

Czech Republic

Kocián Šolc Balaščík Pavel Dejl, Pavel Nosek and Ivo Šimeček

BACKGROUND

1. What is the relevant legislation containing the leniency policy and what is the enforcing body?

Partial or full immunity from fines imposed under Czech Act 143/2001 Coll, on the Protection of Economic Competition, as amended ('the Act') has no legislative basis. Instead the Office for the Protection of Economic Competition ('the Office') issues a notice serving as the basis for the leniency policy and representing a kind of self-restraining soft law declaring how the Office should treat cases under stipulated conditions. The first notice on the leniency programme was published in 2001 and remained effective until June 2007. The Office introduced the new thoroughly revised notice at the end of June 2007 ('the Notice') with the aim of harmonising with the modern ECN model leniency programme and repealing the old one. The Notice is currently available in the Czech version only on the Office's website (www.compet.cz).

Functions relating to public enforcement of competition law in the Czech Republic are concentrated within the Office whose powers comprise the tasks of investigation, prosecution and enforcement of national and EC competition rules. Generally the Office acts within the administrative proceedings (though some preliminary investigation may proceed outside of the proceedings) and its decisions are reviewable by the Czech administrative courts.

2. What are the basic tenets of a leniency/immunity programme?

The basic goals of the Czech leniency programme can be summarised as follows:

- to enable the gathering of evidence of the most serious breaches of competition rules that otherwise might not be uncovered. The programme offers lenient treatment to members of horizontal cartels who decide to cooperate with the Office but otherwise might not do so if the leniency programme did not exist. The Office is thus able to enforce fair competition more effectively through this cooperation, which is completely in accordance with the basic mission of the Office – to protect the competitive process in general and to enable the quick recovery of an effective competitive environment;
- to deter undertakings from forming cartels as others can try to use the immunity offered by the leniency programme to reveal the existence of a cartel. The risk of voluntary disclosure of the contemplated cartel agreement by one of its members in return for full or partial immunity makes it more difficult for competitors to collude. Consequently the preventive impact of the leniency programme benefits the whole economy, including consumers; and
- to confer the maximum benefits of the leniency programme upon the first applicant who meets all of the relevant conditions while still leaving the possibility open for others to reduce their final fine through cooperation. The 'first applicant' is not necessarily the chronologically first applicant but the applicant who first provides the required information. The advantage of being the first and having the chance to receive full immunity is an incentive to make disclosures as early as possible.

The main characteristics of the Czech leniency programme:

- concern corporate leniency only and do not cover sanctions on natural persons who are

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- not undertakings (typically employees);
- exclude from leniency those undertakings that have taken active steps towards the cartel;
- concern only horizontal agreements (ie, agreements and/or concerted practices between competitors and decisions of associations of competitors) aimed at restricting competition by coordinating competitive behaviour of undertakings or influencing the relevant parameters of competition, most typically by fixing purchase or sale prices, the allocation of production or sales quotas or the sharing of markets, including bid-rigging. These cartels constitute very serious violations of competition rules which are often extremely difficult to detect and investigate without the cooperation of at least one of the participants; and
- only the Office itself is entitled to consider whether particular applicants fulfil conditions set for leniency regimes.

3. How many cartels have been unveiled and punished since the adoption of the leniency policy?

The Office recently published an information bulletin containing a brief summary of the leniency practice in the Czech Republic since adoption of the first notice. The Office states there have been just two cases of successful leniency applications. The first case occurred in 2004 when a beverage drink company applied for immunity from fines on its agreement with a distributor containing an exclusive dealership arrangement. The Office was unaware of the breach until the announcement and the company provided the information on a full voluntary basis. Therefore the company was exempted and the fine forgiven, although the market share of the company exceeded 40 per cent and the period in which the agreement was effective reached two years. The second case appeared recently in connection with a worldwide cartel of producers of gas insulated switchgears. The cartel consisted of multilateral arrangements enabling bid-rigging between all main producers for more than 15 years. ABB, one of the undertakings involved in the cartel, decided to apply for full immunity with the Office. In connection with the same matter, it applied for immunity before the Commission and national authorities of other member states. ABB supplied the authorities with full evidence needed to prove the existence of the cartel and in return it received immunity while all the other participants were fined with penalties reaching exemplary amounts.

The Office states there was also at least one unsuccessful application. The case concerned interconnection agreements concluded between mobile operators at the end of 2000. The Office decided that two operators had executed and practiced illegal agreements on indirect fixing of business conditions. In this case the conditions for application of the leniency regime were not fulfilled as the participants did not provide the Office with information on their own initiative and in time, while the Office was yet unaware of that practice. Therefore they were both fined for infringement of competition rules.

