

LIDC
National Report for the Czech Republic

Question A

The consistency and compatibility of transactional resolutions of antitrust proceedings (such as settlement processes, leniencies, transactions, commitments, and amicable agreements) with the due process and fundamental rights of the parties

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1. Introduction

Transactional resolutions of competition proceedings before the Czech Office for Protection of Competition (in Czech: Úřad pro ochranu hospodářské soutěže; hereinafter the “Office”) are quite common. The introduction of transactional institutions has had quite an interesting development in the Czech jurisdiction. After the Velvet Revolution with the advent of new competition law in the Czech Republic (at that time still part of the Czech and Slovak Federal Republic) which was enacted as Act No. 63/1991 Coll., on the protection of competition, no transactional resolutions were contemplated in the proceedings before the Office (or the respective ministry which fulfilled its role at that time). Gradually, however, the Office found its way (despite the lack of statutory provisions to that effect) to the application of some sort of transactional resolutions in its decision-making practice. Throughout the application of Act No. 63/1991 Coll. there were no formal procedures that might have led to a transactional resolution of a case. In practice, however, the Office used from time to time some sort of “competition advocacy” whereby it advised (rather informally) concerned parties of objections it had towards certain practices and asked them to change the practices. If they did so, the Office either did not commence proceedings or in the commenced proceedings refrained from imposing any penalty or imposed only a ‘symbolic’ nominal penalty. In addition, in the so-called exemption proceedings regarding potentially restrictive agreements the Office imposed (after rather informal negotiations with the parties) certain conditions and/or commitments to be complied with in order for the respective agreement to benefit from the issued individual exemption. There were, however, neither settlements nor leniency proceedings at that time. There were no commitments decisions within the control of concentrations procedures either.

A new statute was enacted in 2001 in order to enhance compatibility with the EU law. The respective statute was Act No. 143/2001 Coll., on protection of competition, which after several amendments still applies to these days (hereinafter “2001 Competition Act”). Initially, the situation as regards transactional institutes remained much similar to what it was under Act No. 63/1991 Coll. Subsequently, the Office (and to a certain extent also the legislature) started to formalize the procedures leading to transactional resolutions of cases. As regards

restrictive practices, the Office issued soft-law Leniency guidance in mid-2001. That leniency programme was, however, applied only occasionally and even controversially in a case of vertical agreements.¹ That notice was subsequently replaced by a new (more EU-like) notice in June 2007 which was then applied in number of cases.² Currently, there is a new Leniency notice of November 2013 (hereinafter the “*Leniency Notice*”) and there is a legislative basis for the leniency in Section 22ba para. 1 of the 2001 Competition Act (as of 1 December 2012).³

The Office also started to apply the so-called settlement procedure as of 2008. At the beginning it did so without any legislative guidance. Conditions for the application of that procedure were spelled out only in Office’s decisions and later on in its soft-law documents. The approach towards settlement procedures has changed throughout the time as it can be shown on various cases.⁴ Currently, there is a new Notice on the application of settlement procedures of November 2013 (hereinafter the “*Settlement Notice*”) and there is a legislative basis for the leniency in Section 22ba para. 2 of the 2001 Competition Act (as of 1 December 2012).

In the wake of the Czech Republic’s entry into the EU (and concurrent entry into force of Regulation 1/2003), the exemption proceedings were no longer available under the 2001 Competition Act but in its practice the Office was from time to time ready to issue informal comfort letters which contained conditions which if complied with should in the opinion of the Office have been sufficient for it not to commence proceedings with respect to the agreement(s) and/or practices in question.

Under the 2001 Competition Act also the possibility of commitments decisions was introduced both with respect to restrictive agreements and the abuse of dominant position cases.

As far as the control of concentrations is concerned, the 2001 Competition Act also allowed the Office to issue some measures (remedies) and/or commitments as conditions for approval of concentrations and the Office used that power in a number of cases.

Transactional resolutions outside the competition proceedings are quite rare in the Czech Republic. It is, however, worthy to note that there are some institutions which might be considered to be similar to transactional institutions applicable in competition proceedings. Firstly, Act No. 395/2009 Coll., on significant market power in sales of agricultural and food products and its abuse, contains provisions on commitments which are practically identical to

¹ See Office’s decision in case Ref.No. S 106/04-4340/04-ORP of 12 July 2004 (*Pinelli/ATEA*).

² Pursuant to Office’s data, the Office received two leniency applications in 2010, four in 2011 and three in 2012. Office’s Information Paper No. 3/2013 available also in English at <http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html> (28 April 2014), p. 7.

³ For overview of leniency regime applicable by the Office see also Office’s Information Paper No. 3/2013 available also in English at <http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html> (28 April 2014). In this regard see also Office’s Information Paper No. 3/2007 and No. 1/2004 with respect to previous leniency programmes (available only in Czech).

⁴ For the development of settlement procedure see e.g. Michal Petr. *Narovnání v českém soutěžním právu* [Settlement in Czech competition law]. *Antitrust*, 2011, No. 4, p. 176. For two early cases see also Jiri Kindl. *The Czech Office for Protection of Competition implements informal settlement procedures* (Kofola - Albatros), 20 January 2009, e-Competitions Bulletin, January 2009, Art. N° 25768. For the current status and some selected cases see Office’s Information Paper No. 3/2013 available also in English at <http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html> (28 April 2014).

those contained in 2001 Competition Act.⁵ The said Act, in addition, directly provides that provisions of the 2001 Competition Act shall be applied *mutatis mutandis* to proceedings under Act No. 395/2009 Coll.⁶ Secondly, the Czech Code of Criminal Procedure⁷ provides for conditional suspension of criminal prosecution and the so-called settlement which represent alternatives to traditional ways of criminal prosecution and punishment.⁸ It cannot be, however, said that these institutions would influence the application of transactional institutions in competition proceedings. With respect to Act No. 395/2009 Coll. it is the other way round, i.e. the 2001 Competition Act influenced the said other law. As regards criminal procedure, the respective legal provisions do not influence each other.

The arguments put forward in favour of the transactional proceedings concentrate mainly on the efficiency of administrative proceedings and, in case of leniency, on its usefulness as an investigative tool. The arguments against the use of transactional resolutions were not put strongly in the Czech Republic and rather it was often pointed out that the Office's practice enabling such resolutions might have seemed controversial given the lack of legislative basis for that course of action and the general principles of *ex officio* investigation and non-discrimination. The lack of legislative basis was remedied by the Amendment No. 360/2012 Coll. to the 2001 Competition Act. In any case, the fact is that the transactional procedures, if applied, shorten the duration of administrative proceedings before the Office.

2. Transactional resolution of agreements and the abuse of dominance

2.1. Overview of transactional procedures

There are three types of transactional resolutions of competition proceedings under the 2001 Competition Act. These are leniency, settlement and commitments decisions. Under the current state of law, the leniency applications and related leniency procedures are available only in respect of horizontal hard-core cartels (i.e., they are applicable neither in abuse of dominant position cases nor in cases of vertical restraints). On the other hand, settlements and commitments decisions are available for both, restrictive agreements (of all types) as well as abuse of dominant position cases. In addition to the above statutorily provided for transactional resolutions, there is also an informal procedure leading to a solution of competition concerns without actually initiating formal proceedings before the Office. This informal 'competition advocacy' procedure is dealt with in Office's soft law documents only.⁹ All the aforementioned transactional resolutions will be described in turn.

Leniency

The Leniency Notice issued by the Office in November 2013 currently applies in the Czech Republic. This notice provides details regarding leniency procedure and supplements Section 22ba of the 2001 Competition Act which provides the legislative basis for the leniency

⁵ Section 6(2)-6(4) of Act No. 395/2009 Coll. These provisions were already applied in the Office's decision Ref.No. ÚOHS-S167/2010-13046/2011/460 of 22 August 2011 (*Ahold Czech Republic*) where the case was closed without a fine by accepting commitments offered by Ahold.

⁶ Section 7 of Act No. 395/2009 Coll.

⁷ Act No. 141/1961 Coll., on Criminal Judicial Proceedings (Code of Criminal Procedure), as amended.

