

Regional Court in Brno on Cartels in 2012. Case comments to judgments in *CRT* cartel and *GIS* cartel

In 2012, the Regional Court in Brno has delivered a couple of judgements in two globally notorious cases which were primarily dealt with by the European Commission: the gas insulated switchgear cartel (*GIS* cartel) and the cathode ray tubes cartel (*CRT* cartel). Czech authorities decided these cases because the duration of the scrutinised cartels extended to the time before the Czech Republic's accession to the EU.

The parties to both of the proceedings disputed the competences of the Czech Office for the Protection of Competition (hereafter, OPC or Office) to impose financial penalties upon them. They saw these fines as a breach of the *ne bis in idem* principle, seeing as the Commission has already fined the same cartels. The Office, as well as the reviewing courts,¹ stated first that the question of parallel prosecution of the cartels was clear and that the Czech authority had indeed jurisdiction to decide these cases². The Supreme Administrative Court cited in this context its older *RWE* judgement³. Following the jurisprudence of the Court of Justice, the Court confirmed that the purpose of national competition law is to protect effective competition on the domestic market. By contrast, the aim of EU competition law is not only to protect competition but also, through it, to protect the effective functioning of the common market against, in particular, activities sealing off national markets or affecting the structure of competition within the common market⁴. The Court reasoned that the *ne bis in idem* principle is subject to the threefold condition of identity of facts, unity of offender and uniformity of legal interest protected. The respective cartel decision of the European Commission repeatedly referred to the EC/EEA territory and did not cover the anti-competitive consequences of the said cartel in the territory of the Czech Republic before its accession to the EU. Therefore, the OPC had the competence to decide on this case.

Both courts, the Regional Court in Brno as well as the Supreme Administrative Court, held that the question of jurisdiction was an *acte claire* here. However, the

¹ The Regional Court in Brno as well as the Supreme Administrative Court.

² See e.g. the judgements of the Regional Court in Brno ref. no. 62 Ca 22/2007 of 25 June 2008 and of the Supreme Administrative Court ref. no. 2 Afs 93/2008 of 10 April 2009, both in the *GIS* cartel.

³ Judgment of the Supreme Administrative Court ref. no. 5 Afs 9/2008 of 31 October 2008 in the case of *RWE Transgas*.

⁴ Joined cases C-295/04, C-296/04, C-297/04 and C-298/04 *Manfredi* [2006] ECR I-06619.

Regional Court in Brno decided to refer this question for a preliminary ruling to the Court of Justice of the European Union (hereafter, CJEU) in the second ‘episode’ of the *GIS* cartel case⁵.

The jurisdiction of the Office was confirmed by the CJEU *Toshiba* judgement⁶ which stated that a decision of the OPC alongside a decision of the European Commission did not violate the *ne bis in idem* principle. The CJEU reasoned that ‘the Commission’s decision refers specifically, in many of its passages, to the consequences of the cartel at issue in the main proceedings within the European Community and the EEA, referring expressly to the ‘Member States of the time’ and the States ‘which were contracting parties’ to the EEA Agreement’⁷. The CJEU clarified also that the Commission’s decision does not penalize the possible anti-competitive effects produced by the scrutinized cartel in the Czech territory in the pre-accession period. It was also seen as apparent from the methods of the fine calculation that the Commission did not take account of the countries which entered the EU on 1 May 2004 in its decision⁸. The CJEU concluded therefore that the imposition of separate fines in the Czech Republic did not violate the *ne bis in idem* principle.

The judgements commented here concern procedural questions and questions of substantial law. They are especially interesting because they cover a set of rules how to proceed in cartel proceedings and cartel investigations. They also acknowledge that a range of procedural rules that was formulated for the European Commission by EU courts applies also to procedures conducted by the Office. The following text deals with the most important principles which the Czech competition authority must abide to.

Nemo tenetur

As a rule, the Office requests the parties to antitrust proceedings to provide it with information and documents needed to assess the relevant market, the conduct in question or its effects on the market and consumers. The authority sometimes asks the parties to provide such information in a certain form such as, for instance, filling in a pre-set table. In its requests, the Office regularly warns the parties that failure to comply may lead to the imposition of a fine of up to 1% of their yearly turnover.