There is one case pending currently regarding a cooperation agreement between a sport magazine and betting office in which the magazine committed itself not to publish any betting rates other than the rates of the betting office while the office promised not to issue its own magazine with the same content as that of the magazine and not to advertise in any other magazine. The owner of the sport magazine applied at the beginning of 2006 for leniency and the Office commenced proceedings.

The recently published Notice responds to many problems of the old notice on the leniency programme (see question 18) and one can thus expect more applications in the future.

4. What is needed to be a successful leniency applicant? Is documentary evidence required or is testimonial evidence sufficient?

The Office sets general requirements that must be fulfilled by each applicant, no matter whether asking for immunity or fine reduction ('general requirements'). In order to qualify for leniency, the applicant:

- has to cooperate fully, genuinely, helpfully and continuously from the time of its application with the Office throughout the whole period of administrative proceedings. This means that it shall:
 - provide the Office promptly with all relevant information and evidence relating to the alleged cartel in its possession or that it acquires;
 - provide only full and exact information and no misleading information;
 - remain at the disposal of the Office to reply promptly to any requests that may contribute to establishing relevant facts;
 - make current and, to the extent possible, former employees and members of statutory bodies available to provide the Office with oral explanations;
 - not destroy, falsify or conceal relevant information or evidence relating to the alleged cartel; and
 - not disclose the fact or any of the content of the leniency application before the Office commences the proceedings.
- end its involvement in the alleged cartel immediately following its application;
- 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; and
- has not initiated the formation of the cartel or taken steps to coerce other undertakings to join or remain in the cartel or had the leading role in the cartel.

The Notice and relevant legislation do not set forth a specific standard of evidence to be taken into account by the Office. However the Office is expected to consider evidence that is admissible in court. In general the undertaking participating in a cartel may provide the Office with any relevant information, documents, evidence and witnesses on the existence of the cartel, provided they are true, reliable and helpful for establishing the existence of a prohibited cartel. One might assume that major importance is given to authentic documents and direct evidence. However every information which contributes in a reliable way to proving the existence of a cartel should be assessed as relevant.

The Notice contains explicit rules on the 'significant added value' concept introduced for assessment of applications for fine reductions. The Notice stipulates written evidence originating from the period to which the facts pertain have greater value than evidence subsequently created, and incriminating evidence directly relevant to the facts in question are generally considered to have greater value than those with only indirect relevance. Similarly, the degree of corroboration from other sources required to rely on evidence submitted shall have an impact on the value of that evidence. Convincing evidence has greater value than, for example, evidence in the form of a statement which needs to be confirmed if challenged by a counterparty.

Basically the application may be lodged in writing, orally on the record, electronically or by other technical means (see question 10).

TIMING

5. What are the benefits of being 'first in' to cooperate?

Being the 'first in' confers the greatest benefits on the applicant as full immunity is available to only one participant in an alleged cartel. The first applicant shall receive full immunity provided it submits sufficient evidence to comply with conditions for immunity (see question

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8) and complies with general conditions of the Notice (see question 4) during the whole proceedings.

The benefits of immunity comprise full immunity from pecuniary sanctions under the Act relating to the alleged cartel ('immunity'). However this leaves open the possibility of (i) further criminal prosecutions under criminal law or (ii) civil lawsuits before courts (eg damages claims). Naturally if the applicant fails to disclose other anti-competitive behaviour considered as illegal conduct under the Act, the undertaking is not entitled to immunity with respect to such behaviour.

6. What are the consequences of being 'second'? Is there an 'immunity plus' or 'amnesty plus' option?

The conditions for granting immunity presupposes that only the first applicant complying with those conditions shall receive full immunity, but the second applicant may effectively apply only for reduction of the fine to be imposed on it in a forthcoming administrative decision under the Act ('reduction of fine' – see question 7).

The second applicant might have a (theoretical) possibility to reap the full benefits (immunity) if it becomes apparent that the first applicant fails to fulfil the conditions attached to granting immunity.

7. Are subsequent firms given any beneficial treatment if they make a useful contribution? How are 'useful contributions' defined?

Generally undertakings that do not qualify for immunity may benefit from reductions in fines imposed by the Office in connection with an alleged cartel. This concerns the second and any further applicants. In terms of 'useful contribution', they are supposed to supply information or evidence that 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 strengthens, by its very nature or its level of detail, the Office's ability to prove the alleged cartel.

