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SANCTIONS IN ANTITRUST CASES

Contribution by the Czech Republic

-- Session IV --

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SANCTIONS IN ANTITRUST CASES

-- Czech Republic --

1. Introduction

1. In the Czech Republic, fines imposed on undertakings by the Czech Competition Authority (CCA) amount to the most common (and practically the only) sanction for breaking the antitrust rules. Apart from fines, the CCA may debar an undertaking from bidding in public procurement tenders, this sanction has however not yet been employed. Conversely, the CCA is not empowered to impose sanctions on individuals.

2. Individuals may be found criminally liable, and ultimately imprisoned, for taking part in a cartel, the CCA is nonetheless not aware of any closed proceedings. The amount of actions for damages has been increasing, but they are still rare and arguably do not work as an effective deterrent.

3. In this submission, after briefly outlining the decision making of the CCA and its judicial review (Chapter II), we will concentrate on the fines, in particular the way they are calculated (Chapter III). We will also discuss the only sanction the CCA may impose in addition to fines – debarment from public procurement (Chapter IV). Even though there is virtually no experience in this regard, we will also cover private (Chapter V) and criminal (Chapter VI) enforcement of competition law in the Czech Republic.

2. Decision making of the CCA and its court review

4. As is the case with all the administrative authorities in the Czech Republic, procedure before the CCA is generally governed by the Administrative Proceedings Code;¹ in addition to that, issues specific to antitrust enforcement, including imposition of fines and other sanctions, are regulated by the Competition Act.²

5. If in course of the proceedings the CCA comes to a conclusion that there was an infringement, it issues the statement of objections, in which it gives information on the main facts of the case, the principal evidence substantiating these facts and their legal qualification, as well as the expected amount of fine to be imposed.³ After the statement, the parties are given at least 15 days to contradict the assertions included in it and suggest further evidence, or to propose commitments or settlements.⁴ After assessing the parties' submissions, the CCA issues the final decision.

¹ Act No. 500/2004 Coll., Administrative Proceedings Code, as amended.

² Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts (Act on the Protection of Competition), as amended, available in English at: <http://www.uohs.cz/en/legislation.html>.

³ Sections 7 (3) and 21b of the Competition Act.

⁴ *Ibid.*

6. All the investigation, gathering of evidence, its assessment as well as decision-making is performed by the same case-team. Within the CCA, a specific section ('Competition Section') was established whose employees are responsible for these tasks. The Competition Section is managed by a Vice-Chairman, responsible directly to the Chairman, who decides whether the formal investigation should be opened and issues a statement of objections as well as the decision on the merits.

7. Such a decision (called 'first instance decision') may be appealed to the CCA's Chairman within 15 days.⁵ The appeal has an automatic suspensory effect. The Chairman decides upon recommendation of his advisory committee (called 'appellate committee'),⁶ composed of legal and economic experts from the CCA (but not from the Competition Section), academia as well as practitioners; the recommendation is not binding and the Chairman is solely responsible for the final decision (called 'second instance decision').⁷ However, it has been observed that the Chairman has followed the suggestion of the appellate committee in all the reported cases. Concerning the fines, the Chairman may increase as well as decrease the amount set by the first instance decision, and he exercised this prerogative on multiple occasions.

8. Decisions of the Chairman of the CCA (i.e. the second instance decisions) may be challenged before a single court, the Regional Court in Brno (according to the seat of the CCA). The court reviews the questions of both fact and law.⁸ In practice, virtually all the CCA's decisions are challenged, unless a settlement is reached.

9. The CCA's decisions are nonetheless enforceable even if attacked before the court. Simultaneous with the action, the petitioner can therefore also request the court to suspend all the legal effects of the decision until the judgment is passed; the court will grant suspension if the immediate effects of the decision would amount to harm to the petitioner significantly bigger than the possible harm caused by its suspension to other persons, on condition the suspension would not contravene an important public interest.⁹ In practice, the suspension is granted in approximately 50% of cases.

