

Experience with Direct Settlement in Cartel Cases

The Czech Republic

1. Introduction and context

1. This contribution covers the recent development and experience in the field of direct settlement in the Czech Republic. It is a follow-up to the contribution that the Office for the Protection of Competition of the Czech Republic (hereinafter the Office) drafted for the OECD Competition Committee roundtable on Plea Bargaining, that took place in October 2006 (hereinafter 2006 Contribution)

2. In its 2006 Contribution, the Office held that the Czech competition law does not provide for any specific procedure for plea bargaining. The Office thus discussed three specific approaches, allowing for reduction or even non-imposition of penalty to undertakings that stop the anticompetitive behavior: settlement of the case before initiating the formal procedure, accepting commitments proposed by the undertakings and the reduction of fine in the appellate procedure.

3. This remains to be true. However, there has been significant development in the Czech Republic since the October 2006 meeting. First, in February 2008, the Office issued its rules on so called alternative solution of certain competition cases. In this document the Office described the cases and conditions under which it does not initiate an administrative proceeding, or terminates administrative proceedings in course as a response to cooperation of the parties to the proceeding or investigation. Second, the Office has recently engaged in a “real” settlement procedure that provides for significant lowering of fine as a consequence of guilty plea. The two issues are discussed in more detail below.

2. Rules for alternative solution

4. As stated in 2006 Contribution, since 2004, the Czech Competition law provides for the possibility of adopting Commitments Decision. The Office may, in course of the first-instance proceeding, issue a decision on imposition of commitments proposed by the parties to the proceeding.¹ Such decision, providing the proposed commitments are sufficient for elimination of anticompetitive situation, enables closing the administrative procedure without the need to issue a decision stating that a prohibited agreement had been concluded or that an abuse of dominant position had been committed. Several cases have been closed with the adoption of commitments, since then. In addition, the 2006 Contribution states, that there has been a significant shift in a sense of an attempt of the Office to solve as many less grave cases of infringement as possible, especially those committed negligently, before the formal proceeding was initiated.

5. This approach has brought many benefits for the effective enforcement of competition rules in the Czech Republic. The Office can swiftly close cases of less importance and save its sources to more serious infringements, while the undertakings can escape from lengthy

¹ The „commitments“ contained in the Czech Competition Act are principally identical with commitments regulated by the Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty Establishing the European Community.

proceedings and fines with limited adverse impact on their reputation and professional business image.

6. Even though this attitude has been highly welcome by undertakings and practitioners, some doubts have been raised as to the predictability of the rules and choice of cases, that are candidates for the commitments solution.

7. As a response to this debate and with the aim to increase predictability, transparency and uniformity of its activities in that field, the Office issued on its website guidelines summarizing rules and outlining the approach to be taken in the future.

8. In its Notice on the alternative solution of certain competition issues the Office declared that cooperation with undertakings suspected of anti-competitive infringements, may under certain circumstances lead to the fast and efficient restoration of distorted competition. In such cases, the Office is ready not to initiate the administrative proceeding, or eventually conclude the already initiated administrative proceedings without decision stating that an administrative offence has been committed by this action. Nevertheless, as the Office clearly stated, the alternative solution is not always possible; there are competition problems which cannot be solved in other way than by sanction. The system of adoption of sanctions and the prevention through commitments are interconnected: the authority of the competition office and the seriousness of the appeal to a “non-sanction” solution of an individual case by the Office results directly from the reality of threat of a fast sanction imposition that exceeds the essential threshold of sensibility.

9. Two forms of cooperation on the part of undertakings is considered by the Office as the alternative solution of competition issues:

- a) Elimination of competition problems prior to the initiation of the administrative proceeding (Situation A). In this case, an administrative proceeding is not opened.
- b) Adoption of commitments proposed by the parties to the proceedings within the first instance proceeding (Situation B)

10. The core of the Notice is the definition of cases and conditions under which the Office does not initiate the administrative proceedings, or terminates the administrative proceedings in course. In deciding, whether a case is an appropriate candidate for alternative solution the Office takes into account gravity of the anti-competitive action, its duration, or, in case of collusive behavior, also a question, whether such an agreement has only been concluded, or whether it has already been realized.

11. The preconditions for alternative solution are different whether the alternative solution has to be adopted in Situation A or in Situation B. The outline is in the following chart.

Type of anticompetitive conduct		Situation A (before opening of formal procedure)	Situation B (within administrative procedure)
Less serious infringement	not realized	Available	Available
	with limited effect	Available	Available
	others	NA	Available
Serious infringement	agreement distorting competition which has not been realized	NA	Available
	which has been terminated, and which had a limited effect on the competition, and which did not show signs of a hard-core restriction	NA	Available
	others	NA	NA
Very serious infringement		NA	NA

Very serious infringements: price fixing horizontal agreements, horizontal agreements on market division or output-restriction horizontal agreements; abuse of dominant position with significant impact on a broader group of consumers

Serious infringements: other horizontal agreements, RPM and market division vertical agreements, other particular abuse of dominant position

Less serious infringements: other vertical agreements of minor significance with a limited impact on consumers, which affect only a minor part of the market, and other less serious distortions of competition.