One of the parties to the proceeding in the *CRT* case challenged before the Regional Court in Brno the possibility of using information provided by the parties upon such request. In its opinion, such approach violates the *nemo tenetur* principle. The company stated that the fact that it had to provide information, which it had to gather by itself under the threat of a considerable fine, regardless of the contents of such information, represented an infringement of the prohibition of self-incrimination.

⁵ I.e. after the Supreme Administrative Court quashed its previous ruling and returned it to the Regional Court in Brno for a renewed judgement.

⁶ C-17/10 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* (not yet reported).

⁷ See para. 101 of the judgement.

⁸ *Ibidem*.

The Regional Court in Brno declared in this context that both the European Court of Human Rights and the Czech Constitutional Court have considered forcing parties to the proceedings to cooperate under a threat of an administrative fine to be an inadmissible intervention. Nobody is thus obliged to contribute in an active manner, directly or indirectly, to his/her own condemnation. However, coercive measures may be applied in case of activities which do not require active conduct by the requested party. The Regional Court in Brno further stated that the prohibition to force self-incrimination is not an absolute right – it may be restricted by a certain method of coercion. The Czech Court mentioned here the General Court's ruling in the *Mannesmannröhren-Werke* case⁹ and stated that the Office may ask questions concerning facts. However, it cannot ask for subjective opinions, assessments or conclusions. It can certainly not ask the parties questions that might lead to them admitting their participation in an anti-competitive conduct.

The Regional Court in Brno thus reached the following conclusions:

- an absolute prohibition of self-incrimination is a hurdle to the fulfilment of the Office's mission;
- the Office may ask the parties questions, but only to the degree that they do not lead to the admittance of the existence of an illegal conduct;
- parties to the proceeding are obliged to provide the Office with all information concerning the facts of the case and all relevant documents that they have at their disposal, even if they might be used as evidence against them;
- however, the information requested may concern only factual questions and the documents requested have to be already in existence.

In the *CRT* case, the Office did not coerce the parties to create new documents, but only to provide existing materials (they had to provide documents from cartel meetings, the existence of which was noted in the leniency applications.) Furthermore, the Office stated that it proved the existence of the cartel solely on the basis of the two leniency applications. The documents obtained through the information requests did not form the basis for its decision. The Regional Court in Brno acknowledged that the sole fact that the requested documents were in the case file cannot lead to the illegality of the condemning decision, seeing as they did not constitute its basis. This is so even if they did violate the *nemo tenetur* principle.

Leniency applications as evidence

The Office's decision in the *CRT* cartel was based on leniency applications submitted by two parties to the cartel proceedings: Samsung (type I) and Chunghwa (type II). Other parties to the proceeding challenged the realisation that the facts of the case were established purely on the basis of data obtained from the leniency applications and accompanying documents. The claimants challenged the use of leniency applications as sole evidence for their anticompetitive conduct.

⁹ T-44/00 *Mannesmannröhren-Werke AG v Commission* [2004] ECR II-02223.

In line with the General Court *JFE Engineering Corp.* judgement¹⁰, which allowed a case to be based on a single leniency application only, the Regional Court in Brno argued that if one leniency application is enough, then two are sure to be even more acceptable as sole evidence of a cartel. According to the Czech Court, the question here should not have been whether a cartel decision can be based on a leniency application. Instead, it should be whether the facts obtained from leniency applications are sufficient to support the Office's conclusions and whether the facts declared in the applications are in fact credible. The trustworthiness of leniency applications determines its evidentiary value (see as well General Court judgement in *Mannesmannröhren-Werke*).

On the one hand, the credibility of a leniency application is reduced by the fact that it is submitted by an entity having a personal interest in its contents, seeing as it expects to get immunity from fines, or at least a fine reduction, in return for the submission. On the other hand, the Regional Court in Brno admitted that a competition authority would often find itself in a hopeless position without leniency applications. It would frequently be uncertain if it could at all manage to prove the existence of anticompetitive behaviour (prove that a cartel agreement was concluded and executed) in order to impose antitrust fines. Thanks to leniency applications, a competition authority finds itself in a dramatically different situation – being able to prove the facts of the case. The Court deduced from this that leniency participants have not an entirely personal interest in submitting their applications, seeing as they exposes themselves to the danger of receiving a condemning decision and, possibly even a fine.

