

The International Comparative Legal Guide to:

Cartels & Leniency 2008

A practical insight to cross-border Cartels & Leniency



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THE CARTEL PROHIBITION

1 The Legislation

1.1 What is the basis and general nature of the cartel prohibition?

The cartel prohibition is laid down by statute Act No. 143/2001 Coll. of 4 April 2001 on the Protection of Economic Competition and on Amendment to Certain Acts (Act on the Protection of Competition) as amended (“PECA”).

Similarly to the EC competition law, it covers all entities defined as “undertakings”: i.e. *natural or legal persons, their associations, associations of such associations and other groupings, including where such associations and groupings are not legal persons, provided they take part in competition or may influence competition by their activities, although they are not entrepreneurs.*

1.2 What are the specific substantive provisions for the cartel prohibition?

Agreements that are capable of distorting competition are regulated by Sections 3 to 7 PECA. Under Section 3 PECA, agreements that distort or may distort competition are prohibited and absolutely null and void (invalid). Section 3 sets out a demonstrative list of such agreements and governs conditions which, if satisfied, exempt the agreement from the general prohibition. Section 4 governs block exemptions and Section 5 defines horizontal and vertical agreements. Section 6 sets out the conditions that need to be satisfied in order to exempt an agreement from the prohibition upon application of the *de minimis* rule and defines the most important agreements that cannot fall within the ambit of the *de minimis* exemption (hard-core agreements).

The prohibition itself (Section 3 PECA) provides that any agreements between undertakings, decisions by associations thereof, and conduct by undertakings acting in concert, which distort or may distort competition, are prohibited and invalid unless PECA or any other provisions of law provide otherwise or unless the Office grants an exemption by way of an implementing regulation. A demonstrative list of expressly prohibited arrangements includes the following:

- direct or indirect price fixing or fixing of other business conditions;
- limitation or control of production, sales, R&D or investment;
- sharing of the market or sources of supply;

- bundling and tying;
- discriminatory conduct; and
- collective boycotts.

1.3 Who enforces the cartel prohibition?

The Office for the Protection of Economic Competition (the “Office”) is authorised to conduct “complete” public enforcement of competition law in the Czech Republic. Its powers comprise the tasks of investigation, prosecution and enforcement of national and EC competition rules. Generally the Office acts in accordance with rules of administrative proceedings - at the end of the proceedings the Office issues binding decisions imposing penalties and/or remedies on undertakings found to have engaged in anti-competitive conduct. Nonetheless some preliminary investigation or “competition advocacy” may occur alongside the formal proceedings. The administrative decisions of the Office are reviewable by the Czech administrative courts, but the courts are not involved in the administrative proceedings before the Office.

The Office also supervises the performance of obligations set out in its legally effective decisions, and has power to apply Articles 81 and 82 of the EC Treaty and provide the European Commission with necessary assistance in matters relating to the Czech markets. The Office is not an active regulator of conduct by undertakings and has no special powers to protect consumers. Its task is exclusively to protect economic competition as a social phenomenon, rather than to protect the interests of particular individuals involved in competition.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

When considering thresholds relevant to the opening of an investigation, the *de minimis* rule applies unless agreements constitute hard-core cartels. The general prohibition of cartels would thus not apply to (i) horizontal agreements where the combined share in the relevant market of the parties to the agreement does not exceed 10% or (ii) vertical agreements where the combined share in the relevant market of the parties to an agreement does not exceed 15%.

The cartel prohibition would not apply to agreements that fulfil conditions laid down in block exemptions adopted pursuant to Article 81(3) the EC Treaty (even if there is no effect on trade between Member States).

Administrative proceedings concerning alleged cartel agreement may be commenced by the Office at its own initiative or a motion by a third party. The parties to the proceedings (undertakings involved in the alleged cartel) each receive a notice indicating the

basic concerns of the Office at commencement of the proceedings. The parties may submit any facts, documents and other evidence they find relevant during the entire proceedings, but also have a duty to render all co-operation to the Office.

