Czech koruna or up to 10 per cent of the net turnover of the entity in the preceding calendar year. The Office may impose a fine of up to 1 million Czech koruna for failure to comply with an enforceable decision of the Office.

19 Are sentencing guidelines binding on the adjudicator?

The above-mentioned limits and conditions for imposing a fine are set out in the Act and as such are binding on the Office as the adjudicator.

Leniency/immunity programmes**20** Is there a leniency/immunity programme?

Yes, a leniency programme was launched by the head of the Office in the second half of 2001, in the form of an internal communication.

21 What are the basic elements of a leniency/immunity programme, if one exists?

The objective of the leniency programme is to create incentives for entities that are parties to prohibited agreements to cooperate with the Office when it is investigating activities under prohibited agreements for the protection of consumers and other persons in the Czech Republic. The earlier the entity contacts the Office, the greater the reduction of the fine; this is combined with an assessment of the usefulness of the information provided. The leniency programme addresses mainly those entities that no longer wish to be party to a prohibited agreement but are afraid of receiving a high fine for their activities under such an agreement.

22 What is the importance of being 'first in' to cooperate?

Only the first entity to cooperate with the Office is granted the privilege of either not having to pay a fine at all or getting the greatest reduction to the fine. However, to obtain the highest level of leniency, ie, no fine, the entity must in addition:

- be the first to inform the Office of a hitherto undisclosed prohibited agreement (this must be done before the Office acquires any knowledge of it or when the Office has information about such prohibited agreement but lacks sufficient evidence to begin a formal investigation of the entities involved and to prove the existence of the prohibited agreement);
- terminate its participation in the prohibited agreement prior to informing the Office;
- provide the Office with all relevant information and documents and other evidence that is true and relevant when informing the Office of the existence of the prohibited agreement and must cooperate with the Office during the whole of the proceedings; and
- prove that it did not initiate the signing of the prohibited agreement and that it did not compel any other entity to become a party to the prohibited agreement.

If the above conditions are not fulfilled and the entity concerned is the first to inform the Office of the prohibited agreement, provides it with sufficient evidence thereof and ceases to participate in such agreement, it may obtain a reduction of between 30 and 50 per cent of the fine.

23 What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

If the entity is the second to contact, inform and provide documents and evidence of a prohibited agreement to the Office and ceases to perform under such agreement, then the entity is entitled to a fine reduction in the range of 20 to 30 per cent.

24 What is the best time to approach the authorities when seeking leniency/immunity?

In view of the risk that the Office may begin proceedings on its own initiative or that another entity which is a party to the prohibited agreement may contact the Office first and as a result the fine reductions under the leniency programme may not be as high as otherwise or may even be unavailable, it is advisable to contact the Office at the earliest possible moment.

Update and trends

Recently the Office stayed proceedings initiated against CEZ as, a major electricity producer and distributor, for price discrimination of one of its suppliers and accepted commitments offered by CEZ as to remedy the situation. By taking this decision, the Office confirmed its declared position that prevention and acceptance remedies in the area of protection and economic competition are preferred to mere prosecution and financial sanctions.

On 29 and 30 November 2006, a conference on the occasion of the fifteenth anniversary of the establishment of the Office was held in Brno, Czech Republic. The conference offered a unique opportunity to listen to speeches given by high-ranking representatives of European competition authorities, OECD representatives and lectures by leading experts in competition law from the Czech Republic and abroad, as well as of taking an active part in a debate on various topics of current antitrust policy.

- 25** What confidentiality is afforded to the leniency/immunity applicant and any other cooperating party?

In the internal notice on the leniency programme there are no rules specifically governing confidentiality. However, under the Act a person employed by or otherwise connected with the Office, and performing activities on its behalf, may not disclose any facts which he or she ascertains in the course of such activities that constitute a business secret or confidential information. This obligation survives the termination of the employment or other relationship with the Office.

- 26** What is needed to be a successful leniency/immunity applicant (or other cooperating party)?

It is up to the Office to decide upon full leniency or a partial reduction of a fine. The Office decides upon a fine reduction or full leniency in the course of its final evaluation of the prohibited agreement prior to issuing its decision. The key factor in the granting of full leniency or any fine reduction is the value of the evidence provided by the applicant. The evidence provided to the Office by the applicant must be decisive and substantial. It is not sufficient to inform the Office about the mere existence of a prohibited agreement.

- 27** What is the effect of leniency/immunity granted to a corporate defendant on employees of the defendant?

As stated above, the Act, and therefore also the leniency programme, does not apply to employees. Employees are not parties to the prohibited agreements. The Act and the leniency programme apply to natural persons or legal entities, associations

thereof, associations of such associations and other groupings, including where such associations and groupings are not legal entities, provided they take part in competitive activities or may influence competition by their activities, ie, persons acting on their own behalf who take part in activities under a prohibited contract.

- 28** What guarantee of leniency/immunity exists if a party cooperates?

The leniency programme was issued by the head of the Office as an internal communication. It is therefore not considered a binding legal instrument. However, in practice, if it is applied to one entity, and under similar circumstances the Office refuses to apply it to another entity, then such a course of action by the Office would be inconsistent with the principles of good administration and equal treatment.

- 29** What are the practical steps in dealing with the enforcement agency?

The Office applies the leniency programme to an entity upon a written request by the entity. The request must be made by an authorised representative such as the statutory body of the entity or legal counsel or representatives acting on behalf of the entity on the basis of a power of attorney. Employees of the entity, unless specifically authorised to do so either by law, on the basis of a power of attorney, cannot legitimately apply for leniency on behalf of their employer. As already mentioned, it is advisable to apply to the Office for leniency as early as possible.

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- 30** Are there any ongoing or proposed leniency/immunity policy assessments or policy reviews?

The Office has not published any information regarding this issue.

Defending a case

- 31** Can counsel represent employees under investigation as well as the corporation? Do individuals involved require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

As stated above, neither the Act nor the leniency programme apply to employees.

- 32** Can counsel represent multiple corporate defendants?

Such multiple representation is not excluded per se. However, a conflict of interest between different parties in a cartel case will often arise, thus multiple representation is generally not very common.

- 33** Can a corporation pay the legal costs of and/or penalties imposed on its employees?

As stated above, neither the Act nor the leniency programme apply to employees.

Getting the fine down

- 34** What is the optimal way in which to get the fine down?

If the conditions set out in the internal communication on the leniency programme issued by the head of the Office are met, it is at the sole discretion of the Office to determine the extent of the reduction of the fine within the parameters of the stipulated range. As already stated above, the earlier the entity contacts the Office and begins cooperating, the higher the chances of being granted full leniency.