10. The court acknowledges that its review is limited vis-à-vis the amount of fine imposed by the CCA; according to the case-law, the court would only check whether the CCA dealt with all the criteria set out in the Competition Act (see below), whether its reasoning is logical and whether the amount of fine is not apparently disproportionate.¹⁰ Thus, it is extremely rare that the court would modify the amount of fine; only in one case, the Regional Court decreased the fine to a symbolic level (CZK 1 000 (Czech koruny), approx. EUR 40 (Euros)).¹¹

11. The Regional Court's judgment may be further appealed to the Supreme Administrative Court, which reviews only the questions of law.¹² In practice, almost every decision of the Regional Court is challenged by the unsuccessful party. Suspensory effect may be granted by the Supreme Administrative Court under conditions similar to those described above with respect to the Regional Court.

⁵ Section 83 (1) of the Administrative Proceedings Code.

⁶ Section 152 (3) of the Administrative Proceedings Code.

⁷ Section 152 (2) of the Administrative Proceedings Code.

⁸ Section 75 of the Code of Administrative Justice.

⁹ Section 73 of the Code of Administrative Justice.

¹⁰ Judgment of the Regional Court in Brno of 29 May 2007, Ref. No. 62 Ca 20/2006 (*Telefonica*).

¹¹ Judgment of the Regional Court in Brno of 12 March 2013, Ref. No. 62 Af 58/2012 (*Association of Applied Graphics III.*)

¹² Section 103 of the Code of Administrative Justice.

3. Calculating the amount of fine

3.1 General rules on fines

12. Fines constitute the most common form of administrative sanctions; it is indeed the only one actually employed in practice. If the CCA finds an infringement of competition law, it always imposes a fine (except for the successful leniency applicants), even though the fine may sometimes only be symbolic.¹³

13. General rules on fines are provided for in the Competition Act. A fine up to CZK 10 million (approx. EUR 400 000) or up to 10% of the annual turnover of the undertaking concerned may be imposed for competition law infringements;¹⁴ in every individual case, the higher limit applies.¹⁵ As a matter of principle, the CCA applies the CZK 10 million limit only when fining an entity with no or insignificant turnover, typically associations of undertakings; when fining a company, the turnover threshold is almost universally applied.

14. Specific rules may apply to associations of undertakings. Instead of a fine of up to CZK 10 million or 10% of the annual turnover of the association, as described above, a fine of up to 10% of the annual turnover of the members of the association may be imposed, while each member of the association is liable for up to 10% of its individual turnover.¹⁶ This exceptional procedure was intended to be used in case the association is composed of a limited number of undertakings generating high turnovers, while the turnover (or assets) of the association itself are low. The CCA has not yet availed itself to this procedure and the fines for associations of undertakings have only been calculated taking into account the assets of the association itself, not its members.

15. When calculating the fine, the Competition Act requires the CCA to take into account the gravity of the offence, in particular the manner of its commission, its effects and the circumstances under which it was committed. The conduct of the undertakings in course of the proceedings shall also be considered, as well as their effort to eliminate the detrimental effects of the offence.¹⁷ Courts afford a wide margin of appreciation for the CCA when setting the fine (see below).

3.2 Guidelines on setting fines

16. In 2007, the CCA published its Guidelines on the method of setting fines (Fining Guidelines 2007),¹⁸ based on its hitherto practice and jurisprudence of Czech courts, as well as inspired by the fining guidelines of the European Commission. These were the first antitrust fining guidelines published in the Czech Republic.

¹³ In case of price-fixing through the decision of an association of undertakings with very low market share (significantly less than 1%), the court decreased the fine imposed by the CCA to CZK 1 000 (approx. EUR 40). See judgment of the Regional Court in Brno of 12 March 2013, Ref. No. 62 Af 58/2012 (*Association of Applied Graphics III.*).

¹⁴ Section 22a (2) of the Competition Act; in case the fine would be imposed on an undertaking – natural person that is not an entrepreneur (which has not yet happened in practice), only the limit of up to 10 mil. CZK applies.

¹⁵ Judgement of the Regional Court in Brno of 31 May 2006, Ref. No. 31 Ca 64/2004 (*ČEZ*).

¹⁶ Section 22a (3) of the Competition Act.

¹⁷ Section 22b (2) of the Competition Act.