Although some preliminary investigations may be conducted before commencement of the formal administrative proceedings, most of the investigation relating to the case will take place during the proceedings.

The settled practice of the Office is to submit a “statement of objections” to the undertakings facing any charges before a decision is adopted on merits. This provides the undertakings with additional time to make their last statements or further proposals and may offer commitments to eliminate the Office’s concerns. If such commitments are considered by the Office as sufficient to protect competition the Office may impose an obligation on the party to fulfil such commitments and terminate the proceedings without the adoption of a decision on the merits.

If the Office finds out within the framework of proceedings concerning the alleged cartel that the parties have entered into a prohibited agreement, the Office will declare this to be the fact in a decision, whereunder the Office will also prohibit performance of the agreement in the future.

1.5 Are there any sector-specific offences or exemptions?

There are no sector-specific cartel offences under PECA or other relevant laws.

The competition rules set out in PECA do not apply to the conduct of undertakings relating to the production of and trade in agricultural products if they act in compliance with applicable Community laws and to undertakings providing services of general economic interest. Further, the cartel prohibition does not apply to agreements of sales organisations and associations of agricultural producers on the sale of unprocessed agricultural commodities (except for hard core agreements).

1.6 Is cartel conduct outside the Czech Republic covered by the prohibition?

Jurisdiction under PECA is based on the *effect doctrine* whereunder the prohibition on cartels under PECA also applies to actions by undertakings occurring abroad which distort or may distort competition in the Czech Republic. Hence the provisions will not apply to agreements, the impact of which is felt solely on a foreign market.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out an unannounced search of business premises	Yes	No
Carry out an unannounced search of residential premises	Yes*	No

Investigatory power	Civil / administrative	Criminal
■ Right to ‘image’ computer hard drives using forensic IT tools	Yes	No
■ Right to retain original documents	Yes	No
■ Right to require an explanation of documents or information supplied	No	No
■ Right to secure premises overnight (e.g. by seal)	Yes	No

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

It should be noted that as the proceedings before Office are administrative and the Office by no means acts within criminal proceedings, it cannot exercise any of the mentioned powers in the table. There are no other specific features.

2.3 Are there general surveillance powers (e.g. bugging)?

The Office is not vested with any express surveillance powers, which may be used exclusively in the criminal investigations.

2.4 Other powers of investigation.

There are no other powers of investigations.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business and/or residential premises would be regularly carried out by the staff of the competition authority (a mix of lawyers, general case handlers and, if required, IT specialists).

They will not be prepared to wait for external legal advisors to arrive if in-house counsel is present.

2.6 Is in-house legal advice protected by the rules of privilege?

General protection is afforded by essential rights embedded in the Czech Constitution and on the Act on Advocacy in relation to communications between external (independent) legal advisors (in Czech “*advokát*”) and their clients. Any such communications should thus be expressly labelled and kept separate from other documents. In the event of any doubt, the documents should be kept in a sealed envelope until the decision on the nature of the document is adopted.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals.

There are no other material limitations.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used in connection with a cartel investigation?

The Office has the power to impose fines of up to CZK 300,000 or up to 1% of the net turnover achieved by the undertaking in the last accounting period in the event of obstructions to its investigations.

The Office may further impose a fine up to CZK 100,000 on anyone who intentionally or negligently without serious reasons fails to appear at a scheduled oral hearing, refuses to testify or otherwise obstructs the proceedings.

Recently the Regional Court in Brno upheld the decision of the Office Chairman in which a procedural fine was imposed on an undertaking for obstructing the purpose of an inspection on the company's premises (by making a laptop unavailable and failing to provide requested documents). The Office imposed the highest possible fine at the time (i.e. CZK 300,000).

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Under current Czech law, legal entities cannot incur criminal liability and hence only administrative sanctions may be imposed on companies in breach of competition law.