⁸ See Sections 307-308 (conditional suspension of criminal prosecution) and Sections 309-314 (settlement) of the Code of Criminal Procedure. In more detail see e.g. Jiří Jelínek et al. *Trestní právo procesní* [Law of criminal procedure]. 2nd edn. Leges, 2011, p. 704 *et seq.*

⁹ At present, Office's Notice of 8 November 2013 on Alternative resolution of competition issues and on suspension of cases (hereinafter the "*Alternative Resolution Notice*").

programme. The leniency procedures in the Czech Republic are harmonised with the EU model of leniency. The Leniency Notice explicitly provides¹⁰ that it follows the ECN Model Leniency Programme¹¹ and the leniency notice of the European Commission¹² and the Office will take the said documents and the decision-making practices that relates to them into account.¹³

Accordingly, the Czech Leniency Notice can be applied only with respect to secret horizontal agreements (secret cartels) and it recognizes Leniency type I and Leniency type II. The first deals with an immunity from fines and the second with a decrease in the amount of fine. The immunity from fines (Leniency type I) can be obtained by an undertaking which as the first submits to the Office evidence which the Office did not have in its possession and which will enable the Office to carry out targeted inspections (on-site investigations) or by an undertaking which as the first provides the Office with evidence which proves the existence of the respective cartel agreement. There are, however, some additional conditions too: the leniency applicant must admit its participation on the respective cartel agreement, it must not have taken steps to coerce other undertakings to participate in the cartel and it actively assisted the Office in the respective administrative proceedings, namely submitted to the Office all available documents and information regarding the respective cartel agreement.¹⁴ More detailed conditions are provided for in the Leniency Notice which, for instance, explains in more detail how the assistance to the Office in the administrative proceedings should look like.¹⁵ For obtaining leniency of the type II (a decrease in fine) an undertaking needs to satisfy similar conditions as in the case of leniency type I but the character of information and/or documents provided to the Office is different. An undertaking which wants its fine to be decreased needs to provide the Office with documents and information which have significant added evidentiary value. The reduction of a fine may amount from 20% to 50%, at the maximum.¹⁶

Leniency application for leniency of type I has to be submitted by the day in which a statement of objections has been delivered to the respective undertaking (in practice it, however, needs to be submitted much earlier). Leniency application for leniency of type II needs to be submitted within 15 days from receiving the statement of objections.¹⁷ If such applications are lodged after the set statutory deadlines, the Office may deal with them only in cases worthy of special considering.¹⁸ More detailed procedural rules are described in the Leniency Notice and they generally follow the European Commission's practice, i.e., the Leniency Notice provides for the so-called 'marker' which may reserve the place of the leniency applicant in the 'non-imposition queue' in order to allow it to gather the necessary

¹⁰ Leniency Notice, para. 5.

¹¹ ECN Model Leniency Programme (as revised in November 2012). Available at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (30 April 2014).

¹² Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 08/12/2006, p. 17–22.

¹³ Office's Information Paper No. 3/2013 available also in English at <http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html> (28 April 2014), p. 6.

¹⁴ Section 22ba (1) letter a) of the 2001 Competition Act.

¹⁵ See e.g. para. 15 of the Leniency Notice.

¹⁶ Section 22ba (1) letter b) of the 2001 Competition Act and para. 10-14 of the Leniency Notice.

¹⁷ Section 22ba (5) of the 2001 Competition Act.

¹⁸ Section 22ba (7) of the 2001 Competition Act.

information and evidence for submitting the ‘full’ leniency application.¹⁹ Also, it is possible to communicate with the Office about the potential leniency in hypothetical terms. Nevertheless, hypothetical filings do not secure one’s place in the ‘run’ towards the Office. They are meant to allow the leniency applicant to ascertain whether the evidence in its possession is sufficient for satisfying the substantive conditions for application of leniency (primarily the leniency of type I).²⁰

Settlement

In comparison with leniency, the settlement is currently meant to be used only as a tool for achieving efficiencies in administrative procedure.²¹ In other words, when an undertaking admits its wrongdoing, it may save time (and costs) on the side of the Office and, hence, may merit a certain reduction in fine. The legislative basis for the settlement is provided for in Section 22ba para. 2 of the 2001 Competition Act and it provides that the Office shall decrease the amount of fine by 20% in case the undertaking in question admitted that it committed the respective competition law offence (entered into a restrictive agreement, abused dominant position or implemented a concentration prematurely) and the Office is of the view that the resulting sanction is sufficient taking into account the character and severity of the offence in question. The procedure leading to a potential settlement is described in the Office’s soft-law Settlement Notice of November 2013.

The 2001 Competition Act provides that the application for settlement has to be submitted within 15 days from receiving the statement of objections at the latest.²² However, the efficiencies sought by the settlement may be achieved much more likely if the settlement procedure is started much earlier. For that reason the said Settlement Notice provides for the procedure that shall be typically followed when one wants to participate in settlement. It is possible to submit the application for settlement even if the undertaking in question did not follow the soft-law procedure provided for in the Settlement Notice but in that case it may be more difficult to achieve all benefits ensuing from the settlement procedure and, hence, there is a higher risk that the Office will use its discretion to deny the settlement.²³

The typical settlement procedure has the following stages.²⁴ First, the Office asks the participant(s) whether they are interested in utilising settlement procedure. Second, if the participant(s) are interested in the procedure (and in case of more than participant the

¹⁹ Leniency Notice, paras 30 *et seq.*

²⁰ Leniency Notice, paras 28-29.

²¹ Prior to 2011, the Office used the ‘settlement procedure’ (at that time even without any legislative basis) also as a sort of ‘investigative tool’ which were meant to ease the position of the Office when obtaining evidence from the parties. Also at that time, the reductions in fines were substantially higher and amounted quite often to 50% or occasionally also to 80%. The Office also used that tool to impose measures which it would otherwise hardly issued (due to the lack of appropriate power in the 2001 Competition Act) such as an obligation to provide damages to consumers which were affected by a conduct of the dominant company which had required excessive advance payments (see Office’s decision Ref.No. ÚOHS-S52/2009/DP-7933/2009/820 of 24 June 2009 – RWE Transgas case). This practice was, however, subject to criticism (e.g. Michal Petr et al. *Zakázané dohody a zneužívání dominantního postavení v ČR* [Prohibited agreements and abuse of dominant position in the CR] C.H. Beck, Prague, 2010, p. 442-443, or Jindřiška Munková, Jiří Kindl, Pavel Svoboda. *Soutěžní právo* [Competition Law] 2nd edn. C.H. Beck, Prague, 2012, p. 572) and has changed from the end of 2010 firstly in the Office’s practice and later on, as of 1 December 2012, by law (see current Section 22ba para. 2 of the 2001 Competition Act and the Settlement Notice).

²² Section 22ba (6) of the 2001 Competition Act.

²³ Settlement Notice, para. 6.

²⁴ For details see Part II of the Settlement Notice.

participants waive their right to be present at oral hearings with the other participants), the Office informs the participant(s) in writing about the commencement of the settlement procedure. Third, oral hearing(s) with the participant(s) take(s) place. Fourth, the participant(s) notifies the Office that it continues to be interested in the settlement procedure. Fifth, the Office issues a brief (simplified) statement of objections. Sixth, the participant(s) formally applies for the settlement and the resulting reduction of fine. Seventh, the Office issues a brief (simplified) decision in the matter. In connection with the settlement procedure it is stressed by Office's officials that the Office in the course of the procedure does not 'negotiate' or 'agree' with the alleged perpetrator the solution of the case but that it rather only present its findings to the participant and the participant acknowledges them and, subsequently, may obtain settlement and the resulting reduction of a fine.²⁵ Even though this statement is formally correct, from a practical point of view obviously some sort of 'negotiation' with or rather 'persuading' of the Office may take place when the factual and legal assessment of the case is being formed.

The Office entertains quite considerable margin of discretion in the course of the settlement procedure and it may terminate the procedure at any time until the issuance of the decision without giving any reason.²⁶ Any participant may also terminate its participation in the settlement procedure without giving any reason but only until the formal submission of the application for settlement.²⁷ If there are several participants to the proceedings, all have to participate in the settlement procedure for it to take place (as otherwise the sought administrative efficiencies cannot be achieved).²⁸ Settlement procedure can be combined with leniency but the reduction of fine is not cumulative but consecutive.²⁹

As can be seen from the foregoing, even though the settlement procedure is similar in certain respects to the settlement procedure before the European Commission,³⁰ it is different in several respects. First, the amount of reduction of fine is fixed to 20% (in comparison with 10%). In addition, the settlement procedure is applicable not only to horizontal cartels as is the case before the Commission, but to any types of restrictive agreements and abuse of dominant position cases as well (and in addition also to 'gun-jumping' in case of mergers).

Commitments decisions

The Czech 2001 Competition Act contains similar procedure regarding commitments decisions as it is provided in Article 9 of Regulation 1/2003. The principle of this alternative resolution of a competition case rests in accepting the commitments offered by the suspected perpetrator(s) and terminating the administrative proceedings without declaration of an infringement. The commitment decision may be issued in respect of both restrictive

²⁵ See e.g. Office's Information Paper No. 3/2013 available also in English at <http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html> (28 April 2014), p. 16.

²⁶ Settlement Notice, para. 30.

²⁷ Settlement Notice, para. 29.

²⁸ Settlement Notice, para. 16.

²⁹ Settlement Notice, fn 11. The 20% reduction is calculated after establishing the final amount of fine, i.e. also after the application of leniency (type II). In other words, the maximum reduction one can achieve when both leniency II and settlement reductions are applied is 60% of the amount of fine established in accordance with the Office's guidelines for setting fines.

