

## **New Procedural Notices of the Czech Office for the Protection of Competition: Leniency, Settlement, and Alternative Problem Resolution**

by

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## I. Introduction

In connection with the 2012 amendment of the Czech Act on the Protection of Competition (hereafter, APC), reported in YARS last year<sup>1</sup>, the Czech Office for the Protection of Competition (hereafter, Office) issued three new procedural notices in November 2013: Notice of the Office for the Protection of Competition of 4 November 2013 on the application of Section 22ba of the Act on the Protection of Competition (hereafter, Notice on the Leniency Programme), Notice of the Office for the Protection of Competition of 8 November 2013 on the Procedure aimed at the speeding up of administrative proceedings by means of the application for a reduction of the fine according to Section 22ba(2) of the Act on the Protection of Competition (hereafter, Notice on the Settlement Procedure), and Notice of the Office for the Protection of Competition of 8 November 2013 on alternative resolutions of competition problems and on the dismissal of the matter (hereafter: Notice on Alternative Problem Resolutions)<sup>2</sup>. This contribution analyzes the aforementioned three new procedural soft-law instruments.

The new notices react to changes brought about by the 2012 Amendment of the APC (hereafter, 9<sup>th</sup> APC Amendment) in Czech competition procedure. The 9<sup>th</sup> APC Amendment incorporated the leniency programme and the settlement procedure into the APC for the first time in the history of Czech competition law. Furthermore, the amendment introduced the instrument of the so-called prioritisation, i.e. the possibility for the Office to dismiss a matter in cases where there is no public interest in its prosecution.

## II. Notice on the Leniency Programme

Before the 9<sup>th</sup> APC Amendment, the Czech leniency programme existed only as a soft-law. Thanks to the new legislation, leniency found its way into Section 22ba of the APC. The new Notice on the Leniency Programme will provide interpretational rules for its application as a tool of cartel investigation.

The Notice on the Leniency Programme retains the same structure as its predecessor but it contains changes in its details. Some of these 'little' modifications clarify earlier rules and thus represent a change for the better.

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<sup>1</sup> See R. Neruda, L. Gachová, R. Světnický, '9th Amendment to the Czech Competition Act' (2013) 6(8)YARS 159 ff.

<sup>2</sup> All to be found here: <http://www.uohs.cz/en/legislation.html>.

Some of these amendments mean, however, a deterioration of the position of the parties to the proceedings.

## **1. Positive changes to the leniency programme**

### **a) Possibility of preliminary consultations regarding the leniency application**

Since November 2013, a leniency applicant may, before lodging an official submission, and alongside the possibility of presenting the information in a hypothetical form, ask the Office to consult with it on the matter. Such consultations have, of course, an informal character and shall help applicants assess whether it is appropriate for them to lodge a leniency submission at all, or which effects would the lodging of such submission have on them.

The Office is of the opinion that undertakings will be more motivated to cooperate in the investigation and in proving cartel thanks to the informality of this procedure. The Office will not be able to use the information and documents obtained during such informal talks in the proceedings if the undertakings decide after the consultations not to lodge a leniency application. This shall serve as an incentive that protects the undertaking requesting the consultation.

Informal consultations shall improve the position of potential leniency applicants.

### **b) Non-imposition of the sanction prohibiting the participation in public tenders**

The Notice on the Leniency Programme also reflects the fact that the 9<sup>th</sup> APC Amendment provided for a new type of sanction for bid-rigging cartels. The sanction consists of placing the offender on a blacklist prohibiting the included undertakings from participating in public tenders. Such a sanction may have a significant effect on those undertakings whose commercial activities and income derive from fulfilling public contracts.

According to Section 22ba para. 3 APC, such a penalty cannot be imposed on unsuccessful leniency applicants. The Notice on the Leniency Programme reiterates this rule which is meant to serve as a further incentive for members of bid-rigging cartels to apply for leniency.

### **c) Obligation not to jeopardize onsite inspections**

Under the previous notice, a leniency applicant had to terminate its participation in the cartel immediately after lodging its submission in order for

the application to be successful. This obligation was modified under the new Notice on the Leniency Programme. Now, an applicant shall not terminate its participation in the cartel if this would jeopardize onsite inspections.