Where an undertaking, either intentionally or negligently, infringes the cartel prohibitions or fails to comply with remedial measures, the Office may impose fines of up to CZK 10 million or 10% of the undertaking's net turnover achieved in the last completed accounting period.

When deciding on the amount of the fine, the Office has a duty to take account of the gravity, possible recurrence and duration of the breach. The Office recently published guidelines on penalties summarising the basic principles for calculation of fines for anti-competitive conducts (both prohibited agreements and abuse of a dominant position). The guidelines are based on the rules for imposition of fines adopted by the European Commission, but also take into account the particular legal and competitive environment existing in the Czech Republic.

The highest fine imposed an individual undertaking to date is CZK 240 million and almost CZK 1 billion for members of a single cartel agreement.

3.2 What are the sanctions for individuals?

In theory, natural persons, either as employees/members of statutory bodies of the undertakings or entrepreneurs participating in economic competition, may, under certain circumstances, face criminal prosecution for breach of competition law.

The rules are set forth in the Criminal Code. The subject matter of this particular crime is defined as *"a serious breach of the rules of economic relations under generally applicable statutory provisions with the intention of acquiring a substantial unjustified advantage for oneself or another"*. Thus the Criminal Code may penalise any conduct beyond that permitted under the laws governing economic competition. Some authoritative legal commentaries suggest that PECA forms one of the generally applicable statutes falling within this clause and therefore, that the aforementioned provision of the Criminal Code may apply to cases of unfair restriction of economic competition arising pursuant to a cartel agreement or abuse of a dominant position. To the best of our knowledge however no such case has yet arisen.

3.3 What are the applicable limitation periods for the imposition of sanctions for cartel conduct?

There are two basic time limits set out in PECA. The subjective time limit stipulates that the Office may impose the fine no later than 3 years following the day on which it became aware of the breach; however no later than 10 years after the breach has occurred (objective time limit).

3.4 Is cartel conduct by individuals potentially an extraditable offence?

This is not possible under current Czech law.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

As there are no specific costs/penalties for employees, there is no such regulation.

LENIENCY / WHISTLE-BLOWING

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Office has recently issued Guidelines substantially amending the rules governing the application of the leniency programme (dating from 2001).

The Office has the power (i) to grant full immunity from fines or (ii) to reduce a fine about to be imposed in a forthcoming administrative decision under PECA.

In circumstances where an undertaking furnishes the Office with information, documents, evidence and witness statements relating to the existence of a horizontal agreement distorting competition of which the Office had no knowledge before provision of such information and/or in circumstances where the Office had been aware of the existence of such agreement, but could not obtain sufficient and reliable evidence from other sources, the Office may grant the undertaking with full immunity (upon compliance with conditions set out below).

Undertakings that do not qualify for full immunity (there may only be one "winner") may still benefit from reductions in fines imposed by the Office in connection with an alleged cartel provided that they supply information or evidence which, in the Office's view, constitutes significant added value with respect to the evidence already in its possession at the time the application was submitted. The term "added value" refers to the extent to which the submitted evidence, by its very nature or its level of detail, reinforces the ability of the Office to prove the alleged cartel.

The Office sets out general requirements for compliance by each applicant, irrespective of whether its application is for immunity or a reduction of fine. The applicant must (i) co-operate fully, genuinely, helpfully and continuously with the Office from the date of application for the entire duration of the administrative proceedings, (ii) end its involvement in the alleged cartel immediately following application, (iii) whilst contemplating making an application to the Office but prior to doing so, must not destroy, falsify or conceal evidence relating to the alleged cartel, or disclose, directly or indirectly, the fact or any of the content of the

application it is contemplating except to other competition authorities, (iv) not have initiated the formation of a cartel or taken steps to coerce other undertakings to join or remain in the cartel or have had a leading role in the cartel.

The benefits of immunity comprise immunity from pecuniary sanctions under the PECA relating to the alleged cartel. This outcome, however, leaves open the possibility of (i) further criminal prosecutions of natural persons under the criminal law and (ii) civil lawsuits before the courts (e.g. damages claims).