¹⁸ The Fining Guidelines are accessible in English at: < <http://www.uohs.cz/en/legislation.html>>.

17. Even though fines calculated on the basis of these guidelines increased, the CCA concluded – in particular after it had decided on a significant number of cartel cases in 2013 and 2014 – that these guidelines do not allow for sufficiently high fines to be imposed, as will be discussed below. Also, specific rules were needed for situations where more infringements were addressed by a single decision or where more infringements of the same undertaking were scrutinised in multiple proceedings.

18. Therefore, in October 2016, new Fining Guidelines 2016 were published.¹⁹ To a large extent, they are built on the same principles, only the parameters used in order to calculate fines were modified. We will therefore first summarise the principles of Fining Guidelines 2007, to which all of the existing case-law relates, and only then analyse the new Fining Guidelines 2016 in detail.

3.3 *Fining Guidelines 2007*

19. Under the Fining Guidelines 2007, the fine was calculated out of the annual turnover reached by the undertaking in the last year of the infringement in the relevant market; a certain percentage (up to 3%) of this turnover was identified, based on gravity of the infringement, and multiplied by a “time factor”, one if the infringement lasted less than a year and three if it lasted more than 10 years. Taking into account mitigating and aggravating circumstances, the basic amount calculated in this way could then have been increased or decreased by 50%.

20. As is apparent from these numbers, the CCA’s room for manoeuvre in determining the amount of fine was very limited, in particular as the highest possible percentage to be taken out of the relevant turnover was 3%; because of that, in the last years when the CCA concentrated predominantly on bid rigging, the maximum 3% percentage was used in all such cases. The Chairman of the CCA criticised this approach, claiming that it does not allow for adjusting the level of fine to the peculiarities of each individual case, thus breaching the principle of proportionality; because obviously not all the cases were the most serious ones (or their seriousness was not identical), the Chairman decreased the fines in several cases.²⁰

21. Especially when the undertaking’s turnover in the relevant market amounted only to marginal part of its overall turnover, the sensitivity of the fine was very low. If that was the case, a practice has evolved to set the fine at 0.5% of the overall turnover of that undertaking for hard-core cartels.²¹ Despite this, the level of fines in the Czech Republic amounted to one of the lowest in the EU.

22. Unavoidably, the guidelines needed to be amended, allowing for significantly higher fines to be imposed in case of the most serious infringements, in particular hard-core cartels.

23. Another problem with the Fining Guidelines 2007 was the fact that they did not contain specific rules on imposing fines in situations when the fine was calculated for more than one infringement. Under the Czech law, it is not possible to simply calculate fine for each of the infringements separately, and then add them up. The principle of “absorption” needs to be applied, according to which the CCA has to decide which of the infringements is the most serious one and calculate the fine for it, and then increase the fine such calculated, taking into account the number of infringement;²² the fact that more infringements were committed thus in practice works as a specific aggravating circumstance.

¹⁹ The Fining Guidelines are accessible in English at: < <http://www.uohs.cz/en/legislation.html>>.

²⁰ E.g. decision of the Chairman of the CCA of 11 February 2016, Ref. No. R 381 *et al.*/2015 (*Constructions Cartel I*).

²¹ E.g. decision of the CCA Ref. No. S 631/2014/KD(*Medieval Village Bid Rigging*).

²² Judgement of the Supreme Administrative Court of 31 October 2008, Ref. No. 5 Afs 9/2008 (*RWE Transgas – Wholesale Gas Distribution I*).

24. The new Fining Guidelines 2016 addressed both these problems.

3.4 *Determination of the basic fine*

25. Under the new guidelines, the fine is still calculated out of the turnover in the relevant market in the last year of the infringement. The proportion of it used for the calculation of fine may nonetheless reach up to 15% (i.e. five times more than under the Fining Guidelines 2007).

26. To decide the exact level of that proportion, it is first necessary to ascertain the general gravity of the infringement; in order to do that, the CCA distinguishes between three categories of infringements: (i) the very serious ones, e.g. horizontal agreements having as their object the distortion of competition, hard-core vertical restraints in case of cumulative market foreclosure or abuse of dominance; (ii) serious infringements, e.g. other horizontal agreements, hard-core vertical agreements or implementation of merger before its authorization; and (iii) less serious ones, e.g. other vertical agreements.