This shift reflects the Office's practical experiences. Successful onsite inspections presuppose a moment of surprise. If one of the members would suddenly terminate its participation in the cartel, other members might be forewarned. Thus, they would gain enough time to prepare for onsite inspections, e.g. by destroying certain documents. For this reason, the Office introduced the new obligation not to jeopardize onsite inspections that shall eliminate such scenarios.

#### **d) Keeping leniency applications outside of the case files**

Before the 9<sup>th</sup> APC Amendment was adopted, the Czech law did not contain any provisions on how and where to keep leniency applications. Thus, the practice of the Office of handling the leniency applications (e.g. keeping them outside of the case files) was legally unfounded. The new wording of Section 21c para 3 APC states that leniency applications and related documents (produced both by the applicants and the Office) shall be kept outside the case files until the issue of the statement of objections. The Notice on the Leniency Programme develops this rule further.

Similarly, Section 21c para. 4 APC and the Notice on the Leniency Programme regulate the regime of accessing case files containing a leniency submission. Accessing leniency applications and related documents shall now be allowed only for parties to the proceedings and only from the moment of the statement of objections becoming part of the case files.

This means that 3<sup>rd</sup> parties that assert that they have been affected by the Office's decision will not be allowed access to these documents. This solution will serve as a safeguard for leniency applicants as they will not have to fear that the information and documents provided to the Office will be (ab)used by 3<sup>rd</sup> parties.

Clearly, if such right of the procedural parties would not have been limited in time, they would be able to thwart the proceedings. After the issue of the statement of objections, leniency documents will become part of the case files and procedural parties will have an unlimited access to the files. They will, however, not have unlimited use of the files as they may not make copies or take abstracts of leniency documents.

General inaccessibility of leniency documents to 3<sup>rd</sup> parties contradicts, of course, the recent CJEU judgement in the *DonauChemie* case<sup>3</sup>. According

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<sup>3</sup> Case C-536/11 *Bundeswettbewerbshörde v. DonauChemie AG and Others*, ECLI:EU:C:2013:366.

to the CJEU, it shall be for the courts to decide in individual cases whether public interest in cartel enforcement prevails over an individual interest in given compensation. On the other hand, the revised Czech rules are perfectly compatible with Article 6 of the new directive on damages actions for breach of competition law<sup>4</sup>.

#### **e) Criminal liability of natural persons**

The Notice on the Leniency Programme reacts also to the amendment of the Czech Criminal Code that was carried out together with the 9<sup>th</sup> APC Amendment. This amendment introduced a special provision on active repentance that effaces criminal liability. According to the new Section 248a of the Criminal Code, criminal liability for participating in a cartel expires if the offender fulfils the obligations for leniency set out by the APC.

The Notice on the Leniency Programme specifies that the application of active repentance within the meaning of Section 248a of the Criminal Code requires that the natural person, as the offender, is actively participating in the fulfilment of the requirements set out by the leniency programme by the undertaking. In doing so, the Notice on the Leniency Programme concretises the scope of the participation of natural persons in the leniency programme.

#### **f) Conditions for an applicant's cooperation with the Office necessary for granting leniency**

According to the previous leniency programme, a leniency applicant had to cooperate effectively, fully, continuously and responsively with the Office. According to the new Notice on the Leniency Programme, a leniency applicant has to participate actively in the case investigation. It is obvious that previous rules required the applicant to fulfil very broadly defined conditions, a fact that has created considerable uncertainty. In the past, applicants could have done their utmost and still might not have fulfilled, in the eyes of the Office, the conditions of effective, full, continuous and responsive cooperation. This could have led to the rejection of their leniency application and the loss of its advantages.

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<sup>4</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ [2014] L 349/1.

### **g) Added value**

Unlike the previous notice, the new Notice on the Leniency Programme no longer contains the provision according to which conclusive evidence had more probatory value than other evidence, e.g. in the form of declarations which need further confirmation where contradictions emerge. The new Notice on the Leniency Programme states that significant added value may also be attributed to information and documents that enable the Office to prove a higher gravity or longer duration of the cartel. This makes it possible to submit a leniency application also for entities that cannot provide significant evidence, provide they want to contribute to the enforcement of competition law.