³⁰ See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 01/07/2008, p. 3–5, and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 02/07/2008, p. 1–6.

agreements and abuse of dominant position cases.³¹ Not all (suspected) infringements are, however, suitable for this kind of procedure. The suitable cases are the ones when the negative effect of the respective anticompetitive conduct was not substantial and the prompt removal of the competition issue is necessary in order to prevent harm to competition and the termination of the conduct in question is not of itself sufficient for restitution of the effective competition.³² The Office provides in its Alternative Resolution Notice that examples of cases suitable for resolution via a commitments decision include restrictive agreements by effect (as opposed to restrictive agreements by object) or exclusionary abuse of dominant position when the prompt removal of competition concerns is necessary for efficient development of competition on the affected markets.³³

The commitments procedure may be commenced only by the participant to the proceedings. In other words, the Office cannot formally ‘impose’ commitments upon the undertakings. From a practical point of view, the Office may of course indicate that it would consider some commitments suitable in order to terminate the proceedings. The commitments have to be offered by the undertaking subject to investigation within 15 days from receiving the statement of objections at the latest. Late submissions will be considered by the Office only in extraordinary cases that are worthy of special considering.³⁴ In case there are more participants to the proceedings all have to participate in the proposal of commitments. Once the undertaking(s) submitted the commitments it has to stop the complained of conduct and proceed in accordance with the commitments (even though they have not yet been accepted by the Office).³⁵ Subsequently, the Office evaluates the offered commitments in order to ascertain that they are sufficient for removing competition concerns and reinstating the effective competition. If the commitments are sufficient, the Office will terminate the proceedings and impose upon the participant(s) a duty to comply with the commitments. No finding of an infringement is made. If the commitments are not found sufficient, the Office continues in the proceedings and in the final decision it will explain why it did not consider the commitments sufficient.

Resolution of a case without commencing proceedings

As mentioned above, the Office in its practice also provides for less formal transactional resolution of competition cases.³⁶ There may be cases when the Office investigates certain practices and comes to a conclusion that competition concerns may be removed without initiating formal administrative proceedings. This ‘informal’ procedure is also addressed in the Office’s Alternative Resolution Notice. The Office provides there that from a legislative point of view the respective course of action is based on its power not to commence

³¹ Section 7 (2) and 11 (3) of the 2001 Competition Act.

³² Alternative Resolution Notice, para. 29. It has been also said that the suitable cases include cases when the complained of conduct does not concern serious offences and when it is difficult to ascertain whether the conduct in question is prohibited (Michal Petr et al. *Zakázané dohody a zneužívání dominantního postavení v ČR* [Prohibited agreements and abuse of dominant position in the CR] C.H. Beck, Prague, 2010, p. 475).

³³ Alternative Resolution Notice, para. 30.

³⁴ Section 7 (3) and 11 (4) of the 2001 Competition Act.

³⁵ Alternative Resolution Notice, para. 28.

³⁶ This form of alternative resolution of competition cases was much used in 2006 and 2007 when the Office used it in 17 and 13 cases, respectively. Since then, the Office uses this option on average in 5 cases a year. See Office’s Annual Report for 2012, p. 12. The respective cases include both restrictive agreements and abuses of dominant position. For some examples see e.g. the said Annual Report, p. 12-14 and 16-17.

administrative proceedings when there is no public interest in conducting such proceedings.³⁷ This may apply to cases with only a limited effect on competition. Generally speaking, this option helps the Office to prioritize cases and to concentrate only on the important ones and also saves the Office's resources. In some cases the lack of public interest may arise when the undertaking suspected of competition law infringement undertakes measures that remove any concerns. Obviously, not all competition issues are suitable for being addressed in this way. The Office provides some examples of practices that may be addressed in this way. These include restrictive agreements which were not yet performed and their impact on competition would in any case be only limited, decisions by associations of undertakings with only a negligible ability to uniform behaviour of larger group of undertakings and vertical agreements with limited effect on competition (including potentially also vertical agreements containing hard-core restraints if market shares of the parties are lower than 10%).³⁸

The related procedure before the Office has the following main steps: first, the Office communicates to the suspected undertaking the subject-matter of the Office's concerns; second, the undertaking in question informs the Office within 10 days that it is going to remove the respective competition problem; third, the Office requests the undertaking to propose measures to remove the competition concerns no later than within one month; fourth, the undertaking proposes the measures in question; fifth, the Office evaluates sufficiency of the measures. If the Office finds the measures sufficient, it will refrain from commencing administrative proceedings for so long as the undertaking in question fulfils the measures. No decision is being issued. The Office only makes a written record in the file and informs the respective undertaking accordingly (if there was a complainant, the Office also informs the complainant).³⁹

2.1.1. Discretion of competition authorities and/or judges during proceedings

The level of discretion on the side of the Office differs depending on the type of transactional procedures described in the preceding section. It seems that the lowest amount of discretion the Office shall have in leniency proceedings, given the fact that the substantive conditions are provided quite in detail in the 2001 Competition Act itself (i.e., not only in soft-law) and the fact that the general principle to apply in respect of leniency is 'first come, first serve'. Nevertheless, the application of leniency depends to a large extent on the assessment of evidence provided by the leniency applicant to the Office. This holds true with respect to both leniency type I, when the Office needs to ascertain whether the provided evidence enables it to undertake targeted inspections or whether it proves the cartel agreement, and to leniency type II, when the Office evaluates the 'added value' of the provided evidence. And yet, the potential mistreatment of the evidence by the Office may be subject to judicial review and, accordingly, the aggrieved leniency applicant may challenge the (ab)use of the 'discretion' of the Office in this regard. Given the wording of Section 22ba para. 1 of the 2001 Competition Act, it is obvious that the leniency applicant is entitled to receive leniency if the conditions provided in the law were complied with.

With respect to the settlement procedures, the discretion on the side of the Office is much broader. This discretion seems to be recognised by the legislature in Section 22ba para. 2 of the 2001 Competition Act and it is much emphasized in the Settlement Notice (see above). Generally speaking, when assessing whether a case is suitable for settlement and whether the

³⁷ Section 21 (2) of the 2001 Competition Act.

³⁸ Alternative Resolution Notice, para. 17.

³⁹ Alternative Resolution Notice, paras 22, 23 and 25.

settlement will take place, the Office assesses whether the achieved savings of costs and time justify the reduction in fine. Given that, there seems to be no right to settlement on the side to the parties. As mentioned above, the Office proclaims that it may terminate the settlement procedure without giving a reason practically at any time.⁴⁰

The discretion of the Office with respect to commitments decisions is probably somewhere in between leniency and settlement procedures. On the one hand, the statutory wording provides that the Office *decides* (i.e., not ‘may decide’) about termination of proceedings provided that the undertaking(s) in question proposed commitments that are sufficient for protection of competition and for removal of competition concerns (i.e., harmful situation would be eliminated by fulfilling the commitments) and provided that the practice in question did not result in a substantial restriction of competition.⁴¹ Accordingly, once these conditions are fulfilled, the Office shall issue the commitments decision and there is a corresponding right (entitlement) on the receiving end. However, on the other hand, the assessment of the respective conditions allows much discretion on the side of the Office given the relatively vague wording used in the statute. It is unlikely that judicial review courts would want to ‘second-guess’ the Office in its assessments provided that any refusal to accept commitments is properly explained in the final decision.

An alternative resolution of a case prior to commencing administrative proceedings is governed only by soft-law and depends on many discretionary assessments by the Office.

In addition to the foregoing, it is worthy to mention that in its practice the Office must respect legitimate expectations of the undertakings concerned and also the principle of equal treatment and non-discrimination. Legitimate expectations may arise also from the Office’s soft-law documents. Hence, the discretion on the side of the Office is not absolute even though it may be considerable given the relatively vague wording used in the 2001 Competition Act and the Office’s soft-law documents. The Office shall treat similar cases alike. In addition, the Office is required to explain (provide proper reasoning) in its decisions e.g. why it did not accept leniency applications or a proposal of commitments and the Office’s decision may be subject to judicial review. Hence, the use of Office discretion may be subject to judicial control.

2.1.2. Nature of the legal act concluding, approving, and/or making binding the settlement

In the Czech Republic, all the abovementioned formal ‘transactional resolutions’ are concluded by an administrative decision which is unilaterally issued by the Office. This applies to leniency, settlement as well as commitments decisions. With respect to leniency and settlements, the operative part of the decision does not contain any specific wording that would reflect the leniency and/or settlement procedures. The application of that procedure is, however, reflected in the amount of fine which is included in the operative part of the decision. The explanation of the amount of fine (or its non-imposition in case of leniency type I) is contained in the reasoning of the Office’s decision. As regards commitments decisions, the wording of commitments is included in the operative part of the Office’s decision which also includes a statement that the respective administrative proceedings are terminated.

⁴⁰ Settlement Notice, para. 30.

⁴¹ Section 7 (2) and 11 (3) of the 2001 Competition Act.

As mentioned above, if the Office comes to a conclusion that certain competition concerns may be appropriately solved without actually initiating proceedings, it does not issue any administrative decision but only makes a written record in the file and informs the undertaking in question (via a simple letter) that it will not commence proceedings for so long as the undertaking will comply with the proposed measures (see above).

2.1.3. Legal consequences for the parties

Decisions of the Office taken after leniency procedure and/or settlement procedure are generally no different from ‘standard’ findings of infringement. Accordingly, such decisions include finding and declaration of an infringement of competition law, prohibition of the respective conduct going forward, sanction (i.e., a fine, if any) and, in addition, may occasionally contain some other measures imposed by the Office (e.g. some information duties imposed on the undertakings concerned).

