



Czech Republic - EU Accession - February 2005 Frequently Asked Questions



Central European Advisory Group

Following our Frequently Asked Questions on the Czech Republic EU Accession of 1 May 2004, we have prepared these additional answers to frequently asked questions (“FAQs”) on some key topics of interest that have come up in our practice over the last few months. The assessment of EU law and legal trends within the EU plays an increasingly key role in the evaluation of Czech law and business practices in the Czech Republic, and we believe that companies and entrepreneurs may greatly benefit from an awareness of EU law and EU trends.

Topics explored in this FAQ are

- Competition
- E-commerce
- Trade license regulation
- Distributor and agency relationships
- CE marking.

Further information about these and other issues of interest involved in the accession process may be obtained from Central European Advisory Group (“CEAG”). Various articles and further information on EU law are also available on CEAG's web site (www.ceag.biz).

Central European Advisory Group

FAQ

How did the two recent amendments of the competition act influence business practices in the Czech Republic?

Mergers and Acquisitions¹

Within four months after EU accession, the Czech Republic has seen two new amendments to the Act on the Protection of Economic Competition (Law No. 143/2001 Coll., the "Act"). The first amendment, which became effective as of 2 June 2004, introduced some changes which could affect investors in certain situations (the second amendment concerning quasi-credits is discussed below). Among these are the new powers and obligations granted to the Antimonopoly Office (the "Office"), which can now, *e.g.*, execute a search of non-business premises of statutory bodies, their members, or employees with the use of a search warrant (previously any search was limited to business premises only). Furthermore, several changes have been introduced to the overall procedure for obtaining approvals from the Office on mergers and acquisitions, including new thresholds for determining when it is necessary to seek approval. It appears these new thresholds more closely relate to the prevailing market conditions in the Czech Republic. Under the new version of the Act, mergers or acquisitions requiring approvals become effective only when approved by the Office.

Vertical and Horizontal Agreements

Even though the first amendment to the Act has made several changes with respect to vertical and horizontal agreements containing restraints,² in general, the nature and scope of the prohibited restraints have not been modified. Before, when the issue at hand exceeded the *de minimis* thresholds,³ the parties to any agreement containing prohibited restraints (*e.g.*, agreements dividing markets) were obligated to file for and receive a special exemption from the Office. This procedure no longer holds. Under the current Act, the parties must themselves assess whether or not they fulfill the criteria defining the exemption without notifying the Office. No permission is necessary; the exemptions are valid *ex lege*. Nonetheless, the Office may ban an agreement in the event it ascertains (based, for example, on a complaint or an apparent deformation of the market) that it falls under the category of those which are strictly prohibited. The parties may write to the Office and propose what measures they will take to protect competition in the market.

A related procedural change is that parties may no longer take advantage of filing a request for a determination with the Office whereby they would be assured as to whether or not the agreement in question falls within the category of prohibited agreements. Furthermore, as of May, 2004, Regulation 1/2003/EC has been in effect on the territory of the Czech Republic. This Regulation sets forth procedures according to Articles 81 and 82⁴ of the Treaty regarding the application of cartel regulation and respective block exemptions.

Quasi-credits

The second amendment to the Act, effective as of 7 September 2004, should eliminate so-called "quasi credits" provided by suppliers to their dominant customers. A "quasi credit" is, for example, when a dominant customer, through his unfair negotiating position, arranges that the due date on the supplier's invoice is set in a way so as to give the bill an unusually long term before it must be paid. This practice is now specifically listed as one of the cases of abuse of a dominant position under the second amendment to the Act, and similar behavior is forbidden. No direct or indirect

¹ We also addressed this topic in one of our Clients and Friends letters available on the CEAG web site.

² Horizontal agreements are usually between two sellers, while vertical agreements are between a producer and a seller.

³ *De minimis* thresholds are those below which agreements containing certain restraints are permissible between competitors in horizontal agreements (those on the same level in the market) and vertical agreements. The thresholds have now been changed to 10% for horizontal agreements and 15% for vertical agreements.

⁴ Available at <http://europa.eu.int/eur-lex/lex/en/treaties/index.htm>

- ^ financial gains, or even non-financial gains, can be demanded upon the other party, e.g., in the placement of goods, listings in the customer databases, or requesting any direct or indirect special discounts or other financial advantages in connection with opening new businesses or launching sales campaigns.

