

## The President of the Czech Republic signs the new Criminal Code which introduces criminal sanctions for horizontal agreements

**Czech Republic, Anticompetitive practices, Cartel, Criminal sanctions, Sanctions/Fines/Penalties, Hardcore restriction, Reform, All business sectors**

### Introduction

On 27 January 2009, the President of the Czech Republic signed the new Criminal Code adopted by the Chamber of Deputies and approved by the Senate. The codex will enter into force on 1 January 2010 whereby it will replace the current Criminal Code, dating back to 1961.

In short, the purpose of the new Code is to finally detach the Czech criminal law from the last remnants of the Communist legal ideology and, above all, to bring this segment of law into line with modern European trends. To this end, the new Code brings about a great deal of changes among which features inter alia the criminalisation of certain anticompetitive practices.

### The new criminal framework

The criminalisation of anticompetitive practices is enshrined in Section 248 of the new Criminal Code. In essence, this provision stipulates that anyone who concludes with his competitor an agreement on price-fixing, on market division or other agreement distorting competition will be liable to a three year's imprisonment, if the damage caused to other competitors or consumers does not exceed CZK 500,000 (approx. EUR 18,000). He will be liable to the imprisonment between 6 months and 5 years, if he concludes a prohibited agreement as a member of an organized group, repeatedly or if he thereby causes damage, or gains benefit, of at least CZK 500,000. Finally, the term between 2 and 8 years will be applicable in cases where the perpetrator has caused damage, or gained benefit, of at least CZK 5 mil. or where he has caused another person to go bankrupt.

It clearly follows from the above-cited provision that the new criminal framework covers only horizontal cartels, i.e. anticompetitive agreements concluded between the direct competitors. This is so because these kind of agreements represent the most serious violations of competition law with extraordinary negative consequences for society. By contrast, the new criminal law does not cover less serious infractions of competition rules, such as vertical agreements, abuse of dominant position or unlawful mergers.

### The legitimacy of the new criminal framework

The newly proposed criminalisation of horizontal agreements has already given rise to a controversy among Czech practitioners who highlight the potential pitfalls of the new legislative framework and warn against possible incompetence in its application [1]. Although the seriousness of these concerns cannot be overestimated, a significant distrust in the new law may easily undermine its pro-competitive potential which, it is submitted, clearly outweighs the possible troubles associated with its application.

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In the first place, the criminalisation of horizontal cartels is in line with emerging European trends. Among the countries which employ criminal sanctions against individuals guilty of serious infringements of competition law are Denmark, Ireland, France and Estonia. In addition, there is a visible tendency towards the criminalisation of competition law at the level of EU institutions. No doubt, these trends find their inspiration in the US where criminal sanctions have been introduced as early as 1890 with the adoption of the Sherman Act and nowadays belong to the standard methods of antitrust enforcement.

The legitimacy of the criminal enforcement of competition law is generally based on the following considerations. First, it is to be born in mind that hard core cartels inflict significant harm on the population. They substantially increase prices in an unnecessary way and, at the same time, are likely to restrict the consumers' choice as well as the quality of the goods and services. According to the estimates of the OECD, the resulting harm amounts annually to many billions of US dollars [2]. Consequently, there is an emerging consensus that economic harm of such a magnitude justifies (if not directly necessitates) penal sanctions.

Second, criminal sanctions have a strong deterrent effect on individuals who are in fact responsible for serious violations of competition law but, so far, have been shielded from any punishment behind the corporate veil of companies on whose behalf they acted. Sanctions aimed directly at the individuals directly responsible for the law infringements are necessary since companies themselves may not always be able or willing to discipline their employees for anticompetitive conduct, e.g. because the person they intend to sanction is no longer employed with them or because they simply appreciate the benefits derived from the infraction.

Third, the above-mentioned deterrent effect of criminal sanctions on individuals compensate for the structural inadequacy of administrative sanctions imposed on companies. It has been estimated that sufficiently effective sanctions inflicted on companies should amount at minimum to 150% of the annual turn-over in the products concerned by the violation. However, companies will often be unable to pay fines of such a height and even if they were, such fines would have serious negative side-effects on third parties. Thus, for instance, the companies would have to cut their employees' salaries or reduce resources for research and development. In many cases, however, they would go bankrupt which would have negative impact on their employees, suppliers, creditors, consumers and, not the least, tax authorities [3]. Accordingly, the assertion that sufficiently high administrative fines may dispense with the need for individual criminal sanctions is unfounded. In fact, criminal law enforcement represents a viable complement to the standard methods of administrative enforcement.

## Conclusion

The adoption of the new Criminal Code represents an important step in the advancement of pro-competitive environment in the Czech Republic. Given that the new criminal framework is aimed at the most significant violations of competition law, it is bound to have a positive effect on the enhancement of consumer welfare. At the same time, the limited material scope of the new law provides a prima facie guarantee that it will not frustrate the effective functioning of the Czech economy. Although the new law will bring about increased demands on the professional qualification of the competent public authorities, the possible concerns associated with its application should not lead to resignation at the progressive advancement of competition law enforcement.

[1] See, e.g., Robert Pelikán, Jan Pěvrátel, The Czech Chamber of Deputies adopts a new Code criminalising horizontal agreements, *e-Competitions*, n° 22924.

[2] See OECD Report *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, 2002, p. 90.

[3] See W.P.J. Wils, *Is Criminalization of EU Competition Law the Answer?*, paper presented at the Amsterdam Center for

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Law and Economics Conference Remedies and Sanctions in Competition Policy, Amsterdam, 17-18 February 2005, p. 28  
et seq., available at <http://papers.ssrn.com/sol3/papers....>

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