Pursuant to Section 135 para. 1 of the Code of Civil Procedure,⁴² a civil court is bound by the finding of the Office that an offence (i.e. the infringement of competition law) occurred and who has committed that offence. Accordingly, in subsequent private litigations (if any) that issue is deemed conclusively proved before the civil court. The fact that there was a leniency application and/or settlement in the proceedings before the Office is not relevant in this regard.

On the other hand, as already mentioned above, commitments decisions contain no declaration of infringement. Accordingly, the respective issue (whether a violation of competition law occurred or not) would need to be ascertained before the civil court. The same is obviously the case also when the Office solves a certain case without actually commencing administrative proceedings. The Office is aware that its commitments decisions or non-initiation of proceedings may adversely affect third parties which claim they were damaged by the anticompetitive conduct because they would need to prove before a civil court that an infringement of competition law occurred on their own.⁴³ Nevertheless, this is a ‘normal’ side-effect of these types of ‘transactional resolution’ of competition cases. A civil court can establish all the issues on its own.⁴⁴

If an undertaking violates commitments which were made binding upon it, the Office may impose a penalty upon it in the amount of up to 10% of turnover for the last accounting period.⁴⁵ In addition, the Office may re-commence proceedings which were terminated on the account of the accepted commitments and proceed within them further towards an imposition of fine.⁴⁶

2.2. Fundamental and procedural rights of the parties

In the Czech Republic, fundamental procedural rights stem from three different legal sources. On national level, they are enshrined in the Charter of Fundamental Rights and Freedoms

⁴² Act No. 99/1963 Coll., as amended.

⁴³ Alternative Resolution Notice, para. 45.

⁴⁴ For more details concerning private competition litigation in the Czech Republic, see e.g. Jiří Kindl, Michal Petr. Czech Republic. In: Gordon Blanke, Renato Nazzini (eds). *International Competition Litigation. A Multi-jurisdictional Handbook*. Wolters Kluwer, 2012.

⁴⁵ Section 22a (1) letter e) and Section 22a (2) of the 2001 Competition Act.

⁴⁶ Section 7 (4) letter b) and Section 11 (5) letter b) of the 2001 Competition Act.

(hereinafter the “*Charter CZ*”),⁴⁷ which is a part of the Czech constitutional legal order. The Constitutional Court (hereinafter the “*CC*”) is ultimately responsible for interpreting it. Charter CZ is inspired by the European Convention on Human Rights (hereinafter the “*ECHR*”), which can be directly relied on by parties to the proceedings. The Czech Republic is subjected to jurisdiction of the European Court of Human Rights (hereinafter the “*ECtHR*”).

Being a member of the European Union, public authorities and courts also need to observe the principles of the EU law and the fundamental rights guaranteed by the Charter of Fundamental Rights of the EU (hereinafter the “*Charter EU*”) when applying the EU law. The Office is empowered to apply EU competition law and while doing so, it is bound by the Charter EU and the jurisprudence of the Court of Justice of the EU (hereinafter the “*CJEU*”). Czech courts, including the Supreme Administrative Court (hereinafter the “*SAC*”), however demand that the Office interprets the Czech law in line with the EU one, and the Office is thus bound to respect the fundamental procedural rights guaranteed on the EU level, even in cases where only the Czech competition law is applied.⁴⁸

In the Czech constitutional order, procedural rights are particularly strongly protected in “criminal” proceedings.⁴⁹ The interpretation of this notion is, however, broad and similarly to the rights guaranteed by the ECHR,⁵⁰ these rights do also apply to proceedings concerning other ‘penal administrative’ infringements,⁵¹ including the enforcement of competition law.

Enforcement of competition law is generally governed by Administrative Proceedings Code,⁵² which applies to all proceedings of Czech administrative authorities, with several specific provisions provided for in the 2001 Competition Act.

2.2.1. Right against self-incrimination and presumption of innocence

The right against self-incrimination is not specifically mentioned in the Czech constitutional order. It is nonetheless held to be part of it.⁵³ The same applies to the ECHR⁵⁴ and the Charter EU.⁵⁵ In the Charter CZ, it is explicitly mentioned that an accused has the right to refuse to give testimony.⁵⁶

The requirements concerning privilege against self-incrimination seem to differ in the jurisprudence of ECtHR and CJEU. It is not our ambition to discuss these differences herein, it, however, appears to be the case that while ECtHR gives the accused an absolute right to remain silent,⁵⁷ including as regards questions relating to facts,⁵⁸ the CJEU – specifically with respect to antitrust proceedings – proclaims that the undertakings investigated for possible antitrust infringements are obligated to provide answers to the questions on facts and to submit pre-existing documents even of incriminatory nature.⁵⁹ It might be, therefore, argued that the (general) ECtHR’s case law on privilege against self-incrimination is significantly more stringent than the CJEU’s (specific) jurisprudence on this question in antitrust proceedings. Even though this divergence may be caused by the fact that the ECtHR’s

⁴⁷ Constitutional Act No. 2/1993 Coll., Charter of Fundamental Rights and Freedoms of the Czech Republic, as amended.

⁴⁸ SAC, judgement Ref. No. 5 Afs 95/2007-353 of 29 May 2009 (*BILLA – Meisl I.*)

⁴⁹ Art. 37 *et seq.*, Charter CZ.

⁵⁰ ECtHR, judgement of 23 November 2006, application No. 73053/01 (*Jussila v. Finland*).

⁵¹ SAC, judgement Ref. No. 6 A 126/2002-27 of 27 October 2004.

⁵² Act. No. 500/2004 Coll., Administrative Proceedings Code, as amended.

judgements relate to “hard core” criminal proceedings, where the fair trial guarantees need to be applied in their full stringency,⁶⁰ whereas the CJEU’s jurisprudence is antitrust-related,⁶¹ the national institutions applying competition law – bound both by the ECHR and the Charter EU – find themselves in a difficult position when attempting to reconcile these differences.

Claims by parties to the proceedings that they are not obligated to submit certain information due to the privilege against self-incrimination are relatively common in the Czech Republic. In a recent decision, the Regional Court in Brno (hereinafter the “*Regional Court*”), which reviews decisions of the Office, expressed for the first time its understanding of this issue.⁶² The judgement is currently pending on appeal before the SAC.

In this case, the Office invited one of the parties to the cartel proceedings (a suspected carteliser) to submit certain documents. As in any other similar requests, the Office informed the undertaking concerned that it is under a legal obligation to provide the information and that its failure to do so might result in imposition of a fine.⁶³

The undertaking – after having repeatedly refused to do so – finally submitted the documents, but after the Office had issued its final decision finding a cartel, it appealed the decision (submitted a judicial review claim) to the Regional Court, claiming among others that its right not to incriminate oneself was breached. The court, however, rejected the appeal in its entirety.⁶⁴

The court recalled the ECtHR’s jurisprudence and admitted that even the CC had opined that even though the accused have to allow the evidence to be taken, they are not under any obligation to actively participate in the process.⁶⁵ The Regional Court then summarised the CJEU’s case-law and concluded that to grant the parties to the antitrust proceedings an absolute right to remain silent would go beyond what is necessary to guarantee a fair trial; it held that

“the privilege against self-incrimination is not violated if a competition authority requires certain materials or information, unless the undertaking is coerced to provide answers that would amount to accepting it breached the law, to provide

⁵³ CC, ruling Ref. No. I. US 636/05 of 21 August 2006.

⁵⁴ E. g. ECtHR, judgement of 17 December 1996, application no. 19187/91 (*Saunders v. the United Kingdom*).

⁵⁵ E. g. CJEU, case 374/87 *Orkem v. Commission* [1989] ECR 3283.

⁵⁶ Art. 37 (1) and 39 (4) Charter CZ.

⁵⁷ ECtHR, judgement of 17 December 1996, application no. 19187/91 (*Saunders v. the United Kingdom*), par. 69.

⁵⁸ ECtHR, judgement of 17 December 1996, application no. 19187/91 (*Saunders v. the United Kingdom*), par. 71.

⁵⁹ CJEU, case 374/87 *Orkem v. Commission* [1989] ECR 3283, par. 34 and 35.

⁶⁰ ECtHR, judgement of 23 November 2006, application no. 73053/01 (*Jussila v. Finland*), par. 43.

⁶¹ See e.g. *Wouter Wils*. Self-incrimination in EC antitrust enforcement: a legal and economic analysis. [2003] 4 *World Competition* 567.

⁶² Regional Court, judgement Ref. No. 62 Af 75/2010-318 of 23 February 2012 (*Cartel CRT*)

⁶³ Sections 21e and 22c of the 2001 Competition Act.

⁶⁴ Regional Court, judgement Ref. No. 62 Af 75/2010-318 of 23 February 2012 (*Cartel CRT*).

⁶⁵ CC, opinion Ref. No. Pl. US 30/10 of 30 November 2010.

*answers other than those concerning solely the facts or to submit other documents than those already in existence when they were requested”.*⁶⁶

The Regional Court thus held that the Office is allowed to request pre-existing documents from the undertakings suspected of having infringed competition law, and that it can pose to such undertakings factual questions, unless answering them would amount to the admission of guilt. That approach is in line with the CJEU’s case law. Unfortunately, even though the Regional court recalled the ECtHR’s jurisprudence (and that of the CC as well), it did not substantiate why their more stringent requirements were not applicable in the respective case.

