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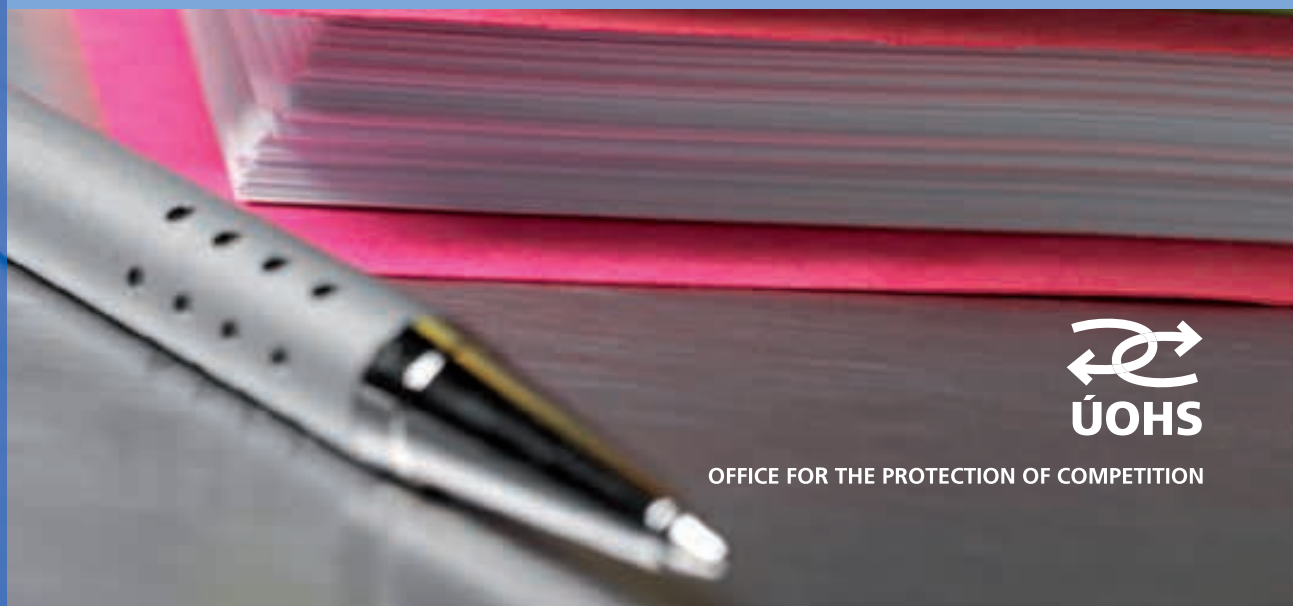
2013

LENIENCY AND SETTLEMENT

INFORMATION BULLETIN 3/2013



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OFFICE FOR THE PROTECTION OF COMPETITION

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Foreword by the Chairman

Petr Rafaj
Chairman of the Office for the Protection of Competition

The Information Bulletin that you are holding in your hands addresses the two probably most frequently used tools of competition law of the present time. The first one, so-called leniency programme, is an investigative tool which is used to detect prohibited agreements and collect respective evidence. The second one, settlement, represents a procedural tool which is used to conduct and, above all, complete administrative proceedings more effectively.

Detection and elimination of cartel agreements is the main and also the most well-known mission of competition authorities. Long gone are the days when it was possible to find a written text of a prohibited agreement signed by all parties in the company director's table or when a party accidentally reveals the cartel to the media due to the lack of their knowledge. These days, cartelists are usually very well versed in antitrust matters, employ large teams of legal advisers and during "illicit" contact with competitors they use the latest technology, including encrypted phone calls and e-mails.

In this environment, any resources, which can be used to effectively eliminate a cartel, are essential for competition authorities. The most effective of those is the leniency programme, i.e. a programme of tolerance, which basically allows a member of a cartel, who notifies the competition authority of the existence of the cartel and brings sufficient evidence to prove and punish the cartel, to have its fine waived completely or significantly reduced. The leniency programme really works because in its nature it constantly psychologically disrupts the integrity of the cartel, whose participants can never be sure that one of them is planning "to betray" the rest in the near future.

In the Czech Republic, the leniency programme has been in place since 2001, but only as a soft law of the Office for the Protection of Competition (hereinafter referred to as "the Office" or "the OPC") and has not been clearly established in applicable legislation. It was incorporated into the Act on the Protection of Competition during the last amendment in December 2012 removing finally all potential doubts about legal certainty in the application of leniency.