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The 'marker' system allows an undertaking wishing to make an application for immunity to gather the necessary information and evidence within a period agreed with the Office.

To be eligible to secure a marker, the applicant must provide the Office with its name and address as well as information concerning the parties to the alleged cartel, the affected product(s) and/or service(s), the affected territory(ies), the estimated duration of the alleged cartel and the nature of the alleged cartel. The undertaking must also provide its reasoning for such application.

The Office has discretion as to whether or not it grants a marker. Where a marker is granted, the Office shall determine the period within which the applicant has to complete the marker by submitting the information in the scope required for immunity. If the applicant completes the marker within the set period, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

4.3 Can applications be made orally (to minimise any possible subsequent disclosure risks in the context of civil damages follow-on litigation)?

The application may be lodged in writing, orally on the record or electronically, provided that a verified electronic signature is also attached.

Any statement addressed to the Office in connection with the application becomes part of the administrative file and may thus be accessed (save for information clearly marked as business secrets) by the other parties to the proceedings, i.e. by the other parties to the alleged cartel.

The Guidelines expressly stipulate that a grant of immunity or reduction of fine following a successful application cannot protect the applicant from private lawsuits in connection with the applicant's participation in a cartel.

4.4 To what extent will the application be treated confidentially and for how long?

Under the Guidelines only the parties to the administrative proceedings may access the leniency application. Except for documentation which has constituted or will constitute evidence in the administrative proceedings before the Office, the applicants may try to limit access to parts of the application marked as business, banking, or similar secrets protected by law. The Office and its employees have a duty of confidentiality under PECA. Severe penalties may be imposed under PECA on any Office employee for improper disclosure of information.

The Office cannot guarantee to protect the content of the application once the administrative file leaves the Office in consequence of court review proceedings or an investigation

conducted by criminal prosecutors. The applicant's identity and evidence will almost inevitably become known upon commencement of court proceedings, because the trial takes place in open court.

4.5 At what point does the continuous cooperation requirement cease to apply?

There is no specific provision governing this point; however, generally the undertakings have a duty to co-operate until the end of the administrative proceedings, including eventual appeal proceedings before the Office Chairman.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

No such rules are set out under current Czech law.

6 Plea Bargaining Arrangements

6.1 Are there settlement or plea bargaining procedures (other than leniency)?

No such rules are set out under current Czech law. The leniency application should be lodged by the person(s) entitled to act on behalf of the undertaking.

APPEALS AND DAMAGES ACTIONS

7 Appeal Process

7.1 What is the appeal process?

Administrative proceedings before the Office take place at two instances. Appeal against a decision at first instance (by the Office) may be filed with the Office Chairman within 15 days of the date on which the initial decision is served on the party (appellant).

The Chairman's decision may be subject to judicial review; appeal against a legally effective administrative decision may be made to the Regional Court in Brno within two months of delivery of the Chairman's decision.

The Court can either reject the application for appeal or annul the Chairman's decision and the first instance decision. If the administrative decision is annulled, the matter is returned to the Office for further proceedings. The judgment of the Regional Court in Brno can be challenged either by the party to the proceedings or by the Office before the Supreme Administrative Court of the Czech Republic within two weeks of the receipt of the judgement. The judgment of the Supreme Administrative Court is binding on the Office, but may nevertheless become subject to review by the Czech Constitutional Court in the event that a party to the administrative proceedings files a complaint based on alleged breach of any of the fundamental rights set out in the Czech Constitution and the Charter of Fundamental Human Rights and Freedoms of the Czech Republic.

7.2 Do courts frequently adjust the level of penalty imposed by the competition authority? If so, on what grounds?

Adjustment of penalties by the Courts is rare. The Courts usually annul the administrative decision and return the matter to the Office if it is held to be defective. Judicial adjustment of the amount of penalty takes place only in the event of a manifest error in the process of determination/calculation of the amount of penalty.