27. In the second step, the individual gravity of the infringement is assessed, in particular its effect on competition (potential or actual), extent of this effect, consumer harm etc. On the basis of this analysis, the proportion of the annual turnover in the relevant market is set as follows:

- 5-15% for very serious infringements;
- 3-10% for serious infringements;
- up to 5% for less serious infringements.

28. The factor of time is then taken into account. The proportion of the turnover thus calculated remains unchanged if the infringement lasted less than a year; the value then progressively increases, until it is multiplied by five if the infringement lasted more than ten years.

29. The sum thus calculated constitutes the basic amount of fine.

3.5 *Adjustment of the basic fine*

30. The basic fine may be further adjusted in three steps: first, taking into account the mitigating and aggravating circumstances; second, taking into account that the undertaking committed more than one infringement; and finally, comparing the amount of fine thus calculated to the overall turnover of the undertaking and the turnover of goods actually affected by the infringement.

3.5.1 *Mitigating and aggravating circumstances*

31. As far as mitigating and aggravating circumstances are concerned, the fine can be increased or decreased by up to 70%. In an (non-exhaustive) list of mitigating circumstances, the following are mentioned:

- the undertaking provided evidence concerning a breach of competition law the CCA was not aware of, in case the leniency program does not apply
- exceptional quality of cooperation of the undertaking with the CCA during the proceedings, surpassing the legal duties and obligations of participants to the proceedings, on condition it significantly facilitated course of the proceedings or finding of the infringement

- activity of the undertaking directed at limiting or undoing the harm and other detrimental effects of the infringement
- the anticompetitive conduct was initiated by a public authority, public authority was involved in it or it was facilitated by the legislation
- the undertaking stopped its involvement in the infringement at the latest before the first instance decision was issued (not applicable to secret cartels)
- adoption and genuine implementation of an effective compliance program.

32. Whereas most of these mitigating circumstances were applicable under the Fining Guidelines 2007 as well, the adoption and implementation of the compliance program was added anew, as the CCA strives to promote prevention by these means. So far, there has been no experience with compliance programs in the CCA's practice.

33. The guidelines include a similar non-exhaustive list of aggravating circumstances:

- recidivism: infringement of Czech or EU competition law in the last ten years, decided on by the CCA, the European Commission or other competition authority
- the undertaking had a leading role in the infringement or initiated it
- the undertaking coerced other parties to the infringement to continue in the anticompetitive behaviour.

34. Concerning recidivism, the CCA has observed that certain sectors are more susceptible to anticompetitive conduct, and undertakings active in these sectors often breach the rules repeatedly; in Czech experience, this is particularly true for the incumbent in the telecommunications market.

3.5.2 *Multiple infringements*

35. As has already been described, the principle of absorption mandates the CCA, in case the undertakings concerned committed more infringements, to identify the most serious one. The fine for this infringement will then be calculated using the rules described above, and subsequently be increased by up to 25% for every other infringement of that undertaking, which is being assessed in such proceedings.

3.5.3 *Overall and case-specific turnover*

36. If the turnover in the relevant market constitutes only a minor proportion of the overall turnover of the undertaking concerned, the absolute amount of fine calculated using the procedure described above may not be sufficiently deterrent; the CCA will thus increase the fine to up to 1.5% of the overall turnover in case of very serious infringements, up to 1% in case of serious infringements and up to 0.5% in case of less serious infringements. Hence, this proportion has increased three-fold since the Fining Guidelines 2007 concerning very serious infringements and has been newly introduced with respect to other infringements as well.

37. On the other hand, the fine calculated out of the turnover achieved in the relevant market may be excessively high in case the infringement actually and directly affected only an insignificant portion thereof; this would typically be the case with bid rigging, where the value of the tender may be very low

compared to the overall turnover in the relevant market. In such cases, the fine shall not exceed the value of directly affected sales multiplied by ten.