The Office takes this judgement as an acknowledgement of its hitherto practice. It requires the undertakings to provide it with answers to questions of facts and to submit pre-existing documents in their possession. Even though the extent to which the undertakings need to comply with such requests is disputed in several ongoing investigations, there has not been any further antitrust-related case-law dealing with that issue so far.

There is no specific case-law concerning transactional resolutions either. Despite the abovementioned fact that the parties to the proceedings frequently claim a right not to incriminate themselves during proceedings, once the case is closed by adopting a commitments or settlements decision, they have never disputed the preceding process.

The commitments decisions probably do not raise any specific concerns *vis-à-vis* self-incrimination, since the undertakings concerned do not have to plead guilty. The case is closed without finding an infringement.⁶⁷

Conversely, concerning settlement decisions, the undertakings need to confirm that they committed an infringement, as described by the Office in the statement of objections.⁶⁸ Thus, in order to benefit from the settlement procedure, the parties cannot exercise their right not to incriminate themselves and need to plead guilty. At the same time, it might be argued that their procedural rights are not compromised because the settlement procedure is initiated by the Office and this happens generally only in the case when the investigation is more-or-less finished and when the Office gathered sufficient amount of evidence to present its case. The settlement, therefore, does not influence the extent of the infringement, but solely the amount of fine. It also ought to be mentioned that the undertakings do not have to settle the case, it is only their right to do so, after they had acquainted themselves with the statement of objections. There has not been any relevant discussion on this topic in the Czech Republic, the settlements are, however, widely considered to be a legitimate resolution of a case.

As far as leniency is concerned, applicants need to admit that they participated in the cartel at hand.⁶⁹ Unlike settlements, leniency applications are mostly submitted at the beginning of the investigation, but similarly to settlements, it is only a right of the undertakings to come forward with the leniency application, they are not in any way obligated to do so. At the same time, the admission of guilt does not result into a penalty if the full immunity is granted (leniency type I). The authors are not aware of any relevant discussion concerning the relationship between the leniency programme and the privilege against self-incrimination in the Czech Republic. Concerning the case-law, the Regional court held that a decision of the Office may be based solely on the leniency application and its accompanying documents.⁷⁰

⁶⁶ Translated from Czech by the author.

⁶⁷ Sections 7 (2) and 11 (3) of the 2001 Competition Act.

⁶⁸ Section 22ba (2) of the 2001 Competition Act.

⁶⁹ Section 22ba (1) of the 2001 Competition Act.

⁷⁰ Regional Court in Brno, judgement Ref. No. 62 Af 75/2010-318 of 23 February 2012 (*CRT Cartel*).

The judgement is currently under review before the SAC. The Regional court thus acknowledged that a leniency application may serve as a valid source of evidence against the applicant as well as the other cartelists.

The presumption of innocence is explicitly mentioned in the Charter CZ. Its text refers to criminal proceedings, guaranteeing the presumption of innocence to anyone accused of a crime until his guilt is declared in a court's final judgment of conviction.⁷¹ It is similarly enshrined in the Charter EU⁷² and the ECHR.⁷³ This principle applies also to the proceedings before the Office, where the parties to the proceedings are deemed not guilty until the final decision finding an infringement is issued.

In the Czech competition case-law, the claims concerning presumption of innocence are rather rare. They were mostly associated with the undertakings' complaints that the Office informed the public about its proceedings, which might have damaged their goodwill. In one such case, the SAC confirmed, *inter alia*, that the presumption of innocence was not violated when the Office mentioned in an interview with one of its representatives that it is investigating certain undertaking.⁷⁴

The authors are not aware of any relevant discussions in the Czech Republic concerning the relationship between the presumption of innocence and transactional resolutions in antitrust cases.

2.2.2. Right of the parties to know the case against them (statement of objections)

Disputes concerning the amount of information that the parties to the proceedings have right to be acquainted with emerge frequently in proceedings before the Office. Affected parties often complain against a limited access to files. The extent of information undertakings are acquainted with does not significantly differ depending on the nature of antitrust proceedings with the exception of leniency applications, which are accessible only after the statement of objections has been issued. All the parties to the proceedings have full access to file. Statement of objections is produced in all types of proceedings and the possibility to conduct oral hearings is not limited to a particular stage of the proceedings.

In the context of the Czech legal order, a transactional resolution of a case does not have any direct impact on information the parties to the proceedings receive with the exception that in case of settlement procedure the Office may (if the respective conditions are fulfilled) issue only a brief statement of objections (see below).

The statement of objections was introduced into the Czech competition law only in 2009.⁷⁵ Before that, the parties to the proceedings sometimes claimed that they have the right to receive a similar document. Courts, however, rejected such claims, stating that the Office did not have such a duty.⁷⁶

In the statement of objections, the Office informs the parties to the proceedings about the facts of the case, principal evidence supporting these findings and legal qualification

⁷¹ Art. 40 (2) Charter CZ.

⁷² Art. 48 (1) Charter EU.

⁷³ Art. 6 (2) ECHR.

⁷⁴ SAC, judgement Ref. No. 7 Afs 86/2007-107 of 31 October 2008 (*Česká lékárnická komora*).

⁷⁵ Act. No. 155/2009 Coll., on the amendment of the Act on the protection of competition.

⁷⁶ E. g. SAC, judgement Ref. No. 5 Afs 7/2011-619 of 29. 3. 2012 (*Bakeries Cartel II*).

thereof;⁷⁷ also the anticipated amount of fine needs to be indicated.⁷⁸ After the statement of objections, the parties to the proceedings are awarded access to all the evidence (including the leniency documentation, see below) and are awarded at least 15 days to express their observations and suggest further evidence.

Even though the parties to the proceedings frequently claim that the statement of objections is not sufficiently detailed, the court has not yet annulled any Office's decision due to this reason. Statement of objections is issued in "normal" as well as transactional procedures. In case of settlement procedure, however, the Office issues only simplified version thereof.⁷⁹ Apart from legal qualification and indication of fine, it includes only the description of basic facts of the case and of principal evidence supporting it. If the parties to the proceedings are not willing to settle the case after having received the simplified statement of objections, they may abandon the settlement procedure.⁸⁰ In such a case, a complete statement of objections would be issued.

2.2.3. Right to be heard and access to file

It is possible to distinguish two formal stages of an investigation of any particular case. Before the formal proceedings are initiated, the Office is empowered to carry out limited investigation, on the basis of which it will decide whether to open formal proceedings.⁸¹

During the preliminary investigation, the undertakings concerned do not enjoy to the full extent the rights of the parties to the proceedings. In particular, they are not entitled to access the file unless they can prove their legal interest or any other serious reason to access the file, under condition that the rights of other persons concerned or the public interest would not be prejudiced.⁸² The Office's practice is rather restrictive and it only rarely enables the access to file before formal proceedings have been initiated.

On the other hand, in course of the formal proceedings, the participants thereto and their legal representatives are without further limitations allowed to inspect the files.⁸³ The files may thus be inspected from the first day of the proceedings going forward. There are, however, certain limitations to that right.

Firstly, parts of the file containing classified information or facts subject to the duty of non-disclosure, imposed or recognised by law, are excluded from the inspection.⁸⁴ Apart from that, the 2001 Competition Act stipulates further limitations concerning business secrets⁸⁵ and the materials relating to the leniency programme.

⁷⁷ Section 7 (3) of the 2001 Competition Act.

⁷⁸ Section 21b of the 2001 Competition Act.

⁷⁹ Para. 23 of the Settlement Notice.

⁸⁰ Para. 29 of the Settlement Notice.

⁸¹ SAC, judgement Ref. No. 5 Aps 4/2011-326 of 22 September 2011 (*Telefónica*).

⁸² Section 38 (2) of the Administrative Proceedings Code.

⁸³ Section 38 (1) of the Administrative Proceedings Code.

⁸⁴ Section 38 (6) of the Administrative Proceedings Code. Such information are defined in Act No. 412/2005 Coll., on the protection of classified information and security qualifications, as amended.

⁸⁵ The same rules that apply to business secrets also apply to banking and similar secrets protected by law; the Office has however so far only dealt with business secrets.

As far as business secrets are concerned,⁸⁶ the parts of file documentation containing business secrets are excluded from the inspection. The file nonetheless needs to contain documents from which the business secrets were deleted or a comprehensible summary of the information, omitting the business secret.⁸⁷ Such non-confidential documents need to be provided by those who claim the right to the business secret.⁸⁸

This limitation to the right to access the file has been repeatedly challenged. The CC, however, confirmed that as long as the Office sufficiently substantiates the reasoning of its decision, the right to a fair trial is not violated.⁸⁹ There have not been many cases in which the court would annul the Office's decision due to access to file violations. On one instance, the Office addressed several telecom operators in order to establish the market share of the undertaking concerned. The answers of the operators were excluded from the file inspection and only the final outcome – the market share of the undertaking – was mentioned. The SAC decided that under those conditions, where the party to the proceedings was not aware of the criteria determining which operators would be addressed nor of the algorithm employed to determine the market share, the undertaking concerned was not able to exercise its right to defence and the Office's decision was annulled.⁹⁰

Concerning the leniency programme, a specific regulation was adopted only in 2012.⁹¹ Under the Competition Act currently in force, the leniency applications as well as the documents attached to it are not part of the files until the statement of objections is issued. Thereafter, these documents would be included in the files and may be accessed, but it is not possible to make copies of them.⁹² There has not been yet any court judgement on this procedure and the respective statutory provisions.