On the contrary, the instrument of settlement involves a reduction of the fine to an undertaking who admits the factual description and legal classification of the offence as it was formulated by the Office in the Statement of Objections in exchange for a reduction in the sanction by twenty percent. The main advantage of settlement is primarily a swift conclusion of the proceedings and the fact that the party to settlement, which agreed with the legal and factual classification of the Office, has no reason to file a subsequent appeal or court action. In addition to reducing the sanction, the undertaking is also motivated to fulfil further conditions by a briefer form of the "settlement" decision. Settlement has been used by the Office since 2008 but there was no statutory support until the amendment in 2012.

It was possible to define both instruments within the Act only in the absolutely necessary form. Therefore, in this Information Bulletin, the Office issues two notices containing a detailed description of both instruments to make their application clear, transparent and predictable for undertakings.

New Leniency Programme

Main Purpose and Principle of the Application of the Leniency Programme

The leniency programme is a tool successfully used all over the world by competition authorities in the fight against cartel agreements, which are one of the most serious[1] merits of distortion of competition. One of the main features of a cartel is the fact that its participants are trying to keep it secret as carefully as possible. Therefore, it is generally very difficult for competition authorities to discover, prove and punish a cartel. Moreover, it must be said in this respect that the demands of a secret conclusion of a cartel, its implementation and monitoring are decreasing in connection with the constantly improving possibilities for the use of modern communication technologies and therefore the likelihood of its detection by competition authorities is naturally decreasing as well. For this reason, the leniency programme was created as a tool for destabilization, detecting and proving cartels. The core of this programme is the so-called prisoner's dilemma principle based on game theory.[2] Leniency programmes around the world therefore generally work so that if any party to the cartel reveals its existence to the competition authority or helps it to prove the cartel, as a reward its punishment is fully waived or less severe on condition that all specific conditions contained in the leniency programme[3] are fulfilled.

Existing Leniency Programme – Implementation and Basic Application

In the area of leniency application, the Office for the Protection of Competition worked with the previous leniency programme established in the form of a soft law in 2007[4]. This programme did not have support in law at that time and was based on the possibility of the Office to use its discretion when imposing sanctions. When creating the old leniency programme, the Office was primarily working with the so-called Model Leniency Programme (hereinafter referred to as "the MLP") of the European Commission, which is the model for leniency programmes within the European Union and on the basis of which leniency programmes of individual member states are more or less based.
In accordance with the MLP, the old leniency programme established two types of leniency – full immunity from the imposition of a sanction and the possibility to reduce the fine by up to 50%. To receive full immunity, it was necessary to either be the first one to bring sufficient information and evidence for the Office to perform dawn raid (so-called Leniency IA) or such evidence and information that are sufficient to prove the cartel (so-called Leniency IB). Only one undertaking might have received full immunity within one cartel. In cases where it was not possible to receive Leniency IA or IB, especially when the Office had already conducted dawn raid and had some evidence to prove the cartel, there was still the option to receive Leniency type II consisting in reducing the final fine by up to 50% to the undertaking submitting to the Office evidence representing added value to evidence which is already available to the Office. Leniency type II was not limited by the number of

1 In many countries, including the Czech Republic, concluding a cartel or at least some of its type, is a criminal offence.

2 The so-called prisoner's dilemma is a strategy game based principally on non-cooperation when due to the fact that each player individually tries to obtain the maximum, the overall maximum, which is possible in the case of cooperation among the players, is not reached. In relation to leniency, it can be understood so that each of the participants in the cartel must constantly fear that one of the other cartelists uses the leniency programme and thanks to that gains immunity (reduction of fine) while the rest is punished with a heavy fine. Based on the theory of non-cooperative games, the optimal strategy for each individual participant in the cartel in terms of the maximization of utility is to admit its participation in the cartel using the leniency programme. If a cartel participant pleads guilty, it receives immunity (reduction of fine) and other participants will be punished. If a cartel participant does not plead guilty and any of the other cartel participants confesses, it will be punished and someone else obtains immunity. In addition to the above, there is a chance that the competition authority detects and proves the cartel and all cartel participants will be punished. In order to destabilize cartels to even greater extent, leniency is also based on the principle of speed because only the first party, which confesses, may receive full immunity.