6. Leniency and settlements

38. In the next step, the amount fine may be reduced if the leniency programme or the settlement procedure applies.

6.1 Leniency

39. Leniency programme was first introduced in the Czech Republic in 2001.²³ It reflected the principles of the European Commission's then effective leniency notice, but it was not identical. In particular, leniency applications could have covered not only horizontal but also vertical agreements; indeed, the first leniency decision concerned a vertical agreement.²⁴ In 2007, a new leniency programme was introduced,²⁵ reflecting the Commission's 2006 leniency notice and the ECN Model Leniency Programme.

40. Finally, in 2012, the leniency programme became part of the Competition Act itself;²⁶ revised guidelines on its application were published in 2013.²⁷ The conditions for immunity and fine reduction are virtually identical to those set by the Commission. Only parties to secret horizontal cartels may thus benefit from leniency application.

41. The programme distinguishes between full immunity and reduction of fines. Full immunity is available to an undertaking that is the first to submit evidence which will enable the CCA to carry out targeted inspections in connection with an alleged cartel or is the first to submit information and evidence which enables establishing that there indeed was a cartel. Fine reduction (30% - 50% for the first applicant, 20% - 50% for the second and up to 20% for others) is available to an undertaking that provides the CCA with evidence of the alleged cartel which represents significant added value, relative to the evidence already in the CCA's possession at the time of the application.

6.2 Settlements

42. Since 2011, the CCA has been decreasing the fine by 20% to those undertakings that, after the statement of objections, agreed not to challenge the CCA's findings.

43. The settlement procedure was formally introduced into the Competition Act in 2012.²⁸ All types of infringements may be settled, agreements, abuse of dominance as well as implementation of mergers before clearance. In principle, if an undertaking admits liability to an offence as described in the statement of objections and challenges neither the facts nor their legal qualification, the fine shall be decreased by 20%. The undertakings are not asked to waive their right to appeal, which would be viewed as problematic

²³ The 2001 Leniency Programme is no longer publicly accessible.

²⁴ Decision of the CCA of 10 August 2004 Ref. No. S 106/04 (*PINELLI*).

²⁵ The 2007 Leniency programme is still available (in Czech only) at: <<http://www.uohs.cz/cs/legislativa/hospodarska-soutez.html>>.

²⁶ Section 22ba of the Competition Act.

²⁷ CCA's notice of 4 November 2013, available (in English) at: <<http://www.uohs.cz/en/legislation.html>> (accessed on 25 May 2016).

²⁸ Section 22ba (2) of the Competition Act.

from the perspective of their constitutionally guaranteed right of defence; no undertaking that agreed to settle has ever appealed the final decision.

7. The 10% cap and the risk of insolvency

44. In the final step, the CCA must make sure that the fine thus calculated will not exceed the overall turnover of the undertaking concerned, achieved in the year before the fine was imposed by the first instance decision.²⁹ Should this threshold be exceeded, the fine would be set at 10 % of the overall turnover.

45. At the same time, the CCA has to make sure that payment of the fine will not cause insolvency of the undertaking concerned. So far, the CCA has not decreased the fine because of this reason.

46. The fines thus imposed have almost always been collected; the CCA is aware of only one case when the undertaking went insolvent (not because of the fine) before the fine was collected; in a recent case, a fine was imposed on an undertaking already in insolvency.³⁰

8. Parental liability

47. A parent company may be held liable for the conduct of its subsidiary under the same rules that apply in the EU law.³¹

48. Concerning fines, the decision has to be addressed to a concrete corporation, and only that is personally liable for paying the fines; joint and several liability for fines is not permissible under the Czech law.³²

49. Despite this, the fine is calculated from the volume of sales of the undertaking concerned (i.e. all the connected corporations responsible for the anticompetitive conduct), not the individual natural or legal person it is imposed upon.

50. It ought to be admitted that this practice has not yet been explicitly confirmed by the courts. A controversial case is still pending, concerning a 2003 price-fixing cartel of bakery companies. Since then, two of the undertakings involved in the cartel merged and their internal structure was significantly altered; currently, the companies then responsible for the infringement still exist, but are virtually inactive, while the turnover of the whole undertaking is produced by other companies. The decision under review³³ imposed fines to these 'original' companies; the fines dramatically exceed their respective turnovers, while still amounting to less than 2% of the turnover of the whole undertaking. The court has not adopted a final judgment yet; it has only declared in a preliminary ruling that such a fine is not prima facie illegal.³⁴ This is, however, an extreme example; in the past, the entities fined have been able to pay the fine themselves, without invoking the liability of other members of the undertaking.