If the applicant complies with such conditions (ie it submits information or evidence with significant added value), and general requirements for leniency (paragraph 4) are met, the Office shall reduce the fine:

- by 30-50 per cent in case of the first applicant who provides the Office with information and evidence which in the Office's view constitutes significant added value;
- by 20-30 per cent in case of the second applicant who provides the Office with information and evidence which in the Office's view constitutes significant added value;
- up to 20 per cent in case of further applicants who provide the Office with information and evidence which in the Office's view constitutes significant added value.

To determine the level for reducing fines within the above set thresholds, the Office takes into account the time at which the information and/or evidence was submitted and the overall added value of particular information and/or evidence.

SCOPE/FULL LENIENCY

8. Is it possible to receive full leniency? And, if so, what are the conditions required to receive full leniency?

It is possible to receive full immunity pursuant to the Notice. As stated above (paragraph 4), the Notice envisages immunity from pecuniary sanctions under the Act in relation to participation of the applicant in an alleged cartel. However no immunity can be given by the Office in respect of prosecutions abroad.

The Notice provides applicants with two ways on how to receive full leniency (immunity):

- the first ('Immunity Type 1A') concerns cases where the submitted information and evidence enables the Office to carry out targeted inspections (so called dawn raids) in connection with the alleged cartel; and

- the second ('Immunity Type 1B') concerns cases where the submitted information and evidence may enable the Office to prove the existence of the alleged cartel.

The relation between the two types is that immunity is no longer available under Type 1B if it was already granted under Type 1A. Immunity is also available under a lower threshold in Type 1A to create an even stronger incentive for cartel participants to reveal infringements not yet known to the Office. However if the Office carried out (unsuccessful) targeted inspections in connection with the alleged cartel before the applicant's decision to reveal participation in that cartel, only immunity Type 1B is available to the applicant.

Immunity Type 1A

The Office grants an applicant who revealed its participation in an alleged cartel immunity from any fine which would otherwise have been imposed, provided:

- the applicant is the first to submit evidence and information enabling the Office to carry out targeted inspections in connection with the alleged cartel; the assessment of relevance of such information and evidence is at the discretion of the Office;
- the Office had not, at the time of the application, already carried out an inspection and did not already have sufficient evidence to carry out such inspection in connection with the alleged cartel; and
- the general requirements for leniency (question 4) are met.

To enable the Office to carry out targeted inspections, the applicant should provide the Office with the following in particular:

- to the best of the applicant's knowledge at the time of its application:
 - a thorough description of the alleged cartel, including its objects, related activities and mechanism of functioning;
 - information about the affected territory (-ies), affected products and/or services, the duration of the alleged cartel and estimated volume of the market affected by the cartel;
 - precise information about contacts within the cartel (particularly dates, places, content and participants of the alleged contacts);
 - explanations concerning particular pieces of evidence submitted in support of the application;
 - name and address of the undertaking submitting the application and names and addresses of all other undertakings participating in the alleged cartel; and
 - names and positions, locations of offices and, if necessary, residence addresses of all individuals who have been or were involved in the alleged cartel according to the applicant (including individuals involved on behalf of the applicant).
- other evidence relating to the alleged cartel in possession of the applicant or evidence that may be accessed by the applicant (in particular any contemporaneous evidence).

Immunity Type 1B

The Office grants an applicant who reveals its participation in the alleged cartel immunity from any fine that would otherwise have been imposed, provided:

- the applicant is the first to submit information and evidence which enables the Office to prove the existence of the alleged cartel; the assessment of relevance of such information and evidence is at the discretion of the Office;
- the Office did not have sufficient evidence at the time of the submission to prove the alleged cartel;
- no other applicant had been granted conditional Immunity Type 1A in regard to the cartel; and
- the general requirements for leniency (question 4) are met.

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9. How many companies have received full immunity from fines to date?

According to information published by the Office only two companies have received full immunity (see question 3) to date.

PROCEDURE/CONFIDENTIALITY

10. What are the practical steps required to apply for leniency?

An undertaking participating in an alleged cartel that wishes to apply for leniency should approach the Office directly. Only persons entitled to represent the undertaking or act on behalf of it may lodge the application.

The Notice defines the application as a voluntary announcement made by the undertaking or on behalf of it regarding its awareness of the cartel and of its position in that cartel. Such an announcement shall be made especially for the purpose of addressing the Office. Any statement addressed to the Office in connection with the application becomes part of the administrative file and may be used by the Office as evidence. The application may be lodged in writing, orally on the record or electronically, provided it is signed with a guaranteed electronic signature. It is also possible to file it using other technical means such as telex, fax or public data networks (with the message not being signed with a guaranteed electronic signature), provided the application is confirmed or, as the case may be, supplemented using means stated above within five calendar days. The application shall be complete, including all required information and/or evidence (see questions 4, 7, 8 and 16). Upon request, the Office shall provide an acknowledgement of receipt of the application as well as receipt of all further submissions of evidence. In the acknowledgement the Office shall confirm the date and, as the case may be, time of each submission.