3 Leniency programmes of individual states differ in specific details and settings not only throughout the world but also within the European Union; however, their basic principle is the same everywhere.

4 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) 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 significant reduction of fine (hereinafter referred to as "the old leniency programme").

participants and the fine might have been reduced to more than one undertaking. The reduction for individual undertakings ranged from 30–50% for the first one meeting the condition to provide evidence that represents added value, 20–30% for the second one and less than 20% for all remaining undertakings. In order to receive leniency, in addition to these general conditions for individual types of leniency, the undertaking had to meet also so-called general conditions of the leniency programme, especially cooperation with the Office during the procedure to the maximum extent possible.

When the old leniency programme was applied generally as well as when trying to apply maximum compliance with the procedure used by the European Commission, the Office had to deal with certain problems, particularly of procedural nature. This was caused mainly due to the fact that the then effective wording 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") and Act No. 500/2004 Coll., Code of Administrative Procedure, which govern the administrative proceedings conducted by the Office, was not set in a way that would enable the old leniency programme to be applied without any problems in the form of a soft law. Experience has shown that the problematic issues were the confidentiality of the leniency application, its content and identity of the applicant during the proceedings and the interaction with the Criminal Code which has proven to be very problematic especially after the introduction of the explicit merits of a criminal offence of concluding prohibited agreement in violation of the Act. In addition to these two main problematic areas, there were also some controversial questions in relation to cases of withdrawals of applications and the deadlines for its submission in general. In a certain way, these aspects could reduce the attractiveness and credibility of the old leniency programme and be the reason why this tool was not more widely used by undertakings. Finally, it is necessary to mention the fact that the existence of the old leniency programme only in the form of soft law was not able to give undertakings such legal certainty, as if its basic principles were incorporated directly in the Act.

Amendment to the Act

On 1 December 2013, an amendment to the Act came into effect[5] which brought, among other changes, mainly the incorporation of the principle of leniency directly into the Act. The amendment established the basic mechanism of leniency in the Act. This principle can be found in Article 22ba (1)[6] and it is called an "application for waiver of punishment" (corresponds to Leniency type IA or IB) and "application for reduction of fines" (corresponds to Leniency type II). Further, the amendment to the Act introduced specific rules for access to leniency applications in the context of access to the file which are stipulated in Article 21c of the Act. The last change incorporated into the Act and directly related to leniency is the power of the Office to impose the sanction of a ban on the performance of public contracts or concession agreements contained in Article 22a (4 and 5) of the Act in cases of so-called bid rigging and the termination of this power according to Article 22ba (3) in the case of successful fulfilment of conditions for leniency of any type.

In direct response to the implementation of the leniency programme into the Act, the Act No. 40/2009 Coll., Criminal Code, as amended (hereinafter referred to as the "Criminal Code") was amended at the same time and it introduced in Article 248a in the form of effective regret the possibility of clearing criminal responsibility for a criminal offence pursuant to Article 248 (2), consisting in the conclusion of a prohibited price-fixing agreement, division of a market or another agreement distorting competition in violation of the law while the possibility of meeting this specific effective regret is conditioned by successful use of any type of leniency.

New Leniency Programme – Legal Concept, Interpretation

By implementing the leniency principle directly into the Act, there have been overlaps and inconsistencies with the old leniency programme. Furthermore, on 22 November 2012 ECN[7] published an amended MLP,[8] according to the older version of which the old leniency programme was set. This amendment to the MLP introduced several new factors in the area of the application of leniency, which needed to be incorporated into the Czech leniency programme in order to maintain the possibility of the most coherent approach to leniency applications with the European Commission possible.

Therefore, on 4 November 2013 the Office issued a new leniency notice called Notice of the Office for the Protection of Competition of 4 November 2013 on Application of Article 22ba (1) of the Act on the Protection of Competition (Leniency Programme) (hereinafter referred to as the "new leniency programme") which is based on the legal interpretation contained in Article

5 Act No. 360/2012 Coll. of 19 September 2012 amending Act No. 143/2001 Coll., on the Protection of Competition and on amendment to certain Acts (Act on the Protection of Competition), as amended, and Act No. 40/2009 Coll., Criminal Code, as amended (hereinafter referred to as "the Amendment").

6 Article 22ba (2) newly includes the possibility to request a reduction of the fine based on the confession to an administrative offence which can be used for so-called settlement procedure. This request is not based on the principle of a leniency programme and is not usable for the purposes of leniency.

