Antitrust

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the urgency and seriousness that would be applied after the formal opening of the proceedings. The responses to such requests are more often than not delegated to lower/medium management levels (eg, sales managers), are not particularly coordinated and are not thoroughly checked by the in-house counsel. As a result, the Agency's real concerns are often misunderstood and the Agency generally receives raw, not systematised data (or requested documents) accompanied by summary explanations prepared by the employees of the relevant department within the company (eg, procurement, sales, etc). Due to the rather low level of 'competition law awareness', these additional statements may do more harm as they could contain various self-incriminating statements and disclosures.

However, NG decided to pursue a different approach, immediately setting up a team involving both the top management and in-house as well as external counsel with expertise in competition law. The main task of this team was to create and maintain a single point of contact and to coordinate all communication with the Agency. Through several rounds of the Agency's subpoenas, all submissions and responses were thoroughly scrutinised and substantiated from a legal perspective, not only taking into account the Agency's immediate questions but also anticipating possible concerns falling outside the initial scope of the investigation (eg, with respect to related markets in which NG might have been active or even with respect to NG's affiliated companies). Such a holistic approach was of special importance since NG and its affiliated companies were enjoying dominant positions in many competitively sensitive energy markets and were targets of several proceedings driven by the Agency.

As a result, NG managed to present its position to the Agency in a clear and legally well-reasoned way, thus avoiding the traps of self-incrimination and eventually succeeding in arguing that allegedly suspicious business practices had not been contrary to the provisions of the Act. The Agency's decision rejecting the complaint (especially taking into account that the complaint had been submitted by the Croatian Chamber of Economy) clearly shows how important it is to engage with legal arguments at a very early stage of any Agency's proceedings and to involve top people and legal advisors. It may also show that the substantiated dialogue with the Agency might be more efficient in this 'informal' pre-investigation phase than in the later phase where the undertaking would face an uphill struggle with the case files already having been built up and the Agency's factual and legal conclusions potentially already having been reached.

Leniency policy becomes law – minor additional changes

CZECH REPUBLIC

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The Czech Republic already has several years of experience with a modern leniency policy. A first leniency programme was published as soft law as early as 2007 and the Antitrust Office (the 'Office') has so far kept its self-commitment in all known cases. Since then, it has been put into application in various cases, even though sceptics point to the fact that most (maybe even all) applications were related to antitrust proceedings going on at the EU level (relating to cartels before EU accession in 2004) or other international cartel investigations with potential Czech applications, and it basically saved some cartellists some money and the Antitrust Office some work, but it did not bring completely unknown cartels to light.

One of the major problems in advising in leniency programmes in a purely Czech context is that certain horizontal cartels were criminalised in 2010 meaning that an attorney advising their client to file a leniency application would expose the client's management or employees to criminal proceedings. The state prosecutor stated in 2007 that he would consider participation of the employer in a leniency application as mitigating fact, but nevertheless this has no real influence

on the final court decision and certainly held off several cartellists from filing, unless they were foreigners without major fear of criminal prosecution by Czech authorities as in the cases known.

The government proposal of the new amendment to the Antitrust Act which had been passed in the first and second lectures in the Lower House of the Czech Parliament in spring 2012 therefore logically included a change to the Criminal Act granting the persons applying for leniency or a reduction of fines full criminal exoneration. According to the reasoning of the amendment – but not the text itself – this shall also apply if the legal entity for which the natural person acted filed for leniency or a reduction of the fines.

The fact that the position of leniency proceedings has shifted from soft to hard law was used for changing several provisions including the introduction of a new Section 22ba into the Act. Now the first application can receive full leniency and the second can receive up to a 50 per cent reduction of fines if he/she provides proof with substantial evidential importance. Other cartellists may receive a reduction of 20 per cent only if they admit the cartel and such a sanction is considered sufficient by the Office. Such applications must be filed within 15 days from the delivery of the statement of objection.

Another important element and motivation for cartellists in practice is that any successful leniency applicant or entity with claim to a reduction of fines shall not be automatically excluded from public tenders as would be the case for any sanctioned cartellist.

The amendment to the Antitrust Act does not, however, solve another relationship that is to be discussed when thinking about filing a leniency application: the protection against private enforcement claims. This has so far been a rather theoretical threat but one may expect that after the amendment comes into law, leniency applications may become more frequent.

The amendment to the Antitrust Act has another interesting feature: the Antitrust Office will not be required to prosecute cartels if their effects on the market and the consumer are small. Again, a cynic may take a critical view and point out that the cartels prosecuted in the past were often small resale price maintenance cartels which had little effect but were easy for the Office to deal with in court. The question to consider in this light is will there now be any cartels for the Antitrust Office to go after?

As there is no strong political opposition expected, the next steps of legislative proceedings should go smoothly and the amendment can be expected to be in law in a few months.

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Finnish Competition and Consumer Authorities to merge

In May 2012, the Finnish Ministry of Employment and the Economy (MEE) made public its proposal to unite the Finnish Competition Authority (FCA) and the Finnish Consumer Agency in early 2013. This plan has been met with mixed reactions.

The stated principal rationale behind the merger is that as both authorities share a common purpose of promoting effective markets and there may therefore be synergy benefits in placing them under one roof. Capitalising on this theory in practice is not without challenges, as the current competition and consumer authorities have considerably distinct statutory functions and areas of interest.

The initiative is informed by an international trend to combine the administration of consumer and competition policy. Competition and consumer agencies have faced or are facing integration – for example, in Denmark, Italy, Poland and Ireland. In the UK, where the Office of Fair Trading has been responsible for the enforcement of both competition law and consumer protection since the 1970s, a deeper integration of the two policy spheres has taken place within the last five years. Experiences in these jurisdictions suggest that combining consumer and competition agencies might elevate the level of expertise within the combined agency and strengthen its ability to analyse the market.