The Office prevented the parties to the proceedings from inspecting the information concerning leniency applications even prior to this specific legislation. Despite the lack of explicit legal basis, the Regional Court confirmed that the Office was right to deny the participants the right to inspect the leniency documents before the issuance of the statement of objections.⁹³ The judgement is currently under review before the SAC.

Concerning the right to be heard, Czech administrative law does not provide for any “state of play meetings” or “hearing officers”, as is the case under the EU law. The Administrative Proceedings Code anticipates oral hearings, they are, however, not meant primarily to be a forum to discuss the case, but rather a tool to gather evidence. As the Regional Court observed with respect to the second instance proceedings, where the decision is taken on the basis of suggestion of the “appellate committee” (see below):

“if the proposed oral hearing was meant to [...] provide a possibility to challenge the proposal of the appellate committee [...], there is no reason to summon oral hearings for that purpose in this case, as the claimants were able to present their opinions in

⁸⁶ Section 504 of Act. No. 89/2012 Coll., Civil Code.

⁸⁷ Section 21c (1) of the 2001 Competition Act.

⁸⁸ Section 21c (2) of the 2001 Competition Act.

⁸⁹ CC, Ruling Ref. No. II. ÚS 192/05 of 11 July 2007 (*Telefónica*).

⁹⁰ SAC, judgement Ref. No. 9 Afs 59/2011-644 of 28 March 2012 (*Mobile Operators: T-Mobile III*).

⁹¹ Act No. 360/2012 Coll., on the amendment of the Act on the protection of competition.

⁹² Section 21c (3), (4) of the 2001 Competition Act.

⁹³ Regional Court in Brno, judgement Ref. No. 62 Af 75/2010-318 of 23 February 2012 (*CRT Cartel*).

*written observations and it was a duty of the [Office] to respond to these not in course of a “discussion” during oral hearing, but in a final decision on the merits”.*⁹⁴

In the Office’s practice, oral hearings are thus not performed primarily in order to enable the undertakings concerned to exercise their right to be heard, but rather to gather evidence.

The only exception relates to settlement procedures with more parties to the proceedings. Normally, all the parties may attend the oral hearings. In the course of settlement procedures, the Office, however, wishes to discuss the case individually with every participant, without the presence of the others. All the participants to the settlement procedure are, therefore, invited to waive their right to take part in the oral hearing concerning the settlement procedure, where the settlement would be discussed with the other parties.⁹⁵

2.2.4. Right to an equal treatment

The right to an equal treatment is explicitly guaranteed by the Charter CZ⁹⁶ as well as the Administrative Proceedings Code.⁹⁷

In the Office’s practice, claims concerning unequal treatment are rare. The authors are aware of only one judgment in which the court decided that the right to an equal treatment was violated.⁹⁸ Despite that the court did not annul the Office’s decision due to that reason. The case concerned a cartel investigation with three parties to the proceedings, two of them represented by the same lawyer. When the Office set a deadline for the parties to express their views to the evidence gathered,⁹⁹ it decided to award 5 working days for one of the participants and 10 for the other two. Thus, technically speaking, the lawyer of the two parties had 5 days for each of the parties, but in fact, the deadline for each of these parties was 10 working days, but only 5 for the first one. Even though the Regional Court found that the first participant was not treated equally, it did not conclude that her right to a fair trial was significantly breached, as she was not able to demonstrate that she was not able to prepare a proper position document.

Transactional resolution of antitrust cases has only a limited direct impact on equal treatment of the parties. In case of commitments, all the participants need to be involved.¹⁰⁰ The same is the case with respect to settlements as currently contemplated.¹⁰¹

2.2.5. Right to an impartial judge

The Office adopts decisions on two levels. The first-instance decision is effectively adopted by the vice-chairman of the Office, responsible for enforcement of competition law – both the

⁹⁴ Regional Court in Brno, judgement Ref. No. 62 Ca 37/2009-680 of 21 April 2011 (*České dráhy*) (translated from Czech by the author). The judgment is currently under review before the SAC.

⁹⁵ Para. 16 and 19 *et seq.* of the Settlement Notice.

⁹⁶ Art. 37 (3) Charter CZ.

⁹⁷ Section 7 of the Administrative Proceedings Code.

⁹⁸ Regional Court in Brno, judgement Ref. No. 62 Af 71/2012-831 of 20. 9. 2012 (*Bakeries Cartel III*).

⁹⁹ In this case, the statement of objections was not issued, because the proceedings started before it was enshrined in the 2001 Competition Act.

¹⁰⁰ Section 7 (2) and 11 (3) of the 2001 Competition Act.

¹⁰¹ Office’s Information Paper No. 3/2013 available also in English at <http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html> (28 April 2014), p. 16.

investigative and decision making phase. Such a decision may be appealed to the chairman of the Office.

The chairman is not directly linked with the investigation or the first-instance decision making. The chairman's decision is based on a recommendation of the "appellate committee", a group of experts from both within the Office (but not those involved previously in the same case) and from other institutions, both lawyers and economists. The chairman is solely responsible for the second-instance decision and is not bound by the recommendation of the committee.¹⁰²

The chairman's decision is final and cannot be further challenged within the Office, it may however be appealed to (subjected to judicial review by) a court.

On several occasions, impartiality of the Office's chairman was challenged. A review of chairman's impartiality is, however, complicated by the fact that the provisions of the Administrative Proceedings Code regarding challenge on the grounds of partiality do not apply to him (there is no other person or body who could substitute him).¹⁰³ The CC, however, ruled that despite these provisions, claims concerning the alleged partiality of the Office's chairman need to be reviewed in a similar way as claims concerning any other officials. The difference is that such review may be undertaken only by a judicial review court (not the Office itself).¹⁰⁴

Commitments and settlements decisions are as a matter of principle not appealed to courts.

2.2.6. Right to trial

The chairman's decision is final and cannot be further challenged within the Office, it may be, however, appealed to (a judicial review claim may be submitted to) a court. Such claim (appeal) may be brought only against chairman's decisions, i.e., if the first-instance decision was not challenged, it cannot be reviewed by a court.¹⁰⁵ The Office's decisions are reviewed by the Regional Court in Brno in full jurisdictions, questions of both fact and law may be disputed, as well as the amount fine. The court may confirm the Office's decision or annul it; it may also reduce the fine.¹⁰⁶ Unless a settlement is reached or commitments are accepted, the vast majority of the Office's decisions are appealed. The Regional Court's judgement may further be appealed to the SAC by the so-called cassation appeal. Its review is, however, limited to the questions of law and procedure.¹⁰⁷

As a matter of principle, every decision of the Office may be challenged by the parties. They cannot waive the right to the appeal prior to the issuance of the decision. At the same time, it is highly improbable that the parties would challenge a settlement decision, based on their consent to the facts, legal qualification and the amount of fine, or a commitment decision, making bounding the commitments that the parties themselves proposed. In the Office's experience, those types of decisions have never been challenged. As far as not-settled leniency cases are concerned, the Office's decision is usually challenged by the participants

¹⁰² Section 152 of the Administrative Proceedings Code.

¹⁰³ Section 14 (6) of the Administrative Proceedings Code. The impartiality rules similarly do not apply to top representatives of other similar institutions as the Office.

¹⁰⁴ CC, ruling Ref. No. Pl. ÚS 30/09 of 2 April 2013 (*Dopravní podnik Ústeckého kraje*).

¹⁰⁵ Section 68 of Act No. 150/2002 Coll., Code of Administrative Justice, as amended.

¹⁰⁶ Section 78 of the Code of Administrative Justice.

¹⁰⁷ Section 103 of the Code of Administrative Justice.

other than the leniency applicant(s). Should the court find that there is a reason to change or annul a decision, such a judgement would apply to those who have not appealed as well, since the decision would be changed or annulled in its entirety.

2.2.7. *Ne bis in idem*

The *ne bis in idem* principle is enshrined in the Charter CZ, under which *no one may be criminally prosecuted for an act for which she has already been finally convicted or acquitted of the charges*.¹⁰⁸ This principle applies to antitrust proceedings as well.¹⁰⁹

Any decision of the Office, when confirmed by the Chairman or when not appealed to him, is deemed to be final and the *ne bis in idem* principle applies to it. The case cannot be re-opened, unless the decision was annulled by the court or unless there were specific reasons to re-open the case expressly provided for in the Administrative Proceedings Code.¹¹⁰

In settlement and leniency cases, “standard” decisions finding an infringement are issued, and the *ne bis in idem* principle thus applies as in other infringement cases. Conversely, commitment decisions do not declare that there was an infringement, the proceedings are merely stopped provided that the commitments would be fulfilled.¹¹¹ If the commitments are not fulfilled, the parties to the proceedings may be imposed a fine¹¹² and the case may be reopened.¹¹³ A “standard” decision finding an infringement and awarding fines may be issued in such re-opened proceedings. In the Office’s experience, the commitments have always been fulfilled and no case has been so re-opened yet.