Agents and Distributors

Generally, agency contracts are not covered by competition law if they qualify as “genuine” agency agreements and if they do not represent an abuse of one’s dominant market position. The principal typically controls the sales prices because of his access to the end customers. As to distributors, restrictions could arise in their commercial activity as regards the customers whom they may pursue, the territories in which they can sell, and minimum, maximum or recommended prices they may set. Czech law does not contain any special solutions or approaches to these questions different from those used in other EU countries. Moreover, Czech case law is less developed in these areas so guidance should be sought in EU law. Such arrangements shall be examined in the overall context of Czech and EU competition law, as well as the positions outlined in Commission Regulation No. 2790/1999 of 22 December 1999 on the application of Article 81(3) dealing with vertical agreements and concerted practices.

^ _____ E-commerce

Did EU accession have an impact on Czech e-commerce?

Spamming

Effective as of 7 September 2004, the new Act on Some Services of Information Society (No. 480/2004 Coll., the “Act”) brought the issue of spamming into Czech legislation (in Czech ší ení obchodních sd lení). However, the provisions dealing with spamming are generally not regarded as being in full compliance with European legislation, specifically Directive 2002/58/EC (the “Directive”), and moreover, they are different from similar regulations on spamming accepted in jurisdictions of other Member States. The Directive recognizes two obligations when it comes to the issue of spamming sent to individuals. The first rule concerning individuals is the general obligation to obtain the prior consent of the individual in question for the purposes of direct marketing (i.e., by e-mail, telefax, automatic telephone machines). This is called the opt-in rule. The second, an exception called the opt-out rule, is when electronic contact details for electronic mail for an individual are obtained in the context of the sale of a product or a service. In this case, the contact details of the customer may be used for later direct marketing (by the very same company) of its products or services which are similar to those purchased earlier by the individual. It is mandatory that the individual be always given the chance to opt-out of the direct marketing campaign and that the option is provided clearly, distinctly, free of charge, and can be exercised easily.

Furthermore, the Member States were given the possibility of designing their approach to ensure the protection of legal entities from spam and to select one of the above rules for other forms of direct marketing (e.g., telemarketing). Direct marketing by anonymous e-mails is against the law.

In the Czech Republic, the opt-in rule has been applied not only towards individuals but also legal entities. On the other hand, in other Member States there has been an obvious trend of applying the opt-out rule for legal entities (Austria, Ireland and others). A significant majority of Member States have already implemented the opt-out exception for current customers. However, the Czech Act does not contain the opt-out exception at all, which runs contrary to the Directive that does not allow deviation on this point.

In this case, an individual (or legal entity) that suffers damage in the Czech Republic due to the failure to implement the EU directive can file a petition within the Czech court system to claim damages against the state and may inform the European Commission of the incorrect implementation of the Directive by the Czech Republic. Also, the Czech regulator (the Office for the Protection of Personal Data in this case) cannot require the application of the provision. This conclusion is supported by a recent decision of the EU Commission that the Finish regulator in the electronic



- ^ communications sector, FICORA, must not apply the provisions of Finish Acts, which are in conflict with mandatory provisions of harmonizing directives – Case FI/2003/0031, with EU Commission reference to 9 September 2003, European Court case *Consorzio Industrie Fiammiferi (CIF) v Autorita Garante della Concorrenza e del Mercato* - C-198/01.

Security and Liability

The Act on Electronic Communications is currently in the legislative process and has yet to be approved. One of the key proposals of this Act includes a provision on the mandatory portability of telephone numbers (mobile and fixed) as well as new obligations on providers of public electronic communications services. For example, the draft Act on Electronic Communications would establish an obligation on providers to ensure protection of personal data and to maintain the confidentiality of communications secure through appropriate technical and organizational means, including the creation of technical and organizational policies. These obligations are in accordance with the Act on Personal Data Protection (No. 101/2000 Coll., as amended) and its last amendment (effective as of 26 July 2004) which also contained specific, significantly similar obligations with respect to the creation of technical and organizational policies.