However, one has to consider the specific situation in which a given leniency application is submitted. If it occurs before the authority has gained any knowledge of the cartel, or if the authority is unable to prove it, then the Regional Court in Brno is right to state that submitting a leniency application goes against the interests of the applicants. In the first case, they risk that their conduct will be exposed to the public and, if their application is rejected, they would have 'unnecessarily' drawn the authority's attention to their conduct. In the second case, the applicant provides the Office with evidence without which a condemning decision could not be rendered at all, even if it does not impose a fine on the applicant.

The situation is different when a competition authority is already in possession of a sizable amount of evidence concerning a cartel. Here, the adversity of the position of a leniency applicant, which would probably be fined anyway, cannot be labelled as adverse as easily. The same can be said in situations where a domestic competition body is deciding on a case already dealt with by the European Commission (as was the case here) or in fact by a different national authority. In the *CRT* cartel, the Commission has already initiated proceedings concerning the global cartel. The only problem that might have arisen domestically would thus have been to prove its effects on the Czech market. Samsung, the first leniency applicant, was aware of

¹⁰ Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp., formerly NKK Corp., Nippon Steel Corp. JFE Steel Corp. and Sumitomo Metal Industries Ltd v Commission* [2004] ECR II-02501.

this fact when submitting its application to the Office. One has to wonder about the motivations of these parties – why did they submit their leniency applications? The only rationale here could be to avoid a fine, or having it reduced at least. Thus, in the author's opinion, the Regional Court in Brno erred in affirming the credibility of the leniency applications in such a general way.

The Regional Court in Brno indicated also that in a situation where neither doctrine nor legislation solves the question whether a leniency application, as well as information provided in connection with it, is protected in civil law suits, the position of the applicant cannot be described as advantageous. The benefits of a fine immunity or reduction is relativized by the fact that the applicant may be sued under civil law and the information provided as part of a leniency application may be used against him.

This disadvantage was eliminated on 1 December 2012. Thanks to an amendment to the Act on the Protection of Competition, access to leniency applications is since then only possible for parties to the proceedings before the Office and their representatives. It is, however, doubtful whether this law can be upheld in light of this year's CJEU *Donau Chemie* judgement¹¹. The CJEU formulated a requirement therein that national rules must leave it to the discretion of domestic courts to decide whether the public interest in the enforcement of competition law prevails over an individual's right to compensation. The CJEU stated that a general rule that does not leave such decision to the discretion of the courts is contrary to EU law. It is therefore possible that the aforementioned provision of the Czech Act on the Protection of Competition will be challenged in the future.

Most importantly, the Regional Court in Brno found further that the evidentiary value of a proof should not be assessed according to where the evidence comes from but according to what follows from it. The Court concluded that the two existing leniency applications are enough to prove the alleged anticompetitive conduct, provided the Office has gained from them two sets of data that does not contradict each other. If the leniency applications show the functioning of the cartel, and at least some degree of participation therein by the parties to the proceeding, then it is not rebutted that each of these parties contributed to the pursuit of a common object at its own level. The existence of the cartel and the participation therein of the parties to the proceedings (alleged cartel participants) is thus proven, unless any of them has produced evidence to distance itself from the cartel.

Access to files – materials for the decision

Since the conclusion reached by the Office that a price cartel between the participants took place (and on what conditions) was based solely on leniency applications, other parties to the proceeding had a strong interest in accessing the case file – especially accessing the leniency applications and their related documents.

According to Czech administrative law (Section 38 Administrative Procedure Code), parties to the proceedings have access to the case file during the entire proceedings,

¹¹ C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* (not yet reported).

that is, from their very beginning (even before the statement of objections is issued). This is a solution unlike those before the European Commission or the German Bundeskartellamt. The Czech Act on the Protection of Competition, *lex specialis* to the Administrative Procedure Code, does not limit access to the case file by the parties. Clearly, business or bank secrets are generally not accessible. However, the practice of the Office in cartel cases shows that even business secrets are usually made accessible to other parties to the proceeding after the statement of objections is delivered, provided they will be used as a basis for the cartel decision¹².