Before making a formal application for immunity from fine, the applicant may present to the Office (i) an outline of the relevant information and evidence ‘on a hypothetical basis’ or, as the case may be; (ii) apply for a reservation protecting the applicant’s place in the queue for immunity for a given period of time allowing it to gather the necessary information and evidence in order to meet the relevant requirements (‘marker’).

The undertaking wishing first to present information and evidence on hypothetical basis may approach the Office anonymously (eg, by its legal advisor). It has to provide the Office with a list of evidence to be submitted within a time agreed upon with the Office. The list shall reflect the nature and content of evidence while retaining the hypothetical nature of the application. The incomplete copies of documents (with sensitive information erased) may be attached to clarify the nature and content of the proposed evidence. The identity of the undertaking applying for immunity and identity of other undertakings involved in the alleged cartel do not have to be revealed before evidence described in the application is submitted to the Office. However, products and/or services affected by the alleged cartel, the affected territory and estimated duration must be clearly stated.

An undertaking wishing to make an application for immunity may also initially apply for a marker allowing it to gather the necessary information and evidence within a time period agreed upon 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.

11. Is there an optimal time to approach the regulatory authority?

The approach should be made as early as possible as immunity is basically available on a ‘first come, first served’ basis. The Notice stipulates that the Office shall not consider other applications for immunity until it adopts its position on already lodged applications concerning the same conduct. The Office will also not consider other applications for reduction of fine until it adopts its position towards already lodged application(s) for reduction of fine concerning the same conduct. Thus generally the earlier the application is made, the greater the probability that the applicant will be the first in line for immunity or reduction of fine.

Immunity is even more difficult to obtain once the Office launches an investigation. In any case the Office does not take into account applications for immunity lodged with the Office after the statement of objections has been delivered in administrative proceedings relating to the cartel in question. The Office eventually no longer takes into account any applications for reduction of fines lodged with the Office after the first-instance administrative body has decided on the subject matter.

Furthermore granting of reduction of a fine depends upon the undertaking providing information of significant added value to the information already in the Office’s possession. So the longer an investigation goes on before the undertaking approaches the Office, the greater the chance that the information disclosed will not represent ‘significant added value’ and thus the undertaking concerned will not be able to benefit from a reduction of fines.

12. What guarantees of leniency exist if a party cooperates?

Generally the Office takes its final position on the grant of immunity or reduction of fine in its decision adopted at the end of the administrative proceedings. Particularly in the case of application for immunity, the Office states in the grounds of its decision that the applicant complied with conditions for immunity and general requirements for leniency (see question 4). In case of application for reduction of fines, the Office states in the reasoning of its decision whether the information and evidence submitted by the applicant represented added value with regard to the evidence already in the Office’s possession at the time the application was submitted, whether the general conditions set for leniency were met and the precise amount of fine reduction.

But the applicants may receive some ‘preliminary guarantees’ promptly after their applications have been filed. Provided they comply with the general requirements during the proceedings, these preliminary guarantees ensure that they obtain requested leniency.

The Notice sets forth the so-called ‘conditional acknowledgement’:

- the Office promptly verifies whether the applicant complies with general requirements for immunity after receiving its application for immunity. If the submitted information and evidence are sufficient for these requirements, the Office confirms in writing to the applicant its compliance with requirements for immunity. If the Office finds that the requirements are not met after receiving the application, it informs the applicant about such fact in writing. The applicant may in such case request the Office to give back the documents supplied by it or to consider its application for reduction of fine. This is without prejudice to the Office’s right to obtain information using its common investigative powers; or
- if the Office comes to the preliminary conclusion that the evidence submitted by an applicant for reduction of fine constitutes ‘significant added value’ within the meaning of the Notice, it informs the applicant in writing of conditional compliance with requirements for fine reduction and of the threshold in which the fine may be reduced. This confirmation will be given no later than the date the statement of objections is notified to the parties. If the Office finds that one or more of the requirements attached to leniency have not been fulfilled, it informs the applicant about the fact.

In case of providing information and evidence on a hypothetical basis the Office verifies

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that the nature and content of evidence described in the list complies with the conditions for immunity from fines (Immunity 1A or 1 B) and informs the undertaking accordingly.