- ^ Furthermore, an important change arising from the proposed Act on Electronic Communications is that service providers will have to inform users about the specific risks of security infringement as well as additional protections in case the security risks are higher than the communication protection given by the supplier. The draft Act on Electronic Communications is currently under debate in the Czech Senate and, if approved, it should go into effect by the end of 2005.

Trade License Regulation

Are there any changes in trade license regulation that have affected the legal status of foreigners acting as statutory bodies in Czech legal entities or as responsible representatives (odpov dný zástupce)?

- ^ Under amendment no. 167/2004 Coll. to the Czech Trade Licensing Act (the “Act”), foreigners who are statutory bodies (EU as well as non-EU nationals) are now under the obligation to act as the responsible representatives liable for the due operation of the companies concerned in the Czech Republic, subject to their fulfilling legal requirements (mainly those concerning their impeccability of character, education, or qualification in the relevant field) even if they do not speak or understand Czech. They must be appointed and duly recorded at the relevant Trade License Office. Before this change, they had to prove that they commanded a basic knowledge of Czech or Slovak to hold such positions. Likewise, the old requirements demanding that the responsible representative holds a long-term residency permit and submits written confirmation that he does not owe any taxes or other withholdings to the state are no longer in force.

Prior to May 2004, a responsible representative had to be in an employment relationship with the entrepreneur. As of 1 May 2004, this obligation can take the shape of a more flexible relationship between them, *i.e.*, a contractual relationship. As well, the new amendment has placed another obligation on the responsible representative: should he know that the entrepreneur has not notified the relevant Trade License Office within 15 days of the responsible representative's appointment or termination, it becomes incumbent upon the responsible representative, as well, to fulfill this obligation.

EU nationals are no longer required to obtain a residency permit to register a business in the Czech Republic. As a result, the whole process of establishing a company, or a branch thereof, by EU nationals in the Czech Republic should be faster, since these EU nationals do not have to wait for their residency permit to be granted in order to file a petition to have their company registered with the court. Furthermore, EU nationals may now also be registered as statutory bodies without requesting a residency permit.



Has the status of agents and distributors been changed by EU law?

Agents

In the Czech Republic, EU law has been implemented into the provisions of the Czech Commercial Code governing agency relationships.⁵ Directive 1999/42/EC (on the recognition of qualifications in respect to professional activities) allows an agent to offer his services in any Member State, and Directive 86/653/EC establishes the basic framework of legal protection for agents. The framework deals with various aspects of an agency agreement such as remuneration, the conclusion and termination of agreements, indemnity, compensation, non-competition clauses, confidentiality, and duties to provide information or reports.

As a result of adopting EU law, any termination notice on such agreements must be given one month prior to ending the commercial relationship during the first year of contract, two months during the second year, and three months during the third and subsequent years of the contract. Although the parties may not agree on shorter periods of notice in agency agreements, the agreement may be terminated with immediate effect under certain circumstances. With respect to non-competition clauses which apply after the termination of the agency relationship, the nature and scope of the trade restrictions that can be imposed are expressly stated and cannot exceed 2 years from the date the contract is terminated.

Distributors

A distributor relationship is neither expressly defined in Czech national law⁶ nor EU law. However, the Roman Treaty, the Community Customs Codex, Council Regulation No. 2913/92, and case law apply. Furthermore, the Commission notice Guidelines on Vertical Restraints, Official Journal (2000) C 291, is still used to distinguish between the four main types of distributorships, each having a different relationship with his supplier: (i) an exclusive distributorship; (ii) a sole distributorship; (iii) a non-exclusive distributorship; and (iv) a selective distributorship.

Since EU law does not provide specific restrictions on the termination of distribution agreements and respective notice periods, any contractual arrangement to that effect would be examined under provisions of Czech law. In the event that a contract was concluded for an indefinite period of time or set for an unreasonably long and extensive term, and no notice period was agreed, the inability to serve one's termination notice would likely be deemed a violation of Czech law, regardless of whether or not it was concluded under foreign law. It would then be appropriate to utilize the provisions of the Civil Code stipulating a 3-month termination period where the notice could be given at the end of the respective quarter. When the contract is concluded for a definite period of time (given that it is not unreasonably extensive), the parties can agree that no termination notice is permissible, and they must follow the contract and take the appropriate steps it prescribes.

What is CE marking?