7 European Competition Network

8 Available at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.

22ba of the Act and some other related provisions of the Act and at the same time it follows the principles set out in the MLP in the maximum extent possible.

The objective of the new leniency programme is to specify and explain the procedure and conditions to be fulfilled by undertakings applying for leniency, or for waiver from the imposition or reduction of the fine respectively in order for the Office to grant their request in its final decision.

The new leniency programme does not change the basic concept or the scope of the application of leniency which is still limited to the so-called hidden cartels[9] and works on the basis of the principle that a sanction is not imposed or is adequately reduced to an undertaking who helps the Office reveal, eliminate, investigate and punish a cartel agreement, with regard to the timeliness of the notification to the Office about the cartel, the quantity of presented evidence, the status of the previous awareness of the Office of the cartel and the quantity of evidence on the cartel available to the Office at the time of the application. The division of Leniency type IA, IB and II also remained preserved.

Compared to the old leniency programme, the new leniency programme is even more focused on the most coherent approach to the assessment of leniency applications with the approach of the European Commission and it states directly that it is necessary to interpret it in accordance with the interpretation carried out by the European Commission and European courts when applying its leniency programme.[10] Therefore, when assessing any possible disputed points of an application, the Office shall use the EU practice in this area and decide in accordance with the jurisprudence of the European Commission, judgements of European courts and explanatory notes to the application of leniency contained directly in the MLP.

Changes brought by the new leniency programme arise primarily from the text of the Act and partly from a change in the MLP. The only substantive change in the application of leniency concerns a circle of the possible successful applicants when the demands on the applicant with regard to its involvement in the cartel were reduced in accordance with the Act and the MLP. Specifically, the threshold of the conditions for granting leniency was reduced so that unlike in the old leniency programme, even undertakings, who were the organizers, leaders or founders of the cartel, can now benefit from the new leniency programme. This change increases the attractiveness and certainty for applying undertakings because even if they played an important role in the initiation or duration of the cartel, they can apply for leniency and they do not have to be afraid that they might be disqualified based on the above criteria. In the new leniency programme, only the condition that an undertaking cannot benefit from leniency if it pressured other undertakings in relation to their continuance or involvement in the cartel was maintained. In addition, the new leniency programme stated that leniency can be successfully applied for even in the case of a cartel agreement which includes vertical elements.[11]

New Leniency Programme and Specific Changes

In the area of conditions for the fulfilment of qualification requirements for Leniency type IA, the requirement for the quality of submitted information has been clarified. The information must allow the Office to carry out targeted dawn raid. In order for the undertaking to meet qualification requirements for Leniency type IA, the information provided by it must be of a higher standard than the information that allows the Office to carry out a "standard" dawn raid. The quality of information must mainly eliminate the risk that the Office could be accused of unjustified investigation (so-called "fishing expedition"). This regulation is in line with the MLP and the approach of the European Commission and its objective is to ensure maximum effectiveness of investigations on site and to discourage undertakings from submitting applications without any idea where any evidence relating to the cartel may potentially be.

The new leniency programme specifies in more details the fact that significant added evidence value is also represented by information and documents that will enable the Office to prove greater severity or longer duration of an alleged cartel agreement. It is hereby expressly declared that if an undertaking, for example, demonstrates that the cartel lasted longer or interfered with multiple markets etc., not only this information will not be considered a burden when calculating the sanction according to the rule on partial immunity, it will also be considered significant added value within the evaluation of the fulfilment of the conditions for granting Leniency type II. This explicit incorporation of the evaluation of the added value of submitted evidence increases the certainty of undertakings in relation to meeting qualification requirements for a reduction of the fine and thus enhances the attractiveness of the leniency programme.