12. Alternative solution of competition issues outside the administrative proceeding provides lower rate of legal certainty to all subjects involved, i.e. to the affected undertakings, to the Office and also to the third parties. The Office thus applies the alternative solution outside the administrative proceeding in a narrower range of situations than is the case of alternative solution in the framework of the administrative proceeding.

13. When considering the adoption of commitments the Office takes into account the fact that the decision on commitments to a certain extent complicates the legal situation of third parties, because the Office's decision does not declare the illegality of action of the undertakings concerned. In the proceedings before the civil court third parties cannot rely on the preceding decision of competition authority and they themselves have to prove all conditions of liability of a defendant.

14. The Notice also provides for set of procedural framework, in which the alternative solution may be sought for. Full text of the notice in English is annexed to this contribution or is available at the website of the Office.²

3. Settlements

15. Hereinafter, the development in the area of settlements is referred to. First, cases, where settlement procedure has been successfully applied by the Office, are described. Then the experience, assessment and outlooks in this field are discussed.

3.1. Kofola case

16. On 25 July 2008 the Office issued its decision in *Kofola* case.³ It was the first case handled by the Office in its history that was solved by using a procedure fulfilling the main features of settlement as defined by the OECD.⁴

17. During the investigation initiated in November 2007, the Office proved that the companies of the Kofola group, producer of soft drinks, entered during the years 2001 to 2008 into vertical agreements on resale price maintenance with their customers prohibited according to the Czech competition law. The agreements were concluded with some of the wholesale customers in various regions of the Czech Republic. These customers were bound to apply unified prices in further sale. The agreements restrained competitive relations among Kofola customers and therefore decreased consumer benefits, otherwise resulting from the unharmed competition on the market of non-alcoholic beverages.

18. It was the parties to the proceeding that asked for settlement of this case. As a legal basis the Office used its guidelines for calculation of fines that provide for up to 50 per cent discount of fine as an award for cooperation during administrative proceeding.⁵

² See <http://www.compet.cz/en/competition/antitrust/competition-advocacy/#c262>.

³ See Office's decision No. S 095/2008/KD-14495/2008/810 of 25 July 2008.

⁴ See OECD Plea Bargaining/Settlement of Cartel CASE. DAF/COMP(2007)38, p. 9.

19. Once it became clear, that the Office had enough evidence at its disposal for proving existence of anticompetitive behaviour, Kofola Group fully cooperated with the Office. The undertaking at the very initial stage declared that it was interested in a fast and effective solution and promised qualified cooperation.

20. As the second step, the parties to the proceeding filed with the Office the formal Request for initiation of settlement procedure. In their Request the parties repeated their intention to fully cooperate and informed the Office that they had initiated an internal antitrust audit. The aim of this audit was to unveil anticompetitive conduct within the holding and to identify relevant information and documents to be presented to the Office in order to help it to prove all elements of the infringement and to help to reach quick closing of the proceeding.

21. While designing settlement procedure to be applied the Office took into account the draft and the final wording of the Commission Notice on the conduct of settlement procedures.⁶ The procedure applied by the Office was heavily inspired by the Commission's rules, but some elements had to be modified in order to reflect the Czech legal system and specifics of the case.

22. Settlement procedure applied by the Office in its Kofola case consisted of the following steps:

- a) Formal Request for initiation of settlement procedure;
- b) Discussion on the preliminary findings and objections between the Office and the parties;
- c) Preliminary request for settlement by the parties;
- d) Specification and amendment of the file and information contained in the preliminary request;
- e) Final request for settlement by the parties consisting of:
 - a. an acknowledgement of the parties' liability for the infringement that is subject to the proceeding, including legal qualification, and the duration of infringement in accordance with the results of the settlement discussions;
 - b. an indication of the maximum amount of the fine the parties foresee to be imposed and which the parties accept;
 - c. the acknowledgment by the parties that they have been sufficiently informed of the preliminary findings and specific objections the Office envisages to employ in its decision, and that the parties have been given sufficient opportunity to study the findings and objections and comment on them;
 - d. the parties' confirmation that, taking into account the mentioned facts, they do not request any further procedural measure, incl. proposals of further evidence, and that they do not request oral hearing;
- f) Formal acceptance of the Final request by the Office.

⁵ See point 34 of the guidelines - Guidelines of the Office for the Protection of Competition on the method of setting fines imposed pursuant to art. 22 par. 2 of the Act No. 143/2001 Coll. on the Protection of Competition as amended

⁶ See 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 (Text with EEA relevance), Official Journal C 167, 2.7.2008, p. 1–6

23. Kofola Group acknowledged its liability for the infringement and its legal qualification. They accepted the objections raised by the Office, specified the beginning of the infringement, the fact, that RPM had been entered and fulfilled intentionally, and explained the reasons for this conduct. They admitted that pressure had been made by them on their contractual partners – distributors to keep the prescribed resale prices. The parties provided the Office with the list of all contracts with RPM provisions.

