

Penal Code to cover cartels



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The new Penal Code, adopted after a decade of discussions, represents one of the most important codification projects since 1989. It will enter into force on Jan. 1, 2010, replacing the current Penal Code whose origins date back to 1961.

In essence, the purpose of the code is to finally detach Czech criminal law from the last remnants of communist legal ideology and to bring this important area of law into line with current European trends.

Not surprisingly, one of the chief purposes of the new code is protection of an efficient market economy, characterized by free competition of the relevant market players.

Among the new concepts introduced by the new Penal Code is a criminal ban on cartels. Until now, the protection of competition against cartel agreements has been guaranteed only through the administrative enforcement by the Office for the Protection of Economic Competition (ÚOHS). However, the detection ratio has remained permanently low. The unsatisfactory results of the fight against cartels led ÚOHS to become a chief proponent of a new criminal framework aimed to ensure a sufficient degree of deterrence by providing for individual penal sanctions.

The new ban on cartels is enshrined in Section 248, titled the Violation of Competition Law Regulations. In essence, the provision stipulates that anyone who concludes with his competitor an agreement on price fixing, market division or another agreement distorting competition will be liable to three year's imprisonment provided the damage caused to other competitors or consumers does not exceed Kč 500,000 (€17,500). If the damage exceeds Kč 500,000, he will be liable to imprisonment between six months and five years. Finally, the harshest sanction, represented by the term of up to eight years, is reserved for perpetrators who cause damage of at least Kč 5 million.

One of the main traits of the new criminal law is that it covers merely horizontal cartels, i.e., anticompetitive agreements concluded between direct competitors. This is because these agreements, labeled by the U.S. Supreme Court as "the supreme evil of antitrust," constitute the most serious violations of competition law with profoundly negative consequences for

market economy and consumer welfare. By contrast, the new criminal law does not cover less serious infractions such as vertical agreements, abuse of a dominant position or unlawful mergers, which continue to be subject to administrative sanctions.

The desirability of the new law

Although the criminal ban on cartels has given rise to no significant controversies among the members of Parliament, this is not to say that the concept is generally accepted without any reservations. The idea has since its inception attracted a large measure of criticism. The critics, often leading practitioners in the field, argue that police investigators, public prosecutors as well as judges lack professional expertise that would guarantee just and efficient enforcement of the law, devoid of any excesses. According to them, criminalization of economic behavior is counterproductive. Instead, they believe that compliance with competition rules may be secured solely by administrative fines.

Although the criticism voiced against the new criminal ban on cartels is not without merits and, in particular, the actions of the law enforcement agencies will have to be carefully scrutinized, it must be acknowledged that the pro-competitive potential of the new law clearly outweighs the possible troubles associated with its application.

The criminal enforcement of cartel law enshrined in the new code is in line with emerging European trends. Among the countries that employ criminal sanctions against individuals guilty of serious infringements of competition law are the UK, Ireland, Denmark, France and Estonia. The precursor of these tendencies is the U.S. model under which criminal sanctions, introduced as early as 1890 with the adoption of the Sherman Act, are widely acknowledged as a highly effective method of antitrust enforcement.

It is also to be borne in mind that hard core cartels are always anticompetitive and, accordingly, illegal. They have an adverse impact on the market economy and

consumer welfare since they increase prices and, at the same time, reduce the quality of goods and services. According to estimates by the Organization for Economic Co-operation and Development (OECD), the resulting harm amounts annually to many billions of U.S. dollars. Consequently, there is an emerging consensus that economic harm of such a magnitude justifies a vigorous answer in the form of criminal sanctions.

In addition, criminal sanctions have a strong deterrent effect on individuals who are 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 ultimately responsible for the creation of cartels are necessary for effective deterrence 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 cartel activity.

Finally, the deterrent effect of criminal sanctions on individuals compensates for the structural deficiencies of administrative sanctions imposed on companies. It has been estimated that sufficiently effective sanctions inflicted on companies should amount at minimum to 150 percent of the annual turnover in the products affected by the cartel. However, companies will often be unable to pay fines of such a height and even if they were, these fines would have serious negative side effects. In the most serious cases, they would go bankrupt, which would adversely affect the unemployment rate, not to speak about the negative impact on their suppliers and customers.

Stronger arsenal of legal weapons

Administrative enforcement of cartel law has its own limits and cannot of itself guarantee an effective fight against anticompetitive agreements. Although it will certainly remain the chief method of competition law enforcement, it should be complemented in appropriate cases with criminal enforcement that may duly compensate for its structural deficiencies.

Seen from this perspective, the adoption of the criminal ban on cartels represents an important step in the strengthening of the pro-competitive environment in the Czech Republic. It promotes effective functioning of market economy and, above all, the ultimate goal of competition law, consumer welfare. It remains to be seen whether its implementation in practice will meet the expectations associated with its introduction. ■

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