The Regional Court in Brno is currently reviewing the first decision by the Office Chairman adopted in the proceedings initiated by a leniency application.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

Czech law has no separate procedural rules governing civil damages actions in competition matters. In the event of such claims, the parties proceed in accordance with the provisions of the Code of Civil Procedure generally applicable to claims for compensation for any kind of damage.

Each party to the dispute has a duty to bear the costs incurred in the proceedings. As a general rule, the winner is awarded recovery of its costs by the other party. Hence the loser will be bound to bear its own costs and to pay the winner's costs insofar as ordered by the court. Costs of the proceedings comprise mainly of court fees (the current court fee for a claim for compensation for damage is 4 per cent of the sum claimed, up to a maximum of CZK 1 million). The court fee is borne by the claimant. In exceptional cases, the court may take into account the personal circumstances of the claimant and rule that the claimant need not pay the fee.

There are no provisions under Czech law currently in force on treble compensation or damages awarded on a punitive basis. Damages are based on the principle of compensating a party for its loss. On this basis, the claimant is awarded compensation for actual losses, i.e. for a reduction of its existing property (*damnum emergens*) and assets that the party sustaining the loss could not add to its property as a result of breach by the defendant of its obligations (*lucrum cessans*).

8.2 Do your procedural rules allow for class-action or representative claims?

No; the closest equivalent being a court order to "join matters".

8.3 Have there been successful civil damages claims in the past?

Enforcement of competition law by way of claims for compensation for damage has not become an extended practice in the Czech Republic. This is true of individual claims for breach of competition law (stand-alone actions) and decisions by competition bodies (follow-on actions). The main barrier remains a lack of sufficient support under existing Czech law.

Published decisions to date include no legally effective decisions on compensation for damage for breach of competition law in the Czech Republic, although some follow-on proceedings are pending at present (generally these are complicated and protracted cases, involving several expert opinions, etc). The main difficulty relates to the burden of proof, calculation of damage and proving a causal link between the conduct and damages suffered.

"Out of court" settlements are uncommon in the Czech Republic.

OTHER MATTERS

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

The recent changes have restored the former full scope of PECA, repealed by amendments of 22 February 2005 (which excluded electronic communications in their entirety from the jurisdiction of PECA at that time). The changes also more closely specify some general rules of procedure under PECA.

The Office has recently issued two important guidelines- (i) on the imposition of penalties and (ii) the new leniency guideline substantially amending the rules governing application of the national leniency programme.

9.2 Please mention any other issues of particular interest in the Czech Republic not covered by the above.

There have been unsuccessful attempts to enact a statute regulating "economic dependence". The most recent was rejected by the presidential veto following approval of the proposal by the Czech Parliament. The proposal set out that the "economic dependence" should not necessarily be linked to existence of a dominant position. The purpose of the legislation should be to discourage particular aspects of conduct by certain competitors whose market strength has permitted them to insist on application of their own, unilaterally advantageous conditions as against those of their business partners, whose market position is substantially weaker (the legislation should particularly cover conduct of large international retail chains vis-à-vis their suppliers).

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Kocián Šolc Balaščík (KSB) is a leading law firm in the Czech Republic. Founded in 1990, KSB has evolved into a modern firm providing law and tax advice to domestic and foreign clients on all important areas for business. With more than fifty lawyers, tax advisors and patent agents, KSB is one of the largest law firms in the Czech Republic, with branches in Karlovy Vary, Western Bohemia and Brussels. In 2006 and 2007 it was voted Law Firm of the Year in the Czech Republic by Who's Who Legal.

KSB's competition and litigation law practice group has a wealth of experience advising internationally-focused clients such as RWE, Telefónica, SKANSKA, HeidelbergCement, Heineken, United Bakeries, and well-known domestic clients including the Czech National Bank, Czech Consolidation Agency, Karlovarské minerální vody.