24. During the proceeding, the parties modified their contracts so that they no longer contained anticompetitive provisions and provided the Office with the relevant evidence. At the same time, the parties undertook that they would inform all their partners that they were and would not be bound to keep the prices set or recommended by the seller for resale.

25. The results of the settlement procedure are remarkable: the length of the administrative proceeding was significantly shortened and, at the same time, the fine to be imposed was substantially lowered. According to the decision of the Office, Kofola Group has to pay CZK 13,5 mil. (EUR 0,5 mil.) fine, which is only a half of the fine otherwise to be imposed if the settlement procedure did not take place.

26. Even though the Office repeatedly informed the parties that the settlement procedure has no implications as concerns their right to defend themselves within the administrative and judicial review, the parties did not appeal the first instance decision and it became final and effective.

3.2. Other cases

27. In September 2008, the Office confirmed that the undertaking Albatros had fulfilled all conditions to qualify for settlement. The subject matter of the proceeding are RPM and agreements limiting buyers in their decision whom to resale. The combined application of both contractual provisions aimed at the protection of specialized booksellers against fierce price competition of supermarket chains, especially in case of highly attractive children books, namely seventh volume of Harry Potter in Czech language. Similarly as in *Kofola* case, the Office intends to lower the fine to 50 per cent of otherwise applicable level as a response to very proactive approach of the party to the proceeding as concerns unveiling the real nature, extent and duration of the infringement.

28. At the present, the application of settlement procedure is considered at least in one additional proceeding led by the Office.

3.3. Experience, assessment and outlooks

29. The following part discusses general explanations, thoughts and plans of the Office in the field of settlements.

30. As already mentioned, settlement procedure has not any direct and explicit background in the Czech legal system. Furthermore, contrary to other jurisdictions, settlement rules are not elaborated in any soft-law document in the Czech Republic. The Office cannot rely on its previous case law. Even though, the Office repeatedly decided to seek settlement with parties to the proceeding. It was done no sooner the Office checked and verified, that principles of settlement procedure are not contrary to the Czech law. As a framework for its deliberation about the amount of discount from fine, the Office used the Guidelines for setting of fines (see above).

31. Settlements were used even in cases of RPM, even though the Office is fully aware of the fact, that such procedure is worldwide more or less used as a procedural tool in case of horizontal cartel agreements. Having that in mind, however, the Office considered the

procedure appropriate for effective and rapid solution of administrative proceedings concerning infringements of vertical character, as well.

32. In two so far settled cases, the Office decreased the fine by 50 per cent, what is substantially more than the Commission offers in its rules for settlements. What matters is the fact, that the Office employed the settlement in vertical agreements cases, whereas the Commission intends to use settlement solely for cartels. Considering the fact, that both in Czech and European competition law the parties to vertical agreement are not entitled to use the benefits of leniency programs⁷, settlement procedure could be used as an investigative tool towards the vertical agreements, without otherwise relevant fear of compromising the effectiveness of leniency programs. This was fully applicable in both mentioned cases; the parties to the proceedings not only admitted their liability and legal qualification, but they provided the Office with the additional evidence about the infringement in question, that were not in its possession and that represented significant added value. Having done that, their significantly contributed to full discovery of illegal behavior, its extent and duration. Within the framework of leniency program, provision of such evidence would qualify the undertaking for up to 50 per cent reduction in fine.⁸ In other words, the reason for more substantial discount of fine during settlement in two Czech cases, as compared to the EC settlement program, is the fact that settlement procedure was in the Czech Republic used both as a procedural measure to shorten the administrative proceedings and as an investigative tool. The Office made clear that in case of horizontal (cartel) agreements where the leniency program is used as a primary investigative tool and where the parties might be provided with full or partial immunity from fine for provision of evidence, such significant reduction of fine would not be possible; in case of cartels the settlement procedure cannot be used for investigation.

33. In its *Kofola* decision, the Office emphasized that there is no legal title for settlement procedure (i.e. there is a discretion of the Office whether it would permit the request of parties to settle) and that acknowledgement of liability and legal qualification is an obligatory precondition for its application. The Office will follow these basic principles in its following decisional activity and it will weigh pros and cons of the settlement procedure in every single case. According to the Offices (limited) experience, the following unambiguous positives, on the one hand, and potential drawbacks, on the other, can be identified.

34. The Office deems that the main contributions of the settlements are effective reparation of an anticompetitive situation, substantial savings of competition authority's resources while retaining the possibility of imposing substantial fine. The deterrence connected with substantial fines that are imposed in settlements decision is the main advantage of this procedure as compared to other forms of alternative solution, mainly commitments decisions where no fines are imposed.

