

Legal update

April 2016

Weinhold Legal

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The information in this newsletter is correct to the best of our knowledge and belief at the time of going to press. Specific advice should be sought, however, before investment and other decisions are made.

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Bills Under Discussion

Amendment of the Act on Criminal Liability of Legal Entities

On 23rd March, 2016, the Chamber of Deputies approved a bill in its third reading that amends Act No. 418/2011 Coll. on criminal liability of legal entities and proceedings against such persons, as amended (the "ACLLP") submitted as Parliamentary Bulletin No. 304 (the "Amendment").

The Amendment is designed primarily to reassess the range of crimes for which a legal entity may be criminally punished. The Amendment proposes a change to the provision of § 7 of the ACLLP. The current concept of the enumeration of offenses for which a legal entity may be punished is replaced by the concept of the negative definition, meaning that if the Amendment enters into force, a legal entity may be punished for all the offences set out in a separate part of the Criminal Code with the exception of offences explicitly mentioned in § 7 of the ACLLP. According to the Amendment, the main exclusions are to be those offences the facts of which either eliminate the possibility of their commission by a legal entity or are so closely tied to a natural person (perpetrator) that it is very difficult to construe the commission of such crime as being in the interest, or within the activity, of a legal entity.

The amendment also proposes that effective regret not establish criminal liability of legal entities for these offences:

- ▶ schemes to defraud in insolvency proceedings;
- ▶ violations of anti-monopoly regulations pursuant to § 248(1)(e) of the Criminal Code;
- ▶ negotiating benefits in a public procurement, a public tender or a public auction pursuant to § 256(3) or (4) of the Criminal Code;
- ▶ schemes to defraud in a public procurement or a public tender pursuant to § 257(1)(b) or (c) of the Criminal Code; and
- ▶ schemes to defraud in a public auction pursuant to § 258(1)(b) or (c) of the Criminal Code.

The Amendment proposes, for the purpose of bringing the concept more in line with the Criminal Code treatment, to expand the list of offences for which a foreign legal entity may be punished, irrespective of where an offence was committed. This primarily entails the possibility of punishing a foreign legal entity for infrequently occurring criminal offences such as torture and other inhumane and cruel treatment, violence against public authorities, apartheid and discrimination against groups of people and wartime atrocities.

The last of the proposed changes is exclusion of the possibility of a limitation on criminal liability and imprisonment for criminal offences mentioned in the provision of § 13 of the ACLLP. This primarily entails certain crimes against humanity and peace, war crimes, the crime of subversion of state power, terrorist attack and terror committed as a war crime or crime against humanity under international law.

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The Czech Government approved the bill once it had been amended by MPs, inter alia, to include criminal libel in the list of offences for which a legal entity is criminally liable and, in contrast, to exclude the liability of a legal entity for violating anti-monopoly regulations pursuant to § 248(2) of the Criminal Code. No less importantly, approval of the bill as amended by the MPs narrowed the liability of legal entities to include only offences committed in their interest or within their activity. Thus, offences committed on behalf of legal entities will no longer constitute offences committed by legal entities establishing their criminally liability. This change is associated with the amended wording of the provision of § 8 of the ACLLP, where for a crime to be imputed to a legal entity, it shall have been committed by a person in a position of leadership within that legal entity, as opposed to the preceding legislative treatment wherein it sufficed for such person to have authorisation to act on behalf of the legal entity or to exercise decisive influence in such legal entity (absent the condition of a leadership position).

The provision of § 8 of the ACLLP was broadened to include a paragraph 5, which enables a legal entity to be freed from liability for a criminal offence, if that legal entity made every effort that could reasonably have been required of it to prevent the commission of such offence by persons mentioned in § 8 of the ACLLP, i.e. statutory bodies, persons exercising decisive influence, employees and so on.

To conclude, we note the published statistics indicating that from 1st January, 2012, i.e. the effective date of the amended law to the 2014 year-end, criminal proceedings were brought against a total of 92 legal entities.

Bill on Compensation of Damage in the Area of Economic Competition and on an Amendment of the Anti-monopoly Act

On 11th March, 2016, the Anti-monopoly Office submitted a bill on compensation of damage in the area of economic competition and on an amendment of Act No. 143/2001 Coll. on the protection of economic competition and on the amending of some laws (the Anti-monopoly Act), as amended (the "Bill").

The Bill transposes EU Directive No. 2014/104/EU into Czech law with the objective of introducing an amendment that would allow the effective claiming of damages caused by a breach of competition rules. According to the explanatory memorandum, the Civil Code regulates the banning of economic competition in the context of obligations arising from misdemeanors (including a list of individual facts of a crime) in the same way as it regulates compensation of damage in cases of the stifling of economic competition (§ 2988 of the Civil Code); nonetheless, this is not (in particular, terminologically) tied to the Anti-Monopoly Act, and jurisdiction in respect of violations of EU law is not addressed. The Bill is also meant to ensure private-law enforcement of the rules of economic competition, in particular so that any natural person or legal entity can sue for compensation of damage caused by anti-competitive behavior.

In order to achieve this goal, the Bill's submitter proposes:

- ▶ To regulate the taking of evidence in a special manner so that:
 - ▶ in the case of prohibited horizontal agreements, the defendant is obliged to prove that damage was not caused; and
 - ▶ in the case of an indirect customer, its position as claimant is simplified, where the Bill stipulates conditions for transferring the burden of proof to the defendant (direct customer). Here, burden of proof means proving a price increase was not passed on to the indirect customer.
- ▶ To set a special limitation period to exercise the right to compensation of damage under the Bill to five years, where such period shall not begin until the stifling of economic competition ceases. A limitation period that is interrupted shall not end sooner than one year after its resumption.
- ▶ An anti-monopoly authority's (Anti-monopoly Office) obligation to submit evidence in its file (with the exception of petitions for abatement or reduction of a fine and related documents). However, evidence may only be submitted to the court once an investigation or administrative proceeding has ended.
- ▶ To make relevant to the Anti-monopoly Act as regards the inspection and availability of information in the Anti-monopoly Office file.

The Bill expressly establishes the specific character of the Civil Code and the Civil Procedure Code.

Finally, the Bill regulates the possibility of a lesser obligation to compensate damage only in the case of compensation of damage caused to direct and indirect customers that are small and medium-sized enterprises and where the infringer has been exempted from the imposition of a fine.

The Bill is currently in a comment procedure and its proposed effective date is 27th December, 2016.

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