### **h) Summary applications**

Already the previous notice contained rules governing cases where the Commission is well placed to deal with the case (i.e. if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States<sup>5</sup>) and the applicant submits a leniency application to the Commission and makes use of the so-called summary application. The new Notice on the Leniency programme changed the provisions insofar that they now copy the provisions in the ECN Model Leniency Programme. Thus, unlike the previous notice summary applications may be submitted not only in cases of type IA applications but also in cases of type IB and II applications. Further, the new provisions regulate explicitly a summary application marker system. Further changes concern the possibility to submit the summary application by making use of the ECN template and in English language. Finally, the applicant is now obliged to substantiate why the Commission is best placed to deal with the case.

## **2. Negative changes to the leniency programme**

### **a) Tightening of the requirements on the quality of information and documents**

Unlike the previous notice, an undertaking applying for leniency type IA has to provide the Office, as the 1<sup>st</sup> applicant, with information and documents that the Office does not yet have and that enable the Office to conduct onsite inspections. The previous notice did not require for the information

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<sup>5</sup> See Art. 14 of the Commission Notice on cooperation within the Network of Competition Authorities.

or documents to be yet unknown to the Office. Thus, providing a new interpretation of already available information could have theoretically been enough. However, the requirement of ‘not yet known’ could have already been interpreted into the previous notice also.

Thus, with the new wording of the requirements, the Office obviously tries to limit the possibility of double interpretation. However, it also tightens the requirements because the Office is not obliged to accept a leniency application if it is based upon information that it already has, although could not interpret correctly until the actual application.

This change leads to a higher uncertainty for leniency applicants which cannot know what information and documents the Office already has and, thus, cannot know whether the information and documents it provided will have enough probatory value in order for the Office to accept their leniency submission.

#### **b) More advantageous position of the cartel initiator**

The previous notice precluded the initiator of the cartel, the party which forced others to remain in the cartel or played a leading role in the cartel for applying for leniency type I. The new Section 22ba para. 1(a) APC precludes that possibility only for those undertakings that forced others to remain in the cartel. The new Notice on the Leniency Programme merely reiterates this requirement and does not contain the other two preclusions.

This may lead to the paradox that the initiator or the leader of the cartel will benefit from full immunity thanks to the leniency programme. The Office, apparently, made concessions to its previous requirements on the quality of the applicant. This seems to be rather unfair towards other cartel members who got involved on the way.

#### **c) Returning of the documents**

Section 22ba para. 5 APC states that a leniency application may be withdrawn within fifteen days after the expiration of the deadline for its submission to the Office<sup>6</sup>.

This situation entails the risk that the Office will keep the information and documents that have been provided in connection with the leniency application after the submission was in fact withdrawn. This may have adverse effects on the assessment of the behaviour of such a temporary applicant.

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<sup>6</sup> I.e. fifteen days after the statement of objections was delivered.

This issue is connected with a further problem in the new Notice on the Leniency Programme. The previous notice contained a provision that, upon request, the Office will return any documents or other materials that were provided in connection with a leniency application to the applicant if leniency was ultimately not granted. This provision was left out from the new Notice on the Leniency Programme.

### 3. Assessment

The new Notice on the Leniency Programme entails a number of changes that should be assessed positively, especially the introduction of the informal consultation procedure and considerations of the new sanction of the public tender blacklist. On the other hand, it also entails a set of new rules that seem rather disputable. This concerns primarily the changes in the position of the initiator of the cartel whose position has been much improved by the amendment and the omission of a rule that would govern the treatment of information and documents submitted as part of a leniency application that was withdrawn and not granted.

Despite the aforementioned deficiencies, it is to be anticipated that the application of the new leniency programme by the Office will strengthen the readiness of undertakings to actively contribute to the detection of cartels without weakening their legal certainty.

### III. Notice on the Settlement Procedure

It was not only the leniency programme that was incorporated into the APC by the 9<sup>th</sup> APC Amendment. The same took place with respect to the settlement procedure which has not, until then, been regulated by Czech law in any form whatsoever (neither in 'hard-law' nor in soft-law) and yet the Office has been happily applying it since 2008. Nevertheless, without any written rules, the procedure lacked transparency for both the procedural parties and potential applicants. Moreover, the Office came to the conclusion that it had been far too generous with the procedure (concerning, especially, the amount of fine reductions) and decided to tighten it up.

The 9<sup>th</sup> APC Amendment and the Notice on the Settlement Procedure represent also a paradigm shift. In the past, the Office used the settlement procedure as a means of procedural economy as well as a means of investigating/proving anticompetitive behaviour (next to leniency). The new legal provisions on set-

tlement assign this procedural instrument – in the manner of other European countries – solely to the category of procedural economy.