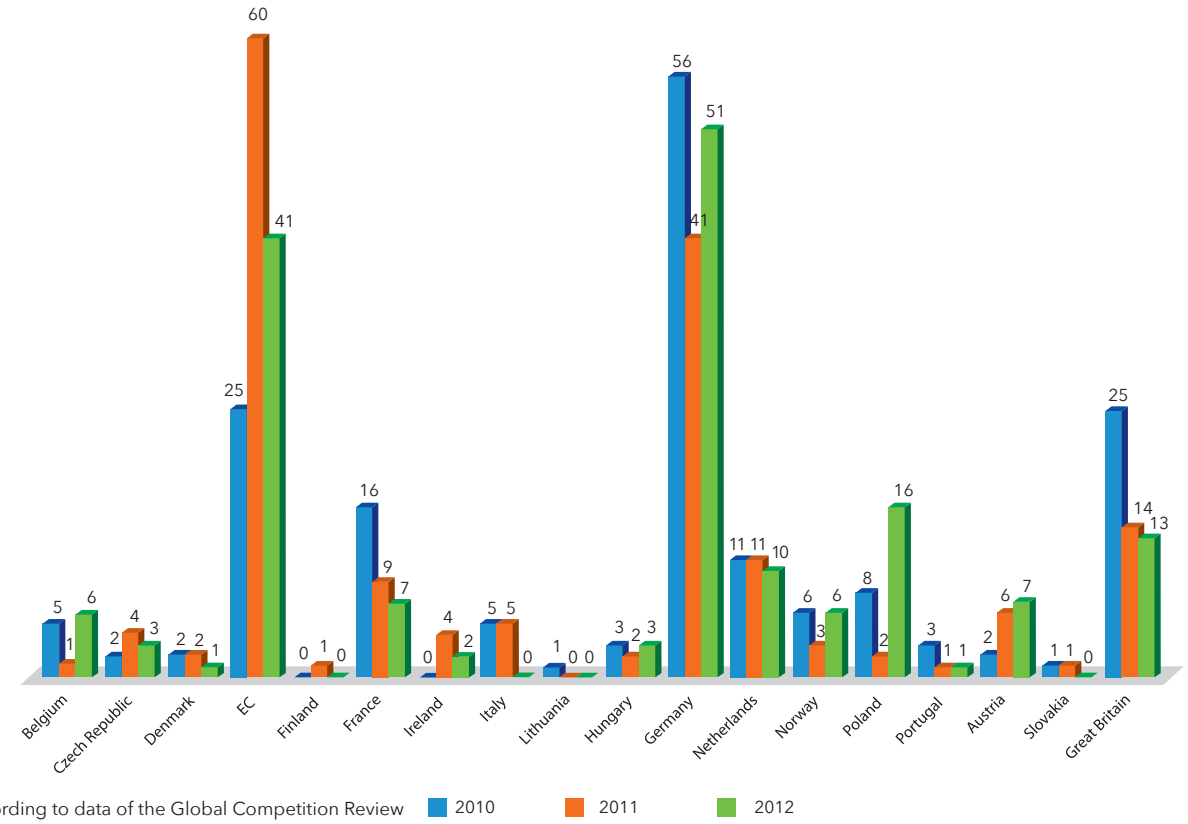
In the new leniency programme, the Office newly introduces the possibility of derogating or modifying some common conditions relating to the behaviour of the undertakings during the investigation that the undertakings must fulfil to be granted leniency. This is mainly derogation of the obligation not to publish information on the submission of an application or

9 Hidden cartels are secret horizontal agreements between two or more undertakings with the objective of coordinating their competitive behaviour in the market and/or of influence competition, particularly by fixing purchase or sales prices and/or other trading conditions, by setting production or sales quotas, dividing markets, including so-called bid rigging, and limiting imports or exports.

10 Official Journal of the European Union C 298, 8 December 2006, p. 17.

11 The leniency programme cannot be used for prohibited vertical agreements without a horizontal aspect, even for "RPM" type agreements.

Number of applications for leniency submitted in individual countries *)



its content before the Office issues a Statement of Objections on this matter. This possibility is in the full discretion of the Office, there is no claim to it and it was introduced for cases where, for example, an applicant for leniency is a participant in a merger and its value is inadequately reduced due to an ongoing investigation of the Office and the expected fine. In this case, the Office could theoretically allow the applicant for leniency to reveal this fact to its business partners in order to increase its value. It should be noted that in the old leniency programme the obligation not to disclose information about the application and its content was set only until the initiation of the administrative proceedings. The new leniency programme extends it until the moment the Statement of Objections is issued in order to maintain a higher effectiveness of investigation and a stronger effect of the so-called prisoner's dilemma on which the application of leniency programme is based in principle.