²⁹ Section 22a (2) of the Competition Act.

³⁰ Decision of the CCA Ref. No. S 338/2015/KD (*Inner Furniture Bid Rigging*); it is worth mentioning that this was a settled case.

³¹ Judgement of the CJ EU of 10 September 2009 C-97/08 P *Akzo Nobel*.

³² Judgement of the Supreme Administrative Court of 24 April 2013, Ref. no. 2 Afs 50/2012 (*GIS Cartel II*).

³³ Decision of the CCAs Chairman of 22 October 2014, Ref. No. R 20, 21 a 22/2004 (*The Bakeries cartel: Fine II*).

³⁴ Resolution of the Regional Court in Brno of 7 January 2015, Ref. No. 62 Af 102/2014 (*The Bakeries Cartel: Preliminary Ruling II*).

51. For a long time, it was not certain whether legal successors of perpetrators of the offence may be found liable. In an older case, the CCA was investigating a price-fixing cartel which took place in 2001. In the meantime, one of the original parties to the proceedings ceased to exist due to internal restructuring (it merged with its subsidiary). The CCA attempted to attribute liability to the legal successor and to impose fine on it. However, the Supreme Administrative Court established in 2009 that without an explicit statutory provision, legal succession is not possible,³⁵ unless the undertaking had undergone the restructuring specifically in order to avoid liability for its anticompetitive conduct. In the meantime, an amendment to the Competition Act was adopted, providing that the responsibility for an offence of a legal person which was dissolved shall pass on to its legal successor; if the dissolved legal person has more legal successors, each of them shall be responsible.³⁶ The experience with this provision has been limited; most of the cases where legal succession took place were settled and were therefore not reviewed by courts.³⁷

4. Alternatives to fines: debarment

52. Debarment from public procurement was introduced in 2012 as a new sanction for bid rigging cartels.³⁸ No such decision has been issued yet. The amendment of the Competition Act of September 2016 significantly changes the rules applicable to this kind of sanction, removing some of their shortcomings.

53. The Competition Act had not originally used the term ‘bid rigging’, it only referred to agreements concluded in relation to public procurement or concession proceedings; paradoxically, an undertaking involved in collusive tendering concerning public procurement was only to be debarred in relation to procurement, not concessions, and vice versa.³⁹ Thanks to the amendment of the Competition Act, this distinction was abolished and the debarment now applies to bidding in tenders in general.

54. In case the CCA decided that there was a bid rigging cartel, it had to impose on the undertaking concerned the sanction of debarment for three years, starting on the day the decision entered into force; the CCA did not enjoy any margin of appreciation and needed to impose this sanction irrespective of the severity of the infringement in question or its effect on competition in the market. The only exemption was dedicated to successful leniency applicants (both leniency I and II) and settlement decisions, where the debarment was – automatically – not imposed.⁴⁰

55. In the CCA’s opinion, the fact that settlements (and leniency) were the only means to evade this sanction contributed to the willingness of the undertakings concerned to settle; this is arguably the reason why no debarment decisions have been issued yet.

56. Thanks to the amendment, this sanction is no longer obligatory in bid rigging cases and the CCA will be able to decide whether it ought to be imposed; the length of the debarment will also be in the discretion of the CCA, with the maximum of three years.

³⁵ Judgment of the Supreme Administrative Court of 30 December 2009, Ref. No. 8 Afs 56/2007 (*The Petrol Cartel I*).

³⁶ Section 22b (6) of the Competition Act.

³⁷ For further details, see e.g. *PETR, M. Limitations to the Succession of Liability*. European Networks Law and Regulation Quarterly, 2014, No. 2, p. 173 *et seq.*

³⁸ Section 22a (4) and (5) of the Competition Act.

³⁹ This distinction might have been caused by the fact that until 2016, there was a separate act on public procurement and a separate act on concessions in the Czech Republic.