Before, the adoption of the 9<sup>th</sup> APC Amendment, the Office applied the settlement procedure on at least six instances<sup>7</sup>, both in cartel (horizontal as well as vertical agreements) and abuse of dominance cases. This is one of the traits that distinguished the Czech procedure from other European jurisdictions, which limit settlements to cartel cases only. The average amount of fine reductions following a settlement was approximately 50% (way above the 10% offered by the Commission); albeit in the last years before the amendment, the discounts were closer to 20%. The fine reduction was conditional upon admitting the anticompetitive behaviour, its legal qualification by the Office as an infringement, as well as the completion of evidentiary proceedings.

With the 9<sup>th</sup> APC Amendment (especially Section 22ba para 2, 3, 6 and 7 APC), the Czech settlement procedure obtained a clearer silhouette. Accordingly, a party to the proceedings wishing to close the proceedings with a settlement has to submit a settlement application no later than 15 days after it received the statement of objections. The applicant has to admit to committing an infringement of competition law: cartel, unlawful vertical agreement, abuse of dominance or violation of the standstill obligation in merger control. It is clear that the scope of the application of the Czech procedure is still broader than the usual one in Europe. If the Office deems the resulting sanction as adequate, it concludes the settlement and reduces the intended fine by (exactly) 20%. Furthermore, an undertaking that successfully completed the settlement procedure cannot be sanctioned by being placed on the public tenders blacklist (a special sanction for bid rigging).

The above-said is the entirety of what the amended APC currently says on the settlement procedure. Therefore, as it was done for the leniency programme, the Office adopted the Notice on the Settlement Procedure.

## 1. Settlement procedure

In its main part, the Notice on the Settlement Procedure deals with the procedure itself, that is, with the particular steps that need to be taken in order to successfully conclude the procedure. The settlement procedure entails seven particular steps:

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<sup>7</sup> Case no. S95/2008/KD *Kofola/Kofola Holding* (vertical agreements); case no. 114/2008/KD *Albatrosnakladatelství* (vertical agreements); case no. S52/2009/DP *RWE Transgas* (abuse of dominance); case no. 147/2008/KD *Karlovarské minerální vody/HBSW* (vertical agreements); case no. S169/2008/KD *Henkel/Procter&Gamble/Reckitt Benckiser* (cartel); case no. 346/2010/KD *AVE/.A.S.A./van Gansewinkel/SITA* (cartel).

- i. **initiation of the procedure by the Office:** The Office sends a call to the parties to the proceedings in order to determine their interest in a possible settlement. The parties must reply within a period stipulated by the Office in the call. Thus, although it seems according to Section 22ba para 2 APC that the procedure is initiated by a party to the proceedings (submission of the settlement application), in practice, the Office is the ultimate initiator of settlements as the procedure itself starts long before the actual application for settlement.

In order to benefit from procedural economies as much as possible, the Office intends to initiate the procedure as soon as it has a satisfactory idea of the infringement of competition law and liability for it.

- ii. **commencement of the settlement procedure by the Office:** After the parties to the proceedings expressed their willingness to conclude (i.e. complete) the proceedings by means of a settlement, the Office officially opens the settlement procedure by sending a written notice.
- iii. **oral hearings with individual parties within the settlement procedure:** The Office conducts these hearings bilaterally. During those hearings, the Office summarizes briefly the facts that it had managed to ascertain, the evidence upon which they are based, the legal qualification of the conduct and the envisaged fine. Should the Office determine during the oral hearings that new facts came to light, it closes the settlement procedure in order to gather further evidence. However, this does not mean that the Office and the parties cannot return to the settlement procedure at a later date. In such cases, the settlement procedure starts from the beginning.
- iv. **notice of interest of the parties to the proceedings to continue with the settlement procedure:** After the oral hearings are concluded, the Office sends a further call to the parties to reconfirm their interest in concluding the proceedings by way of a settlement within a period stipulated by the Office in the call.
- v. **issue of a brief statement of objections by the Office:** If the procedural parties remain willing to conclude a settlement, the Office issues a brief statement of objections containing basic facts, reference to main evidences, legal qualification of the conduct and the amount of fines it intends to impose on the parties. From this moment on (e.g. the moment of the delivery of the statement of the objections to the individual parties), the limitation period of fifteen days begins to run (see Section 22ba para 6 APC). Within this period, the parties have to submit their applications for settlement. The limitation period does not have to be observed only in exceptional cases (hardship clause in Section 22ba para 7 APC).