Access to leniency applications and related documents constitutes the only exception to the above. Until approximately 2011, the Office kept leniency applications inside the case files but protected them from the eyes of other parties to the proceeding (under protection granted to business secrets). That was the case both in the CRT and GIS cartels. In view of the upcoming amendment to the Act on the Protection of Competition, the Office began in 2011 to keep leniency applications outside the case files. This approach was based neither on a statutory nor on a soft law rule. Since 1 December 2012, according to the new Section 21c(3) of the Act on Protection of Competition, the Office has legal backing for such solution.

The Office protected the leniency applications submitted in the CRT case as business secrets not only before the statement of objections was issued, but also after it was delivered to the parties. In other words, it protected them even at a time when it usually unveils all of the evidence that will be used as a basis for its forthcoming decision. Here, the parties never gained access to the leniency applications and could thus not check whether what the Office stated in its decision was actually reflected in the leniency applications. As a result, the parties challenged this approach before the Regional Court in Brno, which reviewed the Office's decision to refuse access to the leniency applications both considering the time before and after the statement of objections was issued. Acknowledging the right of access awarded by Section 38 of the Administrative Procedure Code, the Court reasoned that the access right has to be balanced against other interests also. The Regional Court in Brno arrived thus at the opinion that absolute access denial is possible but only before the statement of objections.

The Regional Court in Brno based its arguments in the CRT cartel case firstly on the CJEU *Pfleiderer* judgement¹³. Albeit the latter concerned a civil law claim, the Czech Court reasoned that the CJEU's arguments can be applied in this case as well, despite it having an administrative nature. The Regional Court in Brno did not oppose access to leniency applications and related documents but stated that all interests concerned must be balanced against each other. The general (public) interest has to be taken into consideration in particular, this being the interest in uncovering cartels.

¹² See A. Drbal, 'Z rozhodovací praxe Úřadu pro ochranu hospodářské soutěže' ['From the case-law of the Office for the Protection of Competition'] (2012) 2 *Antitrust* 123, citing the decision of the President of the Office ref. no. ÚOHS-R52/2012/HS-13543/320/HBt of 20 July 2012.

¹³ C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161.

- The Regional Court in Brno raised three main arguments:
- Leniency applications are often the only reasonable means of uncovering cartels and so the programme should be sufficiently interesting for potential applicants. The approach used should thus be maximally favourable to the applicants.
 - The Office will not be forced by a strict interpretation of the law to keep leniency applications outside the case files because fair process would suffer by this even more. However, keeping the leniency application outside the case files is exactly what the legislator introduced with the latest amendment on the Office's proposal. Keeping leniency applications in the case files but protected as business secret, is more transparent according to the Regional Court in Brno.
 - Advocate-General Ján Mazák stated in *Pfleiderer* that the general (public) interest in uncovering cartels prevails over the interest of individuals in civil claims.

Thus, the Office had the right objections (with regard to the theory of games/prisoner's dilemma), to conceal the contents of leniency applications as business secrets before the statement of even though the information thus protected did not fulfil the prerequisites of a business secret, as it was a less intervening measure. However, access denial to case files even after the statement of objections is delivered would have to have a clear basis in the law. The Regional Court in Brno considered that not all of the information that was concealed even after the statement of objections fulfilled in this case the legal prerequisites of a business secret. This data should have been made available to other party to the proceeding.

Albeit the Office violated the right of the parties to access all information in the CRT case file, the Court found that this violation was not of sufficient intensity to influence the legality of the decision. The Court reasoned that access to case files is not an object in itself – the given statement of objections contained all essential information deriving from the concealed parts of the two leniency applications submitted in this case. The Regional Court in Brno came to this conclusion because the origin and authors of the documents were not concealed and the information was summarized correctly in the statement of objections, a fact ascertained by the Regional Court in Brno.