⁴⁰ Section 22a (6) of the Competition Act.

57. Should a debarment decision be issued, the sanctioned undertakings would be listed in a public register, maintained originally by the Ministry of Regional Development (because this ministry is responsible for public procurement)⁴¹ and after the amendment, by the CCA itself.

5. Private enforcement

58. Private enforcement is still very rare in the Czech Republic. An academic study published in July 2016⁴² identified less than 30 cases over the last 25 years.

59. The rules on private enforcement (concerning not only competition law, but rather civil law in general) have recently been amended. Until the current Competition Act entered into force in 2001, the then-effective Act on the Protection of Competition had contained specific provisions on private enforcement, providing for the right of all persons affected by competition law infringements to request the court to issue a cease-and-desist order or to award the damages, just satisfaction or disgorgement of unjust enrichment.⁴³ These provisions were not included in the current Competition Act because it was believed that general provisions of civil law, especially the then-effective Civil Code⁴⁴ and Commercial Code,⁴⁵ were sufficient.

60. The new Civil Code⁴⁶ that entered into force on 1 January 2014 provides (anew) for the basic rules of private enforcement, according to which anybody whose rights were violated or jeopardised by competition law infringements may claim a restraining (cease-and-desist) order, restitution order, just satisfaction, damages or disgorgement of unjustified enrichment.⁴⁷

61. Most of the private enforcement cases identified by the academic study were actions for damages (approx. one third of them). The study was nonetheless not able to document any case when damages were actually awarded by the court; most of those cases were settled, without any details having been published, and the rest of the claims were dismissed.

62. Arguably, the amount of actions for damages is in fact significantly higher in the Czech Republic. There is however no central evidence of them and even the courts themselves are not able to look them up, without asking for a specific case; the CCA has repeatedly addressed all the courts, but they were able to identify only a handful of cases, which the judges asked by the chairman of that court remembered.

63. The effect of private enforcement is therefore probably not as insignificant as the numbers above might suggest, it is nonetheless arguably not working as an efficient deterrent.

⁴¹ Section 22ba (3) of the Competition Act.

⁴² PETR, M., ZORKOVÁ, E. *Soukromé prosazování v České republice [Private Enforcement in the Czech Republic]*. ANTITRUST 2016 (2).

⁴³ Section 17 of the Act No. 63/1991 Coll., on the Protection of Competition.

⁴⁴ Act No. 40/1964 Coll., the Civil Code.

⁴⁵ Act No. 513/1991 Coll., the Commercial Code.

⁴⁶ Act No. 89/2012 Coll., the Civil Code.

⁴⁷ Section 2988 in conjunction with Section 2990 of the Civil Code.

6. Criminal liability

64. Both natural persons and corporations may be found criminally liable under Czech criminal law; corporations are however not criminally liable for breaches of competition law and their anticompetitive conduct is therefore investigated only by the CCA, on the basis of the Competition Act.

6.1 Criminal liability of natural persons

65. A new Criminal Code entered into force in the Czech Republic in 2010.⁴⁸ According to the old Criminal Code (effective before 2010),⁴⁹ competition law infringements were not explicitly mentioned, but there was a general provision criminalizing a broad variety of offences of economically active persons;⁵⁰ these offences arguably included all the infringements of the Competition Act, not only the cartels. There had nonetheless not been any reported judgement concerning breaches of competition law under that provision.

66. The new Criminal Code introduced a specific crime consisting in concluding an anticompetitive agreement with a competitor; only horizontal agreements are thus considered to be of criminal nature.⁵¹ Apart from other sanctions,⁵² an imprisonment of up to 8 years may be imposed on a convicted carteliser.⁵³

67. Procedure before criminal courts is governed by the Code on Criminal Procedure.⁵⁴ It is completely independent of civil as well as administrative enforcement and criminal courts are bound by neither the CCA's decisions nor the judgements of civil courts finding infringements.⁵⁵

68. There is a specific provision concerning the relationship between immunity awarded to the undertakings in the administrative enforcement (Leniency Programme) and the criminal investigation of natural persons associated with them, especially their managers. In 2012, a new provision on 'active repentance' was incorporated into the Criminal Code in respect of the criminal cartel offence.⁵⁶ The employees and representatives of undertakings that participated in the cartel may avoid criminal sanctions if they actively cooperate with the CCA within the leniency program. The same applies to leniency II applicants (reduction of fine), and arguably also to undertakings involved in the settlement procedure.