- vi. application for settlement:** It is only now that the parties to the proceedings submit official settlement applications according to Section 22ba para 2 APC. The Office calls this an application for the reduction of the fine within the settlement procedure. The application must contain a full and unconditional admittance of responsibility for the competition law infringement and a confirmation of the factual circumstances of the case and of their legal qualification specified in the statement of objections. It must also contain a statement that the given party is familiar with the amount of the fine envisaged by the Office and that it won't propose any new evidence or performance of any further procedural actions.
- vii. issue of a brief decision in the matter:** After the parties submit the settlement application, the Office issues a brief decision in the matter. This (the shortness of the decision) is the real advantage of the settlement procedure, of course next to the 20% fine reduction and avoiding the inclusion on the public tender blacklist. The facts and the evidence of the case are described in a very general manner only. Parties injured through the anticompetitive behaviour at hand are usually not mentioned at all, a fact especially advantageous to those who may fear claims for compensation by injured parties.

Such a procedure shall not only entail procedural economies for the State and for the parties concerned (parties do not request performing further evidentiary proceedings or procedural actions and do not submit appeals or actions to administrative courts), but it shall also contribute to a faster restoration of competition on the market.

## 2. Discretionary powers of the Office

In spite of the settlement procedure being advantageous, it is stained by the fact that its application remains entirely within the discretion of the Office, regardless of the wording of Section 22ba para. 2 APC.

First, as seen above, it is the Office who initiates the settlement procedure. The Office states in its Notice on the Settlement Procedure that it will always make the decision whether the initiation of the settlement procedure is appropriate and useful on a case-by-case basis. When considering the possibility of using the settlement procedure, the Office shall take into account in each case mainly the nature and seriousness of the anticompetitive behaviour, the current status and development of the administrative proceedings, the number of parties and the expected amount of sanctions, including an assessment

whether final sanctions will be sufficient even after their reduction with regard to the nature and seriousness of the offence.

The Office shall also consider whether there is established national or EU case law relevant to the given type of anticompetitive conduct. In cases that might provide a precedential guide for further practice, the Office will generally not initiate the settlement procedure so that its conclusions could be reviewed in court proceedings.

Furthermore, the Office may break off the negotiations almost during the entire settlement procedure. This possibility is not only limited to cases where further evidence is necessary (as stated above). The Office may, according to the Notice on the Settlement Procedure, terminate the procedure at any time and without having to give a reason.

Such termination will, of course, be subject to a possible review by an administrative court, which is not bound by the Notice on the Settlement Procedure; however, its conception is yet unknown.

The possibility of an unreasoned termination of the settlement procedure is available also to the parties of the proceedings.

### **3. Participation of all parties to the proceedings (hybrid settlement)**

Unlike the European regime, the Notice on the Settlement Procedure does not allow for a hybrid settlement. Thus, any time one of the parties to the proceedings withdraws its consent to the settlement, the Office will terminate the procedure. If any of the parties does not express its interest in engaging in a settlement at the outset, the Office will not even start the negotiations.

### **4. Termination of the settlement procedure without the conclusion of a settlement**

The settlement procedure may either end with a brief decision in the matter or with a notice on the termination of the settlement procedure. The latter instrument is used when the Office ends the procedure by terminating it without concluding a settlement.

If the settlement procedure was terminated in a later stage of the proceedings, a problem arises with the documents submitted by the willing procedural parties. The Notice on the Settlement Procedure is trying to solve this problem. It stipulates that documents related to the settlement procedure shall become part of the case files even if the procedure is ultimately terminated. The Office, however, shall not take them into account when issuing a decision in the matter.

## 5. Evaluation

First of all, it needs to be stated that the Notice on the Settlement Procedure is a great step forward when compared with the situation before. However, a number of issues should have been resolved differently.