35. Settlements lead to substantial shortening of first instance proceedings. Contrary to other cases, a formal statement of objections was not drafted and discussed with parties to the proceeding. In *Kofola* case, the Office did not need to spend its material and personal resources on performance of second instance proceeding or on its defense before the court, because the parties did not appeal the decision. Saved time and resources could be used for investigation of other cases.

⁷ See Leniency programme on imposition of fines in accordance with the Article 22 of the Act No. 143/2001 Coll., on the Protection of Competition and on amendment to certain Acts (Act on the Protection of Competition) (hereinafter referred to as "the Act") as amended, on prohibited agreements distorting the competition, on condition that certain additional requirements are fulfilled the parties to the cartel can be granted immunity from a fine or a reduction of a fine, <http://www.compet.cz/en/competition/antitrust/new-leniency-programme/#c211>.

⁸ See point 1.2.3 of Leniency programme.

36. So far experience seems to prove that the main incentive for undertakings to settle their cases is the possibility to dispose of their case, i.e. to influence its outcome and duration of administrative proceeding. The limitation of negative impacts of antitrust investigation on their reputation and good name is deemed to represent the main beneficial feature of settlements. Undertakings refer to negative influence of lowering their reputation and uncertainty about the length and consequences of investigation (incl. the actual amount of fine to be imposed) on their activities in many other areas. Among others, impact on stock prices, availability of loans and credits or doubts of potential strategic partners, are mentioned by them. They appreciate the possibility to seek transparent and quick completion of their case by settlements, for they limit negative consequences of investigation and increase legal certainty of investigated undertakings and third parties.

37. As concerns risks of settlement procedure, the fear of lack uniformity is sometimes mentioned. The risk might be even higher in case the competition authority has not fixed procedural rules for settlements. Also for this reason, the Office intends to draft and issue guidelines on settlements, once it has enough experiences with this procedure. The guidelines shall cover the typical cases that are appropriate candidates for settlements, as well as procedural rules and limits for discounts from fines.

38. Specific consequence of substantial use of settlement procedure, that has not been discussed so far, at least in the Czech Republic, is the fact, that incomes of state budget flowing from fines imposed by competition authority might be significantly decreased.

39. Some commentators point out, that settlements may have adverse consequences for private enforcement of competition law. Settlements decisions will usually contain fewer details than normal decision, they will be shorter and this can diminish the usefulness of it in follow on civil proceedings. On the contrary, the position of plaintiffs might be better because the settlement decision incorporates unreserved acknowledgment of liability for infringement. Due to the total underdevelopment of private enforcement of competition law in the Czech Republic, this risk seems to be very limited.

40. On the other hand, the Office deems that resignation on some procedural tools for defense that the parties do is not a drawback or real risk. First, settlement procedure neither requires, nor foresees such resignation. If parties to the proceeding opt for not appealing a settlement decision, they do that on factual basis, voluntarily (initiation of settlement procedure is basically up to a party and he party may at any time close this procedure) and on the basis of fully informed choice between different variants of further course of proceeding, that is made by an undertaking having for such selection enough sources, information, experience and expertise. The Office is therefore convinced that settlement procedure does not breach principles of justice and fair process.

Appendix

Competition Advocacy – Notice of the Office for the Protection of Competition on the alternative solution of certain competition issues

I. Introduction

1. The role of the Office for the Protection of Competition (hereinafter “the Office”) is first and foremost to protect competition as such. The forms of distortion of competition, review of which falls under the Office’s competence pursuant to the Act No. 143/2001 Coll., on the protection of competition and on amendment of certain acts (Act on the Protection of Competition), as amended (hereinafter the Act, or the Act on the Protection of Competition), are so-called prohibited agreements⁹, abuse of dominant position¹⁰ and certain cases of concentration of undertakings (mergers)¹¹ (Article 1, paragraph 1 of the Act).

2. The activities of the Office are in principle conducted in ex post supervision form – the Office assesses, whether the law has been breached or not by the competitors’ action. This happens in case of prohibited agreements and abuse of dominant position; in the area of merger review this happens in case of the implementation of non-approved mergers (Article 18, paragraph 5 of the Act)¹².

3. Besides the Act on the Protection of Competition the Office applies in relation to the prohibited agreements and abuse of dominant position which could significantly affect trade between EU Member States (so-called conducts with Community dimension)¹³, directly applicable Community law, specifically Article 81, or Article 82 of the Treaty establishing the European Community (hereinafter the EC Treaty)¹⁴. In relation to mergers which may be reviewed by European Commission (hereinafter the Commission), thus so-called mergers with community dimension, the Office, however, does not have any decision-making powers¹⁵.

4. The Act on the Protection of Competition stipulates only the formal procedure which the Office follows if it considers that the violation of competition law has occurred (either Czech or Community). In such cases the Act assumes an initiation of the administrative proceeding at the end of which the Office on the basis of the gathered information declares whether an administrative offence¹⁶ has been committed, and if so, the Office eventually decides to impose a fine¹⁷ or a remedy¹⁸.