Another obligation, which may be delayed in some way, is the applicant's obligation to discontinue its participation in the cartel. The reason for this is that the key to obtaining evidence about the cartel in order to eliminate and punish it is the successful performance of dawn raid for which confidentiality is crucial to prevent the destruction of existing evidence. The new leniency programme therefore explicitly states that the termination of participation in the cartel must be performed so as not to endanger dawn raid. It is obvious, however, that the applicant for leniency must terminate its participation in the cartel at the latest at the moment of the commencement of conducting dawn raid. In this context, the Office always expects close cooperation with the applicant and a clear determination of how to allow the applicant to act in relation to the reported cartel and not to jeopardize the performance of dawn raid without disqualifying the applicant from the possibility of benefiting from the leniency application.

A specific novelty introduced in the Czech Republic, which is reflected in the application of leniency and which was introduced to enhance the fight against cartels in public procurement, so-called bid rigging, is the protection from the imposition of a ban to execute public contracts and concession agreements. The amendment to the Act entrusted to the Office a new sanctioning power to punish cartels of the bid rigging type by imposing a ban on the performance of public contracts and concession agreements for the period of three years which significantly increased a deterrent effect against such behaviour. This new sanction is linked to the protection within leniency so that those undertakings who in the final decision benefit from leniency of any type, are protected against this new sanction. The synergic effect of the above provisions allows the Office to be very effective in the fight against cartels in public procurement and destabilizes cartels in this area.

In the procedural area, the new leniency programme explains time limits, within which the individual types

of application may be submitted, clarifies the principle of the administration of the marker and, in accordance with the Act, defines the protection of documents submitted within the leniency application. Procedural rules governing the time limits for submission of leniency applications and their eventual withdrawal are set in the new leniency programme identically with the Act. In relation to the submission of the application, the new leniency programme specifies that an undertaking may submit an application for leniency only through a person authorized to represent it or act on its behalf. In the area of the instrument of reservation protecting the order of applications (marker), there was further clarification in the sense that if the marker is accepted and a leniency application is subsequently submitted within the stipulated time period, it is expressly specified in the new leniency programme that the decisive moment is the moment of submission of an application for a marker, not its approval. In the area of reservation protecting the order, the so-called marker for the overall application is newly introduced which was newly incorporated within the ECN in the MLP and allows reservations of the order for the case of reallocation of investigation from one competition authority to another not only for the first applicant but also for the subsequent applications. This procedure helps ensure consistent order within the "leniency queues" for cases where the case is reallocated within the ECN.

In addition to the above mentioned procedural changes, the amendment to the Act also significantly strengthened the protection of documents submitted by applicants for leniency to the Office.[12] In this regard, the new leniency programme states that all information and supporting documents addressed to the Office or created by the Office in connection with an application for leniency are kept out of the file until the Statement of Objections and only after the Statement of Objections it is possible to access the parts of the file that contain the application and any information and supporting documents addressed to the Office or created by the Office in connection therewith. However, the file may be accessed only by a party to the given administrative proceedings or its representative and it is not allowed to make copies or extracts. Therefore, the new leniency programme expressly declares that even documents relating to the leniency application, which are directed from the Office towards the applicant for leniency, are subject to protection. A different approach would not make any sense because allowing access of other parties to the proceedings, for example, to a confirmation of conditional fulfilment of leniency conditions, which the Office sends to the applicant, would fundamentally deny the sense of protection of the fact that the application for leniency was submitted and who submitted it and thereby the sense of the provisions of the Act on adding documents relating to leniency to the file only after the Statement of Objections.

The last of the major novelties contained in the new leniency programme is the notification of the connection between the application for leniency and the Criminal Code. The new leniency programme includes the expression of the position of the Office to the conditions which must be met for a natural person to be able to benefit from the provisions of Article 248a of the Criminal Code on the termination of criminal liability for a criminal offence pursuant to Article 248 (2). In this regard, the new leniency programme states that a natural person wishing to utilize Article 248a of the Criminal Code must be actively involved in fulfilling the conditions for granting leniency by the undertaking (applicant for leniency).

Evaluation of Adopted Changes

It can be concluded that the new leniency programme is brought into compliance with the Act and the MLP and ensures maintaining of a coherent approach to the leniency application with the European Commission, provides undertakings with legal certainty and clear instructions how to submit an application for leniency and how to cooperate with the Office within leniency. In relation to increasing the attractiveness of the utilization of the leniency, of the novelties introduced by the amendment to the Act, it is necessary to point out mainly the link with the criminal sanctions of natural persons for a violation of standards of competition law and link with the ban to execute public contracts and concessions imposed in cases of cartel agreements involving bid rigging. The new leniency programme enables effective use of leniency by undertakings, increases the attractiveness of leniency and thus the effectiveness of the Office in the detection and investigation of cartel agreements, therefore in the performance of its primary and most important function in the protection of competition.