The most important of these issues are: the fact that the settlement procedure may be initiated only by the Office, and the fact that the Notice on the Settlement Procedure excludes the use of a hybrid settlement. This limits considerably the provisions set out in Section 22ba para. 2 APC, which states only that the Office shall reduce the fine (the amount of which was notified to the parties by the Office in the statement of objections) by 20% if: the undertaking admits liability for the administrative offence, and if the Office considers such a sanction as sufficient with respect to the nature and seriousness of the administrative offence in question. Para 6 of the same provision states that the application for a fine reduction pursuant to para 2 shall be submitted within 15 days, at the latest, from the day when the statement of objections was delivered to the given party. The APC does not state anything about the Office being the sole initiator of the settlement procedure, or the fact that all parties to the proceedings have to participate in the settlement.

If the Office has arbitrary discretion to initiate a settlement procedure, a possible danger of political bias arises. Moreover, this may violate the right of equal treatment in (almost) identical cases.

The exclusion of hybrid settlements (reduction of fines) may seem to be justified by the fact that procedural economies cannot be reached in such cases: the Office is required to prepare a full statement of objections, deliver a full decision in the matter and that decision may be appealed. However, even a hybrid settlement is justified. This is because the Office will get rid of a number of possible appellants and those who have settled will faster contribute to the restoration of competition.

The fact that the settlement procedure in the framework of the Notice on the Settlement Procedure deviates somehow from the stipulations of Section 22ba APC has led some competition lawyers to the conclusion that the procedure under Section 22ba para 2 APC is not the same as the procedure under the Notice on the Settlement Procedure, that is, that they represent in fact two different settlement procedures<sup>8</sup>. This is, however, only a theoretical contemplation, which remains to be solved by further practice and the courts.

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<sup>8</sup> See e.g. the presentation of Kamil Nejezchleb, 'Narovnání jako procesní institut' ['Settlement as a Procedural Institute'] at the conference 'Aktuální vývoj v právu na ochranu hospodářské soutěže' ['Current Developments of the Law on the Protection of Competition'], Masaryk University Brno, 22 May 2013.

#### IV. Notice on Alternative Problem Resolutions

The Notice on Alternative Problem Resolutions is the last of the three new procedural notices under review here. Like the Notice on the Leniency Programme, it is a new version of an older notice that has been updated according to the new provisions in the APC.

The new Notice on Alternative Problem Resolutions provides for three different procedures of alternative solutions of competition problems:

- i. elimination of the competition problem without initiating administrative proceedings;
- ii. decision on commitments; and
- iii. dismissal of the case.

The first and the last solution were already dealt with by the previous notice. The new notice has added the dismissal.

These procedures, although quite different in their characteristics, are linked together by the fact that the conduct of the undertaking in question is anticompetitive, and the Office has in principle the right to sanction it, but it refrains from doing so for certain reasons. The Notice on Alternative Problem Resolutions builds upon the principle that the Office, as any other public authority, shall perform its powers with restraint and impose a fine only then, when it is (absolutely) necessary. Furthermore, the Notice on Alternative Problem Resolutions shall help the Office to focus on serious competition restraints that cannot be redressed at all, or that cannot be redressed without imposing a sanction. The Office, as any other competition authority, has limited financial and personal resources, making it unable to deal with all anticompetitive behaviours and thus forces it to select which case to pursue. This Notice presents the rules for making such a selection.

The first and the second solution (elimination of the competition problem without initiating an administrative procedure and the dismissal of the case) are now based on a new legal provision (Section 21 para. 2 APC). This provision enables the Office not to initiate proceedings if there is no public interest in the conduct of such proceedings (so-called prioritisation). This enabling provision states that the Office may decide not to initiate proceedings *ex officio* after a preliminary investigation, if there is no public interest in pursuing the case due to the low level of the detrimental effect of the given practice on competition. Here, the Office shall consider particularly:

- i. the nature of the conduct and the manner of its execution;
- ii. significance of the relevant market; and
- iii. the number of affected consumers.

## 1. Dismissal of the case

The Office considers that the anticompetitive effects of an illegal behaviour may be in certain exceptional cases so small that there will be no public interest their prosecution at all. This consideration of the Office is based on the idea of the prioritisation of more important cases (because of the Office's limited resources). The instrument of "the dismissal of the case" can be used in relation to all kinds of competition law infringements: forbidden agreements (cartels and vertical agreements), abuse of dominance or a violation of the standstill obligation.