5. Furthermore, in case of proceedings on prohibited agreements or abuse of dominant position the Act gives explicitly the possibility to decide on imposition of measures, which were proposed together by the parties to the proceedings (hereinafter the commitments)¹⁹.

6. The Office holds the view that cooperation with undertakings which are suspected of anti-competitive infringements, may under certain circumstances lead to the fast and efficient restoration of distorted competition. In cases where the undertakings are prepared to remedy their action out of their own initiative, the Office is ready to offer a helping hand to these undertakings; if the anti-competitive situation is remedied, the Office is ready not to initiate the administrative proceeding, or eventually

⁹ Cf. Article 3 and following of the Act

¹⁰ Cf. Article 10 and following of the Act

¹¹ Cf. Article 10 and following of the Act

¹² *Ex ante* regulation (which the Office performs in connection with the approval of mergers (cf. particularly Articles 16 and 17 of the Act), is not included in this document.

¹³ *Ex ante* regulation (which the Office performs in connection with the approval of mergers (cf. particularly Articles 16 and 17 of the Act), is not included in this document.

¹⁴ *Ex ante* regulation (which the Office performs in connection with the approval of mergers (cf. particularly Articles 16 and 17 of the Act), is not included in this document.

¹⁵ Council Regulation (EC), No 139/2004, Article 21, paragraph 3

¹⁶ Cf. Article 7, paragraph 1, Article 11, paragraph 2 and Article 18, paragraph 5 of the Act.

¹⁷ Cf. Article 7, paragraph 1, Article 11, paragraph 2 and Article 18, paragraph 5 of the Act.

¹⁸ Cf. Article 23, or Article 18, paragraph 5 of the Act.

¹⁹ Cf. Article 7, paragraphs 2 – 5, and Article 11, paragraphs 3 – 7 of the Act.

conclude the already initiated administrative proceedings without decision stating that an administrative offence has been committed by this action.

7. The partnership approach between the Office and the undertakings may in many cases lead to a faster and more reliable achievement of the aim of competition policy, which is the protection of competition, but also to the restoration of competitive conditions in the market. The rapidity of this solution is connected with the informality of the approach. Higher reliance of the results is based on the assumption that the undertakings identify themselves more with measures they themselves adopt (although after formal steps taken by the Office) than with a fine which is imposed always against the will of its addressee.

8. Nevertheless, it is unquestioned that the alternative solution is not always possible; there are competition problems which cannot be solved in other way than by sanction. The Office believes that the system of adoption of sanctions and the prevention through commitments are interconnected: the authority of the competition office and the seriousness of the appeal to a “non-sanction” solution of an individual case by the Office results directly from the reality of threat of a fast sanction imposition that exceeds the essential threshold of sensibility. Thus the Office applies concurrently with these rules strictly its principles for imposing fines²⁰.

9. This document describes the cases and conditions under which the Office does not initiate the administrative proceedings, or terminates the administrative proceedings in course, depending on the seriousness of an anti-competitive conduct, with regard to the fact whether and for how long the anti-competitive state has lasted and on the measure of undertaking’s cooperation. These procedures are in this document called “alternative solution of competition issues”.

10. The Office is convinced that the primary consideration of the possibility of alternative solution of competition issues is the assessment of gravity of the anti-competitive action, its duration, or in case of agreements distorting competition also a question, whether such an agreement has only been concluded, or whether it has already been realized. It is necessary to take into account also the fact that the choice of alternative solution influences essentially the procedural situation of the subject harmed by the anti-competitive action in the framework of the judicial proceedings on the damages caused by anti-competitive actions (see below).

11. Alternative solutions of competition issues, as described in this document, do not represent the only way the Office may cooperate with the undertakings on the elimination of competition problems. Procedures of the Office described in this document thus do not affect the so-called Leniency programme²¹ related to cases, where an undertaking enables the Office to prove a prohibited agreement for which the Office has not had sufficient evidence before. Moreover, the further on described procedures do not affect the possibility of the Office to decrease the fine during the appellate proceedings if the party to the proceeding has fulfilled the remedies imposed on it in the first instance decision.

12. The rules mentioned below are not applied by the Office in non-standard cases where it is possible to define clearly the specificities of cases and the measure of difference and where this different procedure is necessary for effective protection of competition.

II. Alternative solution of competition issues in general

13. The following forms of cooperation on the part of undertakings is considered by the Office as the alternative solution of competition issues:

²⁰Guidelines of the Office on the method of setting fines

(<http://www.compet.cz/en/competition/antitrust/guidelines-on-the-method-of-setting-fines/>), thereafter the Guidelines on setting fines.

²¹ The Office’s *Leniency programme* (<http://www.compet.cz/en/competition/antitrust/new-leniency-programme/>).

Elimination of competition problems prior to the initiation of the administrative proceeding, and

Adoption of commitments proposed by the parties to the proceedings in the framework of the first instance proceeding.