CE conformity marking⁷ is not a certification of quality and it is not granted by a regulatory body. It is a self-assessment declaration not intended to prove a standard of quality, but rather to show that the manufactured product bearing the

⁵ An "agent" is an independent entrepreneur engaged to undertake a long-term commercial activity on behalf of the principal.

⁶ Innominate contracts are used to govern distributor relationships. Generally, the distributor is deemed to be an independent entrepreneur acting in his name and on his own account.

⁷ The marking stands for a European Union proof of conformity. The abbreviation "CE" is a French acronym for "Conformité Européenne," which means literally "European Conformity." The mark indicates that the manufacturer has satisfied all legal assessment procedures specified for his product.

^ label meets the legal requirements set forth in the relevant EU directives. Not all products sold in the EFTA and EU markets must bear the CE marking; it is only obligatory for those products stipulated in certain EU directives. These usually involve issues of health and safety as well as environmental protection legislation (e.g., Directive 85/374/EEC or Directive 93/465/EEC). A detailed list can be found at www.unmz.cz. According to rough statistics, the CE marking is mandatory for about 60-80% of the products sold in the markets of the EFTA and EU. When products which are required to have the CE marking do not display it, they can be withdrawn from the market by the respective EFTA and EU authorities.

Prior to its accession to the European Union, the Czech Republic had already harmonized its legislation in this area based on the 2001 protocol on Conformity Assessment and the Acceptance of Industrial Products (agreements between the EU and candidate countries on free movement of goods) known as PECA. In the Czech Republic, the Act on Technical Requirements for Products (No. 22/97 Coll., as amended) states clearly that anyone launching new products on the Czech market is required to introduce safe products only. Prior to placing a particular product on the market, the producer or importer must issue a written declaration of conformity, stating that the product meets prescribed standards, conforms with safety requirements, and is in accordance with the above-mentioned legal norms as well as relevant technical rules and official recommendations from state authorities. With this declaration of conformity, it is possible to mark the product with the CE marking. The Czech mark of conformity, CCZ, may be used only for products when EU regulations governing the use of CE marking do not apply. Should it be found that a product does not comply with CE marking legislation, the Czech Trade Inspection Office or the State Institute for Drug Control may impose a fine of up to CZK 20 million, withdraw the product from the market, or even stop its production entirely.

^ It should be noted that machinery also falls under the category of products regulated by the legal norms covering CE marking. Therefore, it is recommended that manufacturers adopt internal guidelines and approval procedures, applicable to machines and equipment used in manufacturing or assembly. The rules on CE marking apply whenever the machines are acquired by the company or their title has been transferred (including lease agreements), whenever they are moved, handled or stored, and certainly prior to their launch in operation.

CE marking procedures

Prior to placing the CE marking on a product, the manufacturer must follow certain assessment procedures based on the category into which the product falls. Sometimes, it is necessary to have the cooperation of an external specialist. The entire process is rather technical and must be carefully followed. It generally consists of the following steps: the declaration of conformity (for the EU directives complied with, standards used, name of notified body if required, etc.) and the compilation of a technical construction file. The file generally consists of the appropriate declaration of conformity, a general description of the product, design and production drawings and diagrams, detailed technical data for essential aspects of the product, a listing of standards or solutions applied, a report on the calculations and tests that were carried out by the internal or external specialist, certificates and inspection reports, and a user's manual. The user's manual must contain all the information required for the appropriate and safe use of the product, and it must be written in the language of the target country, or countries, in the EEA into which the product will be imported, as well as in the language of the country, or countries, in the EEA where the product is to be placed on the market. Furthermore, some products may be covered by more than one directive since different risks may be dealt with under separate directives. When more than one directive may apply, the CE marking can be affixed only if the product complies with all the appropriate provisions of the applicable Directives.

^ In the event damage or injury is sustained from a particular product, the user may hold the manufacturer, authorized representative, agent or importer responsible. European legislation in the area of product liability allows the injured person to claim damages. All manufacturers, exporters and importers have a responsibility to ensure that the products they place on the market are safe.

The purpose of this document is to provide the reader with a broad overview of select issues and questions arising in connection with the accession of the Czech Republic into the European Union.

The information is general in nature, is not intended to offer specific advice on any point, and should not be relied upon. Specific legal advice should be obtained as part of any complete analysis of a particular issue or situation.