Kamil Nejezchleb
OPC, Cartels

12 Leniency protection of documents is incorporated in Article 21c (3 and 4) of the Act.

Notice of the Office for the Protection of Competition of 4 November 2013 on Application of Article 22ba (1) of the Act on the Protection of Competition (Leniency Programme)

1. Through this Notice, pursuant to the Article 22ba (1) of the Act No. 143/2001 Coll., on the Protection of Competition and on Amendments to Certain Acts, as amended (hereinafter referred to as "the Act") the Office for the Protection of Competition (hereinafter referred to as "the Office") sets out the framework for granting immunity from a fine imposition or reduction of the fine imposed upon undertakings which are or have been party to secret cartel agreements and which decide to cooperate with the Office during the investigation of the alleged cartel. By cartel agreements it is meant secret horizontal agreements between two or more undertakings aimed at coordinating their competitive behavior in the market and/or influencing the competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid rigging and restrictions of imports or exports.
2. Such cartel agreements lead not only to increase in price and reduced goods[1] choice for the consumer but also have negative impacts on relevant economic sector through the restriction of competition, avoiding pressures that lead the companies to innovate, both in terms of product development and the introduction of more efficient production methods. Finally, such cartel agreements result in artificial prices and reduced choice for the consumer and in the long term, they lead to a loss of competitiveness and reduced employment opportunities.
3. Cartel agreements have serious negative impacts on competition and the Office considers the combat against such agreements as its priority. By their very nature, secret cartels are often difficult to be detected, investigated and prohibited without the cooperation of undertakings or individuals who are involved in them. Therefore, the Act provides the possibility of application of the Article 22ba (1) on those undertakings, which are willing to put an end to their participation in illegal practices and cooperate in the Office's investigation under defined conditions, independently on other parties to an agreement.
4. The Office assumes that transparent setting and explanation of its procedures for applying the Article 22ba (1) of the Act in this Notice provide the undertakings with better understanding of the manner and conditions needed for submitting the application for granting the immunity from the fine imposition or reduction of the fine imposed pursuant to the Article 22ba (5) (hereinafter referred to as "the application") and therefore increase the legal certainty of undertakings. Certainty and understanding is crucial for undertakings in order to use the legal possibility to apply for immunity or reduction of the fine imposed.
5. This Notice results from the Act and at the same time from the Model Leniency Programme of the European Competition Network (hereinafter referred to as "ECN")[2] and Commission Leniency Programme[3] and shall be interpreted in accordance with these documents. Leniency programme refers both to secret horizontal[4] agreements forbidden under the Article 3 of the Act and Article 101 of the Treaty on Functioning of the European Union. Non-imposition of the fine on the basis of this programme is possible (hereinafter referred to as "*Leniency type I*") along with possibility to reduce the amount of the fine (hereinafter referred to as "*Leniency type II*").

I. Immunity from a fine imposition (Leniency type I)

6. This part regulates conditions under which the Office will grant immunity from a fine to the undertaking who was a party to the cartel. Further distinction between Leniency type IA and Leniency

1 In this Notice, goods mean products and services as described in the Article 1 (1) of the Act.

2 Document is available on http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.

3 Official Journal of the European Union C 298, 8 December 2006, page 17.

4 This does not exclude the application of leniency programme also on horizontal agreements that includes also vertical characteristics.

type IB is set, according to character of information provided by the undertaking to the Office.

I.1. Leniency type IA

7. The Office will grant the immunity from the fine imposition to the undertaking if:
a. The undertaking is the first to submit evidence which the Office does not possess and which, in the Office's view, at the time it evaluates the application, will enable the Office to carry out targeted inspections[5] in connection with an alleged cartel; relevancy of this information is evaluated by the Office.
b. The undertaking admits its participation in cartel.
c. The Office had not had sufficient evidence to adopt an inspections decision at the time of the application and had not carried out an inspection (dawn raid) in connection with the alleged cartel arrangement, and
d. the common conditions attached to leniency application are met.[6]
8. In order to fulfil conditions set in the Article 7 of this Notice, the leniency applicant is obliged to provide the Office with the following information and evidence:
a. In the extent known to the applicant at the time of submission:
i. A detailed description of the alleged cartel agreement, including its aims, activities and functioning etc.; information about products and services concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application;
ii. The name and address of the undertaking submitting the immunity application as well as the names and addresses of all other undertakings that participate/participated in the alleged cartel;
iii. The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;
b. Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