The parties argued further that they could not verify whether the concealed parts of the leniency applications did not actually contain data that spoke in their favour. Upon reviewing the documents, the Regional Court stated however that it did not consider this to be the case.

It follows from the above that according to the Regional Court in Brno, the Office may conceal from the parties to the proceedings evidence it will use to base its decision upon. It is sufficient that reviewing courts can verify the contents of such evidence in order to ascertain whether the Office's summary of the inaccessible evidence corresponds to its actual content and whether the Office did not deny access to evidence speaking in favour of the parties. However, in the author's opinion, a judge having no thorough knowledge of the domain cannot assess this question appropriately.

The practice of the Office today is that if a piece of information forms a basis for its decision, the authority grants access to it even if it is a business secret.¹⁴ Furthermore,

¹⁴ A. Drbal, 'Z rozhodovací praxe Úřadu...', p. 123.

the Office reviews business secrets of the parties to the proceeding continuously during the proceedings. If it finds that given information can no longer be classified as such with respect of others, it requests the party to the proceeding claiming the business secret to revise its categorization. In cases where the Office further considers that a piece of information identified by the interested party as a business secret does not, in fact, fulfil the legal prerequisites thereof, it makes the information accessible to other parties to the proceedings.

In the *GIS* case, the Regional Court in Brno dealt further with the question of how much time do the parties to the proceeding have at their disposal in order to familiarize themselves with the documents in the case file in situations where access was only given after the statement of objection was delivered. This issue concerns documents meant to form the basis for the cartel decision. The *GIS* statement of objections was issued in the course of January 2007; parties were granted 15 working days to react. They could get acquainted with the materials supporting the decision in the last week of January – the decision was issued on 9 February 2007. The parties were thus informed approximately one week before access to the relevant materials was granted. They had approximately one week afterwards to react. After two and a half years of the investigation, the parties had only days (few weeks) to familiarize themselves with the material (which often had to be translated seeing as the parties were not Czech undertakings) and to react adequately.

The Regional Court in Brno found that having such short deadlines cannot be considered unlawful in itself. Particular negative consequences of short deadlines for the parties have to be taken into account. The Court admitted that the deadlines set by the Office in this case may seem to be too short and inadequate at first sight. According to the Court, however, neither the content of the submissions made after access was granted, nor the appeal to the President of the Office suggest that the parties to the proceeding did not have sufficient time to prepare their argumentation. The Regional Court in Brno considered also the goal of the legal instrument of getting acquainted with the materials supporting the decision. Its goal is to get the parties familiar with all gathered data, on which the decision will be based. As such, this has to occur after the collection of evidence in the final phase of the proceedings and immediately before the issuing of the decision on the merits. Having regard to this goal, the Office evaluated the materials supporting the decision already amply in the statement of objections.

The Regional Court in Brno reasoned also that, in their reactions to the statement of objections, the parties primarily commented on the Office's position during the proceedings and on their procedural position towards the manner of dealing with the case. They also criticised the incompleteness of the gathered materials. The Court deduced that the parties did not need a longer deadline for delivering such statements, neither did they need time to comment on the opinions of other parties. Furthermore, the Regional Court in Brno stated that the parties had ample opportunity to present their views during appeal proceedings before the President of the Office. The Court concluded therefore that although the deadlines were very short, no procedural rights of the parties were violated so as to affect the legality of the decision.

In spite of the judgment, such a short time for comments on evidence may, in general, be in breach of the right to effective defence. If a party finds itself confronted with completely new evidence/argument, which it must soundly rebut, not having enough time to do so largely limits the scope of its defence. One week for finding new evidence seems too short. Moreover, under new legislation on access to leniency applications, parties do have access to these documents after the statement of objections is delivered, but they do not have the right to make copies of or at least takes notes from such documents. As a result, they must learn all relevant facts by heart and if they want to rebut them effectively, they would usually need to access the leniency documents several times. They must be awarded ample time to do this.

Liability of the concern

Several corporate groups were involved in the *GIS* cartel case. The Office fined both a parent company and its subsidiaries; it also fined the successor company of one of the cartel members and companies belonging to the group that it formerly belonged to.