Unlike the other forms of alternative problem resolution, the Office does not provide for any clear guidelines on the question which cases could fall under this rule. The Office will assess them *ad hoc* considering whether the anticompetitive conduct had/has no effect on competition or whether the effect was/is very small. The Office is of the opinion that these cases will mostly concern entirely insignificant geographical markets or a marginal number of affected consumers. Such cases could relate to, for instance, Christmas markets in city centres, selling of refreshments at a pool or in a zoo.

The Office – to illustrate its conception – gives one example of a case where it would apply the instrument of case dismissal. It concerns the violation of the standstill obligation if this infringement could evidently not lead to a distortion of competition and if the non-imposition of a sanction will not jeopardize the principle of *ex ante* merger control. The Office is of the opinion that this condition is fulfilled if the concentration could have been approved in a simplified procedure (Section 16a APC) and the parties have ceased implementing the concentration before the Office has acquired knowledge of the infringement.

The termination of proceedings with a dismissal has to be performed by drawing a record of the dismissal (Section 21 para. 2 APC). If the proceedings were initiated after a motion of an affected party, a simple record for the files will be accompanied by a written notice to the complainant. The notice has to be justified – a key realisation in light of the principle of due administration, and might prove important should the complainant submit an action to the administrative courts.

The complainant obviously cannot submit an action against an administrative decision as there is no decision in the sense of the law. The complainant can also not submit an action for inaction because, as the Supreme Administrative Court stated for instance in its judgement in the *Novinová a poštovní.s.r.o.* case<sup>9</sup>,

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<sup>9</sup> Judgement of the Supreme Administrative Court no. 6 Ans 6/2013 of 7 June 2013, *Novinová a poštovní.s.r.o. v Office for the Protection of Competition*.

the complainant has no individual right consisting of the obligation of the Office to initiate administrative proceedings. However, it is possible – in theory – to submit an action for unlawful interference. Here, any person who claims that his/her rights were directly affected by an action (that is not a decision) of an administrative authority has standing. The complainant would of course have to substantiate how the dismissal interferes or interfered with his/her rights. In such case, the justification of the dismissal in the notice will play a major role in the qualification of the actions of the Office as unlawful.

The Office believes that those undertakings and consumers, who consider themselves as being affected by the illegal behaviour in cases that have been dismissed, will not remain without protection as they can use civil law instruments: damages claims and injunctions. The problem here is that those instruments do not yet work properly in the Czech Republic for a variety of reasons, the most important being lack of competition law knowledge by competent judges. Thus, the affected individuals do have a theoretical possibility to enforce their rights, but their success in real life remains unclear even if their claim is reasonable and sound.

## **2. Elimination of the competition problem without initiating administrative proceedings**

If the effect on competition of the anticompetitive conduct in question is low (especially if the infringement was short lived and its effects can be eliminated swiftly), the Office has also a second option how to deal with the case – ‘the elimination of the competition problem without the initiation of proceedings’. This option was already included in the previous Notice on Alternative Problem Resolutions, albeit it did not have a legal basis in the APC. Now, it could be claimed that it has ‘sort of’ a legal basis in Section 21 para.2 APC – the same provision that serves as a legal basis for case dismissals.

The Office will assess the suitability of the use of this solution primarily on the basis of the scope of the harmful effects of the conduct in question. If these are limited, or if it can be expected that the scope of the harm will seriously increase if the problem is not immediately eliminated, the Office will proceed with the elimination of the competition problem without initiating administrative proceedings.

However, the Office will embark on this procedure only under the condition that the undertaking or undertakings in question are able to take measures necessary for a swift elimination of the competition problem.

In its previous notice, the Office limited the scope of the application of this notice only to less serious infringements (especially vertical agreements with a limited effect).

Its application scope has been widened under the new notice. Accordingly, the competition problem elimination procedure can be applied especially to:

- i. agreements in general, which means – with regard to the further points on the list – horizontal cartels that have not been implemented yet and the effects of which on competition would have been limited;
- ii. decisions by associations with a negligible ability to unite the conduct of a larger number of undertakings, regardless of whether the agreement includes a hard-core restriction. However, this will apply only under the condition that the aggregate market shares of the association's members does not exceed 5% and the contents of the decision have not been disseminated among undertakings not participating in the association;
- iii. vertical agreements with a limited effect on competition, regardless of whether the agreement includes a hard-core restriction or not. However, none of the parties to such agreements may have a market share exceeding 10% and none of the affected markets may be foreclosed by the cumulative effect of the agreements.