14. The possibility of the alternative solution of competition issues is dependent, among others, on the gravity of the infringement the undertakings are suspected to have committed. In its application practice²² the Office distinguishes among three categories of infringements' gravity, differing in the extent of threat for competition:

Very serious infringements: namely price fixing horizontal agreements, horizontal agreements on market division or output-restriction horizontal agreements; abuse of dominant position with significant impact²³ on a broader group of consumers, implementation of mergers contrary to a legitimate decision of the Office, and non-fulfillment of measures imposed by the Office pursuant to Article 18, paragraph 5 of the Act.

Serious infringements: other horizontal agreements, resale price maintenance and market division vertical agreements, other particular abuse of dominant position or violation of prohibition of merger implementation pursuant to Article 18, paragraph 1 of the Act in cases than different from those mentioned in "14. i" above, and

less serious infringements: other vertical agreements of lesser significance with a limited impact on consumers, which affect only a minor part of the market, and other less serious distortions of competition.

15. Conditions for alternative solution of competition issues before the initiation of the administrative proceeding and in the framework of the administrative proceeding are entirely specific; for this reason this document deals only with their individual forms. Alternative solution of competition issues outside the administrative proceeding provides lower rate of legal certainty to all subjects involved, i.e. to the affected undertakings, to the Office and also to the third parties. The Office thus applies the alternative solution outside the administrative proceeding in a narrower range of situations than is the case of alternative solution in the framework of the administrative proceeding.

III. Elimination of competition problems prior to the initiation of the administrative proceeding

16. Pursuant to Article 20, paragraph 1, letter a) of the Act the Office supervises, whether and how the undertakings fulfill their duties resulting from the Act or from decisions of the Office issued on the basis of this Act. Pursuant to Article 20, paragraph 2 of the Act the Office proceeds in the course of supervision appropriately pursuant to Article 21, paragraph 5 to 9 of the Act, thus pursuant to provisions which regulate the administrative proceedings before the Office.

17. Investigations conducted by the Office in order to find whether violation of law has taken place or not, are regarded as initiated by the Office's ex officio. These investigations may basically end either in a conclusion that in the given case the violation of law has not taken place, and that outside the course of the administrative proceeding, or the Office initiates the administrative proceeding or the case is passed on to other relevant body.

18. If the Office learns about possible violation of law, it conducts an investigation to find out whether the detected facts give reasons for the initiation of an administrative proceeding in the given case (cf. Article 21, paragraph 3 of the Act).

²² Guidelines on setting fines, paragraphs 21 – 24.

²³ Both direct and indirect impact on consumers is taken into account.

19. If the detected facts give reasons for the initiation of an administrative proceeding, the Office preliminarily analyses the gravity of the action in question, and whether the anti-competitive action has already been realized and if so, the duration of the infringement.

20. The Office is of the opinion that in case of certain less serious infringements it is not contrary to preventive sanction policy of the Office if it does not initiate the administrative proceeding (and thus does not decide on the commitment of the infringement, or on imposing a sanction) under the condition that the competition problem will be fully eliminated in the near future.

21. In case the Office, on the basis of a preliminary assessment, comes to a conclusion that it is possible to assess the anti-competitive action as less serious and that this action either has not been realized or has had a limited impact on competition, then, provided it does not result from the circumstances of the case that in order to get evidence it is necessary to undertake investigation on the premises in the course of the administrative proceeding (cf. Article 21, paragraphs 5 and 6 of the Act), the Office notifies, before the initiation of the administrative proceedings, the undertakings suspected of committing the infringement of the fact in which of their action the Office sees a possible violation of the Act or Articles 81 and 82 of the Treaty. Limited impact on competition is, according to this point, assessed mainly from the territorial point of view (area affected by the anti-competitive action), from the personal point of view (the number of competitors and consumers influenced by the anti-competitive action), and from the time point of view (the duration of the infringement).

22. If the undertaking which has been notified by the Office according to the preceding point of the suspicion of having committed an anti-competitive infringement, announces the Office in 10 days in writing, that it is to eliminate the identified competition problem, the Office invites this undertaking to submit in one month and not longer a proposal of a measure, implementation of which will lead to a full elimination of the competition problem. Such a proposal must contain a deadline in which the competitor implements the measures in question.

23. If the Office receives a proposal of a measure in the period stated in the previous paragraph, it assesses its sufficiency. The sufficiency of the measure is assessed from the point of view of the ability to properly, i.e. timely and completely, eliminate the competition problem. It is not possible to regard as sufficient such measure, the implementation of which is dependent on uncertain circumstances or which is not implemented immediately.

24. The proposed measures have to be of such a character and intensity that their implementation is capable of justifying the resignation on authoritative declaration of unlawfulness of the action and on imposition of administrative sanction on action, which is normally considered as an infringement of law. It can be thus applied only when the implementation of the proposed measure leads to an objective possibility of immediate and full solution of the detrimental situation caused by the anti-competitive action.