Some of the parties to the proceedings claimed before the Regional Court in Brno that the original decision of the Office, as well as the appeal decision of the President of the Office, was based on evidence against corporate groups as a whole, rather than against particular companies within them. Some of the parties further stated that since they belong to these corporate groups, liability should have been established solely with the parent companies and not with them.

The Regional Court in Brno agreed with the Office that liability could not be found with a corporate a group (a non-person). If several entities commit an offence, even if they form one unit from an economic point of view, only an entity that has legal personality can be the bearer of liability. For that reason, the decision has to target a particular legal person, which needs to be determined on the basis of the rules on control within the specific corporate groups. The Court acknowledged that there are other methods of handling these situations, which make it possible to adjust the method used to the type of internal transactions present within a given group so as not to impede the enforcement of competition law. It was stressed that there can be no exception to the rule that it is necessary to identify those specifically liable for the activities within corporate groups. The Regional Court in Brno went on by applying the rules established by EU institutions.

In determining liability within a group, the degree of direct and active participation in the reviewed conduct of the particular entities has to be taken into account (see Commission decision in *Rubber Chemicals*¹⁵). The extent of consultations among group members in connection with important trade matters may be used as the criterion for the establishment and distribution of liability within a particular corporate group (see Commission decision in *Organic Peroxide*¹⁶). The participation of the parent company's

¹⁵ Decision of the European Commission No. 38.443 of 21 December 2005, *Rubber Chemicals*.

¹⁶ Decision of the European Commission No. 37.857 of 10 December 2003, *Organic Peroxide*.

managers in defining business strategies of its subsidiary may act as another factor for determining liability (see Court of Justice judgement in *Commercial Solvents*¹⁷). This, however, may not have discriminatory effects – liability shall be determined according to the cumulative principle (cumulative fines) rather than on the basis of solidarity (see General Court judgement in *Tokai Carbon*¹⁸).

The Regional Court in Brno then resumed that there are several methods how to take into account the concept of a single economic unit. It is necessary to choose the method that corresponds best with the concept of the given cartel and with reasonable sanctioning of cartel participation, without unjustifiably discriminating any of the cartel members. It is thus sometimes necessary to determine the individual degree of cartel participation of each given undertaking. In some cases, particular companies within the corporate group may be regarded as mere instruments of the cartel idea concluded among corporate groups. In this scenario, it is reasonable to establish liability of parent companies. However, it is unreasonable to cumulate liability in such a manner that it is established for the parent company and its subsidiaries. This cannot be viewed as establishing liability within the particular corporate group on the basis of solidarity, be it from the point of view of declaring that an infringement has been committed, or from the point of view of imposing a fine.

The Regional Court in Brno concluded on the basis of the administrative case file that the Office did not gather enough material to determine liability of individual companies within particular groups.

It must be stated for the sake of completeness that the Regional Court's judgement was reviewed by the Supreme Administrative Court in April 2013. The conclusions of the Regional Court in Brno were confirmed. The Supreme Administrative Court added also that it is indeed possible to determine liability of each of the undertakings party to the proceedings according to different methods, considering which of these methods is in each particular case the most appropriate.

Conclusions

It must be stated in conclusion that the two 2012 judgements of the Regional Court in Brno provided very useful guidelines for the Czech Competition Office and for parties to future cartel proceedings. They summarised the jurisprudence of EU courts on how the Commission is to conduct its proceedings in cartel cases and acknowledged its applicability to proceedings conducted by the Czech authority.

Although one cannot always agree with the conclusions reached by the Regional Court in Brno, its judgements in both the *GIS* cartel and the *CRT* cartel case provide helpful new guidance for the Office and parties to cartel proceedings.

Dr. Petra Joanna Pipková

Centre for Comparative Law, Law Faculty, Charles University Prague;
pipkova@prf.cuni.cz

¹⁷ 6-7/73 *Commercial Solvents* [1974] ECR 223.

¹⁸ T-71/03, T-74/03, T-87/03, T-91/03 *Tokai Carbon* [2005] ECR 00010.