69. There has been no experience with criminal liability of individuals yet; according to the CCA's knowledge, no criminal decision has been issued so far. The CCA nonetheless notifies the police that it started investigating certain undertakings susceptible for cartel behaviour, so that the police may investigate the individuals involved.

⁴⁸ Act No. 40/2009 Coll., the Criminal Code, as amended.

⁴⁹ Act No. 140/1961 Coll., the Criminal Code.

⁵⁰ Section 127 of the Act No. 140/1961 Coll., the Criminal Code.

⁵¹ Section 248(2) of the Criminal Code.

⁵² Other sanctions may amount to a fine of up to CZK 36.5 million (approx. EUR 1.5 million), prohibition of certain activities (including managerial positions) or ultimately, forfeiture of property.

⁵³ Section 248 (4) of the Criminal Code.

⁵⁴ Act No. 141/1961 Coll., Criminal Procedure Code, as amended.

⁵⁵ Section 9(1) of the Criminal Procedure Code.

⁵⁶ Section 248a of the Criminal Code.

6.2 *Criminal liability of corporations*

70. As of 2012, criminal liability of corporations was introduced, in addition to criminal liability of individuals.⁵⁷ It was primarily intended to enable attributing liability to a concrete person in cases when a corporation was clearly involved in an illegal activity, but it was not possible to infer criminal liability of individual persons, or when a corporation was established by natural persons in order to be involved in an illegal activity and to reap the benefits thereof.

71. The corporations could have been originally liable only for specifically listed crimes; in 2016, this approach was revised and corporations are now liable for all the crimes, with an exception of several specifically listed ones, which can by definition be performed only by natural persons (e.g. murder, bigamy, cruelty etc.). Cartels were added into this list during the legislative process, and corporations thus remain not to be criminally liable for it.

6.3 *Discussions concerning criminalization of cartels*

72. Concerning the criminal liability of natural persons for cartels, there was no preceding public debate; as has already been mentioned, it was perceived as *narrowing* of the hitherto broad criminal liability. There were two negative consequences of the absence of discussion: first, the police was not specifically trained to uncover cartels, which might have resulted in today's lack of cases. And secondly, the links between administrative and criminal enforcement were not enshrined in legislation; for example, the leniency program of the CCA has been reflected by the Criminal Code only since 2012, i.e. almost 3 years after the new Criminal Code had been introduced.

73. Conversely, the debate concerning criminal liability of corporations was much more intense. It had been originally proposed that corporations should be liable for cartels as well, but it was heavily opposed by the CCA. Due to the peculiar relationship between administrative and criminal enforcement, the CCA would have been effectively prevented from cartel investigation, because it would have to report all the cartel cases to the police and withhold any investigation activities until the police have closed their proceedings; as the police were not ready to take over all the cartel investigations, it was decided that the competence should stay with the CCA for the time being.

7. **Conclusions**

74. In the past, the fines were generally believed to be too low in the Czech Republic; this will arguably be remedied by the new Fining Guidelines 2016. It is however questionable whether the increased level of fines can in itself guarantee sufficiently deterrent effect of sanctions.

75. In Czech experience, the debarment acted not as a prevention of bid rigging, but rather as a motivation to enter into settlement negotiations; such a sanction does therefore presumably not have sufficiently deterrent effect either.

76. Sanctions on individuals might be more effective, but there is no practical experience with them in the Czech Republic. Criminal enforcement is not working in practice, and administrative sanctions on individuals are not common in Czech legal order.

77. In future, the CCA shall concentrate – next to the significantly increased level of fines – on promoting criminal enforcement. General discussion on administrative sanctions on individuals might also be in order.

⁵⁷ Act No. 418/2011 Coll., on criminal liability of legal persons and proceedings with them (Act on Criminal Liability of Legal Persons).