The Office is obliged not to use evidence against the applicant when setting a final fine for it in cases when the evidence was submitted by the applicant and it proves additional facts having direct bearing on the amount of the fine (higher gravity or longer duration of the cartel).

13. Is confidentiality afforded to the leniency applicant and other cooperating parties? If so, to what extent?

The Notice provides that access to leniency applications shall be granted only to parties to the administrative proceeding. The applicants may principally try to limit access to certain parts of the application, if such parts are marked as forming its business, banking, or similar secrets protected by law (this is not true about those parts of the documentation which constituted or will constitute evidence). In any case the Office cannot guarantee the protection of content of the application once the administrative file leaves the Office as a consequence of court review proceedings or investigation taken by the criminal prosecutors. The applicant's identity and evidence would almost inevitably become known when a court commences proceedings because the trial would be in open court.

The Office and its employees are subject to confidentiality obligations set out in the Act that set forth severe penalties for any employee of the Office who discloses information improperly.

CONSEQUENCES

14. What effects does leniency granted to a corporate defendant have on the defendant's employees?

The granting of immunity or reduction of fine to a corporate defendant has no effect on the potential liability of its employees. Consequently even if an undertaking is granted immunity, any of its employees could still be theoretically found criminally liable in connection with the undertaking's involvement in the cartel.

15. Does leniency bar further criminal or private enforcement?

The Notice explicitly provides that granting of immunity or reduction of fine in consequence of a successful application cannot protect the applicant from private lawsuits in connection with its participation in that cartel. Thus the leniency regime leaves open the possibility of (i) civil lawsuits for damages against the undertaking as well as; (ii) potential criminal prosecutions under applicable provisions of the Criminal Code against the undertaking's directors or employees.

RELATIONSHIP WITH THE EUROPEAN COMMISSION'S LENIENCY NOTICE AND LENIENCY POLICY IN OTHER EU MEMBER STATES

16. Does the policy address the interaction with applications under the Commission Leniency Notice? If so, how?

The Notice takes into account possible proceedings before the Commission. In cases where the Commission is 'particularly well placed' to deal with a case in accordance with paragraph 14 of the Network Notice, the applicant for immunity of the Type 1A (see question 8) may make use of so-called 'summary application'. Thus the applicant may file the main (complete) application with the Commission and only summary application with the Office. Such summary applications have to include at least:

- the name and address of the applicant;
- the identity of other undertakings which participated or have participated in the alleged cartel;
- the affected product(s) and/or service(s);
- the affected territory(-ies);

- the duration;
- the nature of the alleged cartel;
- the member state(s) where the evidence is likely to be located; and
- information on the applicant's other past or possible future leniency applications to be lodged with other competition authorities in relation to the alleged cartel.

Having received a summary application, the Office acknowledges receipt and confirms to the applicant that it is the first to apply for immunity. Should the Office request specific further information, the applicant has to provide such information promptly. Should the Office decide to act upon the case, it determines a period of time within which the applicant must make a full submission of all relevant evidence and information required to meet the conditions for Immunity Type 1A. If the applicant submits such information within the set period, the information provided will be deemed to have been submitted on the date when the summary application was made.

17. Does the policy address the interaction with applications for leniency in other EU member states? If so, how?

The applicant has a duty to inform the Office about applications for leniency which it has lodged with other competition authorities in the past or is to lodge in the future.

REFORM/LATEST DEVELOPMENTS

18. Is there a reform underway to revisit the leniency policy? What are the latest developments?

As mentioned above, a new leniency programme was introduced in June 2007.

The old notice on leniency was often criticised for: (i) not granting enough legal guarantees for the applicants; (ii) not defining proper rules for setting reductions in fines; and (iii) not providing the applicant with any information on likelihood of success of its application until the final decision. The main changes to the new programme compared to the former programme are as follows:

- exclusion of vertical agreements from the leniency regime and focus on the most harmful horizontal agreements;
- full harmonisation with the ECN Model leniency programme;
- introduction of two types of full immunity;
- time stamps provided by the Office, upon request, relating to receipt of the application as well as all further submissions of evidence;
- introduction of the application in hypothetical terms and the marker system;
- introduction of the 'summary application' for cases when the Commission is approached;
- introduction of conditional acknowledgement of leniency;
- guarantee that evidence proving additional facts having direct bearing on the amount of the fine (higher gravity or longer duration of the cartel) submitted by the applicant for the sake of reduction of its fine will not be used on its account when setting a final fine to be imposed on it; and
- introduction of the 'significant added value' concept in connection with an application for reduction of fine.