25. If after assessing the above-mentioned criteria the Office finds that the proposed measures are sufficient, the Office does not initiate the administrative proceeding, and this will last as long as the undertaking fulfills conditions contained in the proposal of the measure.

26. If the Office does not receive the proposal of a measure in the given period, or if the Office does not find the proposed measures sufficient, eventually if the undertaking concerned does not act according to the proposed measures, the Office initiates the administrative proceeding.

IV. Adoption of commitments proposed by the parties to the proceeding in the course of the first instance proceeding

27. Both in administrative proceedings on agreements distorting competition and on abuse of dominant position the Office may impose on the parties to the proceeding an obligation to fulfill measures they have jointly proposed, if such measures are sufficient for the protection of competition

and if the detrimental situation is eliminated thereby. If the Office does not find such measures sufficient, it communicates the reasons for such finding to the undertakings in writing and it continues with the proceeding; otherwise it shall impose fulfilment of such measures and terminate the proceedings²⁴. The parties to the proceeding may propose the measures to the Office in writing within 15 days following the day, on which the Office delivered to them its objections to the agreement; any proposal or changes in the proposed measures made after this period shall be taken into account by the Office only in cases deserving special attention. The parties to the proceeding are bound by their proposals towards the Office, as well as mutually among themselves, or towards the third parties, and following the proposal, until the decision of the Office is issued, they must not perform the agreement in its original wording²⁵. The Office may not issue a decision imposing the measures, if the prohibited agreement has already been performed and if it resulted or could have resulted in a substantial distortion of competition²⁶, or if the abuse of dominant position resulted in a substantial distortion of competition²⁷.

28. The Act enables the parties to the proceeding suspected of having concluded a prohibited agreement or abused their dominant position to propose the Office measures (commitments), the fulfilment of which leads to elimination of the situation the Office (on the basis of the information obtained in the course of the administrative proceeding) regards as detrimental. In case the fulfilment of such commitments is sufficient for the protection of competition, the Office issues a decision which imposes fulfilment of these measures on the parties to the proceeding and simultaneously terminates the proceedings (Article 7, paragraph 2, and Article 11, paragraph 3 of the Act, thereafter “the decision on commitments”).

29. Decision-making practice of the Office shows that the proposed commitments should have such characteristics and intensity that their fulfilment is able to justify the termination of the administrative proceeding in progress which may eventually lead to an imposition of sanction for an infringement regarded as an administrative delict. This is an exceptional situation when the interest in an instant and full settlement of the detrimental situation outweighs the interest in punishment of the guilty undertaking, and subsequently the interest in legal certainty of third parties²⁸.

30. When considering the adoption of commitments it is necessary to take into account the fact that the decision on commitments in a certain way complicates the legal situation of subjects affected by the anti-competitive behavior, either consumers, or competitors of the parties to the proceedings (the so-called third parties), because the Office’s decision does not declare the illegality of action of the undertakings concerned. In the proceedings before the civil court such third parties cannot rely on the fact that the question, whether the administrative delict has been committed and by whom, has already been bindingly solved as a preliminary question²⁹, and they themselves have to prove basic conditions of private responsibility for anti-competitive behavior.

31. All the parties to the proceedings submit the proposal of commitments jointly (Article 7, paragraph 2 and Article 11, paragraph 3 of the Act); in the case of a prohibited agreement it thus has to be a joint proposal of all its participants, in the case of collective dominant position a joint proposal of all the undertakings in the dominant position in the relevant market. In case any of the parties to the proceeding does not agree with the proposed commitments, it is not possible to issue the decision on the commitments.

32. The proposal of commitments has to be offered within 15 days following the day on which the Office delivered its objections to the parties to the proceedings; if there are more parties to the

²⁴ Article 7, paragraph 2, or Article 11, paragraph 3 of the Act.

²⁵ Article 7, paragraph 3, or Article 11, paragraph 4 of the Act.

²⁶ Article 7, paragraph 4 of the Act.

²⁸ Cf. the decision of the Office for the Protection of Competition of May 15, 2006 R 10/2005 ČSAD Liberec

²⁹ Cf. Article 131, paragraph 1 of the Act No. 99/1963 Coll., Rules of Civil Procedure, as amended

proceeding, this period starts on the day the last party has received the objections. Statement of objections is not defined by the Act; however, from the existing decision-making practice of the Office it results that it is such statement of the Office (therefor it is not a decision), in which are the parties to the proceeding notified: which of their actions are regarded by the Office as unlawful; which of the legal provisions were violated; and on the basis of which evidence did the Office come to such conclusion. The statement of objections is generally an individual administrative act undertaken in the course of the administrative proceeding following the termination of evidence gathering, but before the parties to the proceeding inspect the documentation serving as the basis for the decision^{30, 31}.