2.3. *Rights of third parties*

In the Czech Republic, the parties to the proceedings concerning anticompetitive agreements or abuse of dominant position are only those allegedly involved in the conduct under review,¹¹⁴ i. e. the parties to an agreement or the dominant. These parties enjoy all the procedural rights described above.

On the other hand, third parties such as complainants, competitors or those harmed by an anticompetitive conduct cannot become parties to the proceedings and do not enjoy any specific procedural rights; neither can they become parties to the court proceedings reviewing the Offices decisions.¹¹⁵

¹⁰⁸ Art. 40 (5) Charter CZ.

¹⁰⁹ SAC, judgement Ref. No. 5 Afs 9/2008-328 of 31 October 2008 (*RWE Transgas I.*).

¹¹⁰ The proceedings may be re-opened if new facts emerge within three years after the decision was issued (Art. 100 *et seq.* of the Administrative Proceedings Code) or if it comes out within a year that the decision was illegal (Art. 94 *et seq.* of the Administrative Proceedings Code).

¹¹¹ Section 7 (2) and 11 (3) of the 2001 Competition Act.

¹¹² Section 22a (1) (e) of the 2001 Competition Act.

¹¹³ Section 7 (4) and Sec. 11 (5) of the 2001 Competition Act.

¹¹⁴ Section 21a of the 2001 Competition Act.

¹¹⁵ E. g. SAC, judgement Ref. No. 1 Afs 76/2008-246 of 29 May 2008 (*Ústecký kraj*), where a party allegedly harmed by an abuse of dominance attempted to join the court proceedings. Similarly in merger review cases, parties raising complaints against the merger are not parties to the proceedings. The Regional Court, however, recently ruled that they may file an appeal against the Office’s decision to its chairman. See Regional Court, judgement Ref. No. 62 Af 55/2011-174 of 2 July 2013 (*Litvínovská uhlená*). The judgement is currently under review before the SAC.

2.3.1. Right to be heard and access to file

Anybody else then the parties to the proceedings themselves may get access to file only if they can substantiate their legal interest or other compelling reasons to do so, and if the interests of the parties to the proceedings, other persons or public interest would not be jeopardised.¹¹⁶ In the past, the courts have stated that such an interest may be, for example, the fact that a third party is involved in a private litigation with the party to the proceedings or is intending to bring a damage claim.¹¹⁷ The Office has not yet granted access to its file to a third person under those circumstances.

As far as the right to be heard is concerned, third parties do not enjoy any specific rights. They can freely submit their observations in writing and they may be summoned to oral hearings. As has already been described, oral hearings are understood to be primarily a means of gathering evidence, and the third parties are thus not invited to discuss the case with the Office, but only to answer its questions. The parties to the proceedings are allowed to be present to such a hearing.¹¹⁸ The above rules apply in cases of transactional resolutions in the same way as in “standard” cases.

2.3.2. Right to trial

Due to the fact that the third parties are not parties to the proceedings, they cannot challenge decisions of the Office.¹¹⁹ A complainant cannot challenge the fact that the Office has not opened formal investigations.¹²⁰ This applies to cases concluded by a transactional resolution as well as to “standard” cases. Therefore, as has already been described above, settlement and commitment decisions have never been appealed so far.

2.3.3. Right of equal treatment

Transactional procedures have only limited and (at maximum) indirect impact upon the rights and interests of the third parties. The authors are not aware of any relevant discussions in the Czech Republic that would deal with a right of the third parties to equal treatment in the context of transactional procedures. As mentioned above, the third parties are not parties to the proceedings before the Office.

2.3.4. Other issues and rights

The interests of third parties are taken into account only to a limited extent. The basis for this approach is to be found in the understanding that the ‘public law’ rights of third parties are not dealt with in the proceedings before the Office. Only the rights and duties of the parties to the proceedings are being determined in such proceedings.¹²¹

¹¹⁶ Sec. 38 (2) of the Administrative Proceedings Code.

¹¹⁷ SAC, judgement Ref. No. 1 Afs 86/2013-78 of 23 January 2014 (*RegioJet*). Similarly in a merger review, the undertaking raising objections against the merger usually has the legal interest to access the file; see SAC, judgement Ref. No. 9 Afs 29/2012-53 of 28 March 2013 (*Litvínovská uhelná*).

¹¹⁸ Section 49 of the Administrative Proceedings Code.

¹¹⁹ See e. g. SAC, judgement Ref. No. 1 Afs 76/2008-246 of 29 May 2008 (*Ústecký kraj*).

¹²⁰ SAC, judgement Ref. No. 6 Ans 6/2013-27 of 7 June 2013 (*Mediaservis*).

¹²¹ SAC, judgement Ref. No. 1 Ans 12/2013-82 of 16 January 2014 (*RegioJet*).

In commitment cases, third parties – if they can be identified – are sometimes invited to express their views on the commitments proposed.¹²² They do not, however, enjoy any specific legal standing and they cannot formally influence the contents of the commitments.

2.3.5. Principle of legitimate expectation and of good faith

No specific legal regime applies to communications of the Office's officials to companies during negotiations. It ought to be mentioned that the Office does not make any "proposals" in the course of transactional procedures, it merely states its viewpoint and invites parties to provide their proposals or opinions. In order to improve the transparency of its transactional procedures, the Office issued guidelines on leniency, settlements and commitments cases. Third parties are not involved in these procedures.

In leniency cases, after receiving the application, the Office confirms in writing that the application fulfils the criteria for awarding leniency, on condition that all other requirements of the leniency programme would be fulfilled.¹²³ Those statements are deemed to be binding on the Office, even though they are not provided for by the 2001 Competition Act and the final decision on awarding leniency is issued only in the decision on the merits.¹²⁴

In settlement cases, the actual settlement is reached when, after receiving the statement of objections, the parties to the proceedings accept the factual and legal qualification presented by the Office. If this happens, the infringement described in the final decision and its legal qualification must fully correspond to the one in the statement of objections. Even though not provided for by the 2001 Competition Act, there may be negotiations among the Office and the individual parties to the proceedings; minutes of such negotiations would be drafted.¹²⁵

The commitments procedure is described in the 2001 Competition Act only rudimentarily. The statute, however, does not provide for any negotiations, it only states that the Office shall terminate the proceedings if the parties proposed the commitments and the corresponding statutory conditions were complied with.¹²⁶ Similarly to the settlements procedure, if there were any preceding negotiations, minutes would be drafted.

In the Office's experience, the parties to the proceedings have never challenged the procedure of transactional resolutions. On several occasions, the parties claimed that the case should have been resolved by commitments, not by an infringement decision, the courts, however, confirmed that the legal conditions for such a resolution were not met.¹²⁷

¹²² E.g. in the Office's decision Ref. No. S-282/2008/DP-4232/2009/820 of 28 April 2009 (*ČEZ*), the commitments consisted in amendments to contractual relations between a company suspected of abuse of dominant position and a complainant.

¹²³ Para. 32 and 37 of the Leniency Notice.

¹²⁴ Para. 25 of the Leniency Notice.

¹²⁵ Para. 19 of the Settlement Notice.

¹²⁶ Section 7 (2), (3) and Sec. 11 (3), (4) of the 2001 Competition Act.

¹²⁷ E. g. Regional Court in Brno, judgement Ref. No. 62 Ca 37/2009-680 of 21 April 2011 (*České dráhy*). The judgment is currently under review before the SAC.

2.3.6. Confidentiality and publicity of the transactional solutions

The Office is obligated to publish its decisions.¹²⁸ Decisions in leniency, settlements and commitments cases are published on web pages of the Office as well, in the same way as all the other decisions.¹²⁹ Business secrets are concealed.

Concerning the final decisions, it ought to be mentioned that the settlement decisions tend to be significantly shorter than “standard” ones.¹³⁰ It only contains the basic facts of the case and their legal qualification, with references to the file where the evidence is to be found.

Concerning other documents relating to transactional procedures, they are contained in the file and accessible under standard rules (see above).

3. Merger control

Pursuant to Section 17 para. 4 of the 2001 Competition Act, the Office can approve concentrations (mergers or acquisitions) subject to fulfilment of commitments which were proposed by the merging entities (undertaking concerned) to the Office in order to preserve the effective competition.¹³¹ The Office’s decision-making practice operates with both structural as well as with behavioural remedies. In fact, the Czech practice in this respect is much influenced and follows the practice of the European Commission as enshrined in its Remedies Notice.¹³² The Czech Office is very reluctant to prohibit concentrations. It seems that it prefers that the cases in which significant competition concerns are identified are solved via a proposal of commitments and related conditional approval subject to fulfilment of the proposed commitments. The Office commences approximately 40-50 merger approval proceedings a year.¹³³ Approximately 50-60% of these proceedings are dealt with in a simplified procedure. Most of the rest are solved in the so-called phase one (i.e. within 30 days from the merger approval filing). Only a handful of cases are moved into the second phase.¹³⁴ Similarly, only a handful of cases are finally resolved by a conditional approval subject to commitments but these cases usually involve the most contentious and interesting competition law questions.¹³⁵ Recent cases include e.g. a concentration between Agrofert Holding and Euro Bakeries Holding when the commitments included divestment of several bakeries; a concentration between Agrofert Holding and Loredana Corporation when the commitments were to remove personal connections between Agrofert and its competitor

¹²⁸ Section 20 (1) (a) of the 2001 Competition Act.