On the other hand, the instrument of the elimination of the competition problem without initiating proceedings cannot be applied to cases where onsite inspections are conducted or an extensive economic or econometric analysis is necessary.

If the Office, on the basis of its preliminary investigations, reaches the conclusion that the case at hand is fit for this procedure, it will send a 'statement of suspicions' to the undertakings concerned containing a description of the conduct it considers anticompetitive. From the moment of its delivery, the undertaking has ten days to submit a written reply containing the assurance that it is prepared to eliminate the problem. After this, the Office gives the undertaking one month to submit a proposal of measures that shall eliminate the problem. If the anticompetitive behaviour concerns several undertakings, the proposal has to be submitted by all of them jointly.

The proposed measures have to be sufficient – of such a character and intensity that their performance will justify in itself the resignation of an authoritative declaration of the illegality of the conduct and of the imposition of a fine. If the measures are dependent on uncertain circumstances, or they cannot or shall not be performed directly, the Office will not consider them as sufficient.

If the Office considers the measures sufficient, it will inform the undertakings of its decision *notto* initiate proceedings. However, the resignation is not everlasting – it only lasts as long as the undertaking performs the measures, or as long as the circumstances have not significantly changed.

This solution to a competition problem is considerably fairer to the affected parties than dismissal since it is to be expected that the proposed measures will eliminate the source of the adverse effects on competition. This instrument is thus not just the Office turning a blind eye to a problem, as is the case with dismissals. Instead, it is the fulfilment of the authority's duties, which do not consist of imposing fines, but of protecting competition.

### 3. Decision on commitments

Finally, the Office defines also in the new Notice on Alternative Problem Resolutions its rules on 'decisions on commitments'. The latter were already subject to the previous notice, together with the 'elimination of competition problems' procedure. Commitments can of course be applied only in already initiated proceedings, which would otherwise end with a condemning decision.

The parties to the proceedings have the right to submit to the Office a commitments proposal that should lead to the restoration of competition. Commitments may be submitted fifteen days, at the latest, after the delivery of the statements of objections to the respective procedural party. Should the Office consider them as sufficient and accept them, it will terminate the proceedings with a decision accepting the commitments without declaring the conduct illegal and imposing a fine. In its decision on commitments, the Office can include further conditions and obligations (accepted by the parties) that are necessary to achieve a goal that the Office had previously communicated to the parties.

Unlike the two previous alternative competition problem solutions, commitments had a legal basis in the APC already before the 9<sup>th</sup> APC Amendment<sup>10</sup>. Nevertheless, the Office has taken the opportunity to amend some of its aspects with the new notice.

In particular, the Office has changed its position with regard to the assessment of whether a case is fit for the application of this legal instrument. In the previous notice, the Office built upon the typical feature of the seriousness of an infringement. In the new notice, the Office builds upon the scope of the harmful effects of the conduct, on the possibilities to restore effective competition, or on the needs of extensive conduct changes in order to restore competition (cessation of the conduct is not enough). This is one of the rays of the so-called 'more economic approach'. Consequently, the use of this instrument is most appropriate for vertical agreements and abuse

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<sup>10</sup> Prohibited agreements in Section 7 para. 2 APC, abuse of dominance in Section 11 para. 3 APC.

of dominance. It is worth noting, however, that its application in horizontal cartels is not explicitly excluded.

Commitments are, according to the Office, appropriate especially in those cases where, without a swift cessation of the conduct, there is a risk that competition will not be able to develop effectively on the affected and related markets, or in cases where the agreement brings efficiencies, but does not fulfil all of the requirements for an exemption and where a simple cessation would lead to a loss of these efficiencies.

## V. Conclusions

Overall, in spite of the little flaws contained in the three new procedural notices, they have to be welcomed for several reasons. First of all, the Office has modernized its soft-law and moved it from the ‘formalistic approach’ box to the ‘more economic approach’ box. Second, in the area of settlements, there is finally a codified set of rules that provides for a certain amount of legal certainty, albeit soft-law instruments have ‘only’ a self-binding nature. However, though the notices were published in November 2013, their application in practice cannot be assessed yet. Thus, it is necessary to await the Office’s future actions that will provide for an interpretation of unclear terms.