33. The proposal of commitments is binding for the parties to the proceeding. After the proposal of commitments has been submitted to the Office, the parties to the proceedings may not continue in action, which was indicated by the Office as detrimental in the statement of objections (e.g. they may not fulfill an agreement, which the Office regards as prohibited), and thus have to proceed according to the proposed commitments (Article 7, paragraph 3 and Article 11, paragraph 4 of the Act). In case any of the parties to the proceeding does not comply with this obligation, the submission is not regarded as proposals of commitments in accordance with the law.

34. The decision on commitments may not be issued if the action, which the Office regards as detrimental on the basis of the gathered evidence, has already been performed and has resulted (or could have resulted) in a substantial distortion of competition (Article 7, paragraph 4 and Article 11, paragraph 5 of the Act). The Office holds a view that with regard to these provisions of the Act the decision on commitments may be accepted only if it relates to:

less serious infringement;

serious infringement in the form of agreements distorting competition which has not been performed so far;

serious infringement which has been terminated, and which had a limited impact on the competition, and which did not show signs of a hard-core restriction pursuant to Article 6, paragraph 2 of the Act, or pursuant to paragraph 11 of the Commission Notice on the de minimis agreements³².

35. Limited impact on competition is, according to this point, assessed mainly from the territorial point of view (area affected by the anti-competitive action), from the personal point of view (the number of competitors and consumers influenced by the anti-competitive action), and from the time point of view (the duration of the infringement).

36. The Office assesses only such proposals of commitments that have to be delivered within 15 days following the statement of objections. Later proposals shall be taken into account by the Office only in cases deserving special attention. Similar regime stands also for significant changes in the already proposed commitments. This does not exclude later partial modification or specification of the timely proposed commitments.

37. If the Office receives the proposal of commitments in the stated period, it assesses the sufficiency of commitments with a view to their ability to eliminate the detrimental situation, and proceeds pursuant to criteria stated in paragraphs 22, 23, 28 and 29.

³⁰ Cf. Article 36, paragraph 3 of the Act No. 500/2004 Coll. on Administrative Proceedings, as amended.

³¹ The possibility of proposal of commitments after this period is described below.

³² Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (de minimis) (2001/C 368/07).

38. Provided the Office finds the commitments sufficient, it imposes the obligation of their fulfillment on the parties to the proceeding and by the same decision it concludes the administrative proceeding. Such decision does not declare a breach of competition law.

39. If the Office

does not receive the proposal of commitments;

receives the proposal of commitments after the stated period and it is not a case deserving special attention;

finds the proposed commitments insufficient,

it continues in the administrative proceeding. In the two last mentioned cases the Office notifies the parties to the proceedings of this fact in writing.

39. The Office believes that commitments pursuant to Article 7, paragraph 2 and following of the Act or Article 11, paragraph 3 and following of the Act must be strictly differentiated from remedial measures pursuant Article 23 of the Act (thereinafter “remedial measures”). Remedial measures are complementary instrument the Office may use if it concludes that neither the authoritative declaration of an anti-competitive infringement together with its prohibition for the future, nor the eventual sanction imposed in the form of a fine pursuant to Article 22, paragraph 2 of the Act, constitutes sufficient measures to achieve the aim of the Act. From its nature it is an imposition of measures defining an obligation to restore the previous state resulting from the parallel prohibition of particular action and from a general obligation to refrain from unlawful action. The relationship of the two instruments, i.e. commitments and remedial measures, is as follows: if the Office does not find the commitments proposed by the parties to the proceeding sufficient to eliminate the detrimental situation, it may, provided the conditions of the Act are fulfilled, impose measures (similar in substance and form) as remedial measures pursuant to Article 23 of the Act³³.

40. The Office continuously supervises the fulfillment of commitments by which it conditioned the termination of the administrative proceeding; the supervision is performed pursuant to Article 20, paragraph 2 of the Act. If the Office discovers that some undertakings do not fulfill the measures adopted pursuant to Article 7, paragraph 2 or Article 11, paragraph 3 of the Act, it imposes a fine on these undertakings pursuant to Article 22, paragraph 2 of the Act. This does not affect the procedure pursuant the following point.

41. Even if the administrative proceeding has been terminated as a result of adoption of commitments proposed by the parties to the proceeding, the Office may re-initiate the administrative proceedings, provided one of the three situations anticipated by the Act occurs. The Office re-initiates the administrative proceedings pursuant to Article 7, paragraph 1, or Article 11, paragraph 2 of the Act, if

the conditions decisive for the decision on the termination of the proceeding have significantly changed;

the undertakings have acted contrary to the imposed measures, or

the decision on the termination of the proceeding has been issued on the basis of false or non-complete documents, data or information³⁴.

³³ Cf. points 81 to 88 of the justification of decision R 10/2005 of May 5, 2006 in the *ČSAD Liberec* case.

³⁴ Article 7, paragraph 5, or Article 11, paragraph 6 of the Act.

In such cases the re-initiation of proceeding is not obstructed by the principle of the authority of the thing judged.