¹²⁹ All decisions are available (in Czech) at: <http://www.uohs.cz/cs/hospodarska-soutez/sbirky-rozhodnuti.html> (1 May 2014).

¹³⁰ Para. 27 of the Settlement Notice.

¹³¹ For details regarding this procedure see Jindřiška Munková, Jiří Kindl, Pavel Svoboda. *Soutěžní právo [Competition Law]* 2nd edn. C.H. Beck, Prague, 2012, p. 514-516.

¹³² Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22/10/2008, p. 1-27.

¹³³ In 2013, there were, however, only 35 such proceedings. For the relevant statistical data see Office’s annual reports available at <http://www.uohs.cz/en/information-centre/annual-reports.html> and Office’s statistical data available at <http://www.uohs.cz/cs/informacni-centrum/statistiky/statistiky-z-oblasti-hospodarske-souteze.html>.

¹³⁴ For instance, in 2012 there were three such cases (Office’s Annual Report for 2012, p. 18) and four such cases in 2013.

¹³⁵ Pursuant to Office’s statistics available at <http://www.uohs.cz/cs/informacni-centrum/statistiky/statistiky-z-oblasti-hospodarske-souteze.html> (30 April 2014) and Office’s annual reports, there were three such cases in 2012, one in 2011, one in 2010, one in 2009. There was no such case in 2013.

AGRO Blatná; and a concentration between Česká lékárna and Lloyds Holding when the commitments included divestment of three chemistry shops.¹³⁶

3.1. Negotiation of remedies

The proposal of commitments must be made by the merging entities prior to the commencement of the proceedings¹³⁷ or in its course but in any case not later than within 15 days from receiving statement of objections. If this deadline is not honoured by the merging entities but the proposal of commitments reaches the Office within additional 15 days, the Office may still take the commitments into account but only in cases worthy of special treatment.¹³⁸ Accordingly, the initiative as regards commitments has to always come from the merging entities. In other words, the Office cannot impose commitments upon them. Nonetheless, the Office may to a certain extent negotiate the commitments with the parties to the concentration and indicate whether the contemplated (or even offered) commitments are sufficient or not. In practice this ‘negotiation’ usually takes place in the course of oral hearings or even at ‘informal’ meetings with case handlers. Finally, however, the outcome of the ‘negotiation’ has to be provided in writing, i.e., parties to a concentration must submit a written proposal of commitments. Parties to a concentration may submit modified proposals of commitments provided that the above period for lodging them is maintained. In addition, the Office is explicitly empowered to accompany the approved commitments with certain additional conditions and duties (such as information duties) which are meant to secure fulfilment of the commitments.

There is no particular role of third parties (including competitors) in defining remedies (or commitments). The right to propose commitments is the sole right of the merging entities. The Office may, however, take into account the view of the third parties when it assesses whether the proposed commitments (remedies) are sufficient for preserving the effective competition and removing competition concerns which the Office identified. There is no particular role for the third parties in the merger approval procedure either. They may, however, lodge objections against the notified concentration and the Office shall properly address such objections. The third parties are not parties to the proceedings and they do not have any special right to inspect files. They may be granted such access to files only if they would prove a special legal interest or another serious reason that would mandate granting the access. Pursuant to available sources the Office has never granted such access but this Office’s position is now subject to judicial review in one case.¹³⁹ The third parties cannot generally challenge the Office’s decisions but the Regional Court in Brno recently held that the third party which lodged objections against a certain concentration can submit an appeal to the Office’s Chairman if it believes that its objections were not properly addressed by the

¹³⁶ See Office’s Annual Report for 2012, p. 19-22 or in detail Office’s decisions in cases Ref.No. S472/2011; Ref.No. S396/2011 and Ref.No. S544/2012.

¹³⁷ Pursuant to Section 15(4) of the 2001 Competition Act the merger approval proceedings are initiated when the Office receives a *complete* application for approval of concentration including all the required particulars.

¹³⁸ Section 17(4) of the 2001 Competition Act.

¹³⁹ In this regard see SAC’s judgment Ref.No. 9 Afs 29/2012-53 of 28 March 2013 (*Litvinovská uhelná*), subsequent judgment of the Regional Court in Brno Ref.No. 62 Af 59/2010-117 of 2 July 2013 (*Litvinovská uhelná*) and the final SAC’s judgment Ref.No. 9 Afs 73/2013 – 43 of 9 April 2014. See also Jiří Kindl. The Czech Supreme Administrative Court renders two rulings dealing with access of complainants to files in competition proceedings (*Asiana v Student Agency* and *Litvinovska uhelna* cases), e-Competitions Bulletin, June 2013, Art. N° 52498.

Office in its decision.¹⁴⁰ The judgment of the Regional Court is currently subject to review before the SAC. At present, the third parties cannot ‘hijack’ the procedure regarding approval of concentration given their limited role in the proceedings and the current stance of the Office. The risk of such ‘hijacking’ might, however, arise in future in case that the aforementioned judgment of the Regional Court in Brno supporting rights of the third parties is confirmed by the SAC and, subsequently, would be applied by the Office in an extensive way.

3.2. Enforcement of remedies

When the Office issues a conditional approval of a certain concentration subject to commitments (remedies) which were offered by the parties to the concentration, the respective addressee(s) of the decision are then obligated to fulfil the respective commitments (implement the remedies). If they do not do so, the Office has several options how to react to such incompliance. Firstly, the Office may impose a fine upon the respective undertaking(s) in the amount of up to 10% of the turnover of the respective undertaking for the last accounting period.¹⁴¹ Secondly, the Office has the so-called de-concentration power and it may order the respective entity to undertake various measures in order to reinstate the effective competition on the relevant market (such as divest assets, sale shares etc.).¹⁴² In addition, the Office can also entirely cancel the previous decision approving the concentration.¹⁴³

4. Impact on transactional outcome and on market intervention

In the Czech Republic, the antitrust related jurisprudence is still rather limited. As transactional cases are as a matter of principle not appealed, they are not reviewed by courts and the case-law cannot expand. It might be argued that in a long term, transactional mechanisms might be – due to limited jurisprudence – detrimental to predictability of competition law enforcement.

With regard to commitment decisions, the point can be made that since the Office does not authoritatively declare whether it considers the conduct under review to be lawful or illegal, longer term predictability of its interpretation of competition law may be compromised. As the infringement is not found, such decisions may also complicate the position of potential claimants in private litigation (see above in 2.1.3.). The number of commitment decisions is quite low. The last one was issued in 2009. Overall, there have been less than 10 such decisions.

Similarly, with respect to settlement decisions, even though they do find an infringement, and thus facilitate the legal position of claimants, the facts contained in them are limited, which may at the same time complicate the claimants’ position.

It is difficult to come to any conclusions concerning longer term effects of transactional procedures. Private enforcement is still very limited in the Czech Republic, therefore it is not possible to assess properly whether it had been negatively affected or not. Despite limited

¹⁴⁰ Regional Court in Brno, Ref.No. 62 Af 55/2011-174 of 2 July 2013 (*Litvínovská uhelná*).

¹⁴¹ Section 22a (1) letter e) and 22a (2) of the 2001 Competition Act.

¹⁴² Section 18(5) of the 2001 Competition Act.

¹⁴³ Section 19(1) of the 2001 Competition Act. For more details regarding sanctions for non-compliance with legal duties in mergers see Jindřiška Munková, Jiří Kindl, Pavel Svoboda. *Soutěžní právo* [Competition Law] 2nd edn. C.H. Beck, Prague, 2012, p. 523-525.

impact assessment and some relevant concerns with respect to transactional procedures, the Office has so far taken the view that these instruments are very efficient and that their possible negative effects would therefore be outweighed. The Office is committed to using these instruments in the future.¹⁴⁴

5. Conclusion and recommendations

Transactional resolutions in competition cases and related procedures in the Czech Republic before the Office are largely similar to those available in proceedings before the European Commission. This applies to both proceedings regarding restrictive practices as well as mergers. There are, however, certain differences especially as regards the settlement procedure in restrictive practices. From a practical point of view, the current state of affairs seems satisfactory and the authors do not have any particular suggestions for an improvement. It may be, however, pointed out that the antitrust practice in the Czech Republic now deals with a relatively contentious issue of the extent of rights of the third parties in both proceedings regarding restrictive practices (esp. abuse of dominance) and in merger approval proceedings. The issues at stake are primarily their access to files and their possibility, if any, to challenge the outcome of the proceedings before the Office. These issues are currently pending before the SAC.

¹⁴⁴ See e.g. the opening words of the Office's Chairman in the Information Paper No. 3/2013, available also in English at <http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html> (1 May 2014).