I.2. Leniency type IB

9. The Office will grant immunity from fine imposition to the undertaking if:
a. The applicant is the first to submit information and evidence which, in the Office's view, prove an existence of an alleged cartel pursuant to the Act and which the Office has not gathered yet; the relevance of submitted documents is assessed by the Office.
b. The undertaking admits the participation in cartel.
c. The Office did not, at the time of the submission, have sufficient evidence to prove the alleged cartel.
d. No undertaking has been granted conditional immunity[7] from fines according to Leniency IA in connection with the alleged cartel, and
e. the common conditions attached to leniency application are met.[8]

II. Reduction of a fine (Leniency type II)

10. The Office will reduce a fine imposed on undertaking if:
a. An undertaking provides the Office with evidence of the alleged cartel which, in the Office's view, represents significant added value relative to the evidence already in the Office's possession at the time of the application.
b. The undertaking admits the participation in cartel.
c. The common conditions attached to leniency application are met.[9]
11. The concept of "significant added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Office's capability to prove the alleged cartel. During the assessment the Office usually evaluates written evidence originating from the time referred, rather than evidence elaborated later on, for example in the form of a statement. In general, it is considered that the evidence related directly to the concerned questions shall be deemed more valuable than evidence related indirectly. The evidence's value is determined also by the level of acknowledgement received from other sources necessary to ensure reliability of the evidence offered. Evidence with significant added value represents information that enables the Office to prove higher level of infringement or longer duration of alleged cartel.
12. If the conditions attached to Leniency type II application have been fulfilled, firstly the Office takes into account the order of undertakings in which they applied for the leniency and reduces a fine:
a. To the first applicant providing the Office with information and evidence representing significant added value, by 30–50%;
b. To the second applicant providing the Office with information and evidence representing significant added value, by 20–30%;
c. To the other applicants providing the Office with information and evidence representing significant added value, up to 20%.

5 Article 21f or 21g of the Act.
6 See Article 15 of this Notice.
7 See Article 32 of this Notice.
8 See Article 15 of this Notice.
9 See Article 15 of this Notice.

13. During the determination of the appropriate level of reduction of the fine in all of these cases, the Office will take into account the time at which undertakings submitted information and evidence fulfilling the conditions set in Article 10 of this Notice and the extent to which the evidence, by its nature or details, strengthens the possibility of the Office to prove the cartel.
14. If the applicant is the first to submit additional evidence and information in terms of Article 10 of this Notice, which the Office uses to establish additional facts which have a direct bearing on the amount of the fine, such as gravity or duration of the infringement, this will be taken into account and considered as non-aggravating for the undertaking which submitted the evidence.

III. Common conditions for granting immunity from imposing and reduction of a fine (hereinafter refered to as "common conditions for leniency application")

15. The applicant must satisfy the following conditions:

a. The applicant must actively assist the Office in the course of the administrative proceeding. This includes especially:

i. Without the Office´s consent, the applicant shall not disclose any information about its leniency application or its content until the Statement of Objections is issued by the Office;
ii. At the time when contemplating the submission of leniency application, the applicant must not have destroyed, falsified or concealed evidence relevant to alleged cartel or disclosed its intention to submit application or a part of intended application, except having done so at other competition authorities;
iii. Providing the Office promptly with all relevant information and evidence related to alleged cartel that comes into the applicant´s possession or under its control;
iv. Providing the Office only with true, complete and exact, not misleading information;
v. Being available to the Office to reply promptly to any requests that may contribute to the establishment of relevant facts on this subject;
vi. Making current and, if possible, former employees, directors and members of statutory bodies available for the interviews with the Office;
vii. Not destroying, falsifying or concealing relevant information or evidence which falls within the scope of alleged cartel agreement.

b. Should the applicant have not terminated its involvement in the alleged cartel agreement already; the applicant would do so at the time of its leniency application; by its conduct the applicant must not affect the conduct of dawn raids.
c. The applicant has not taken steps to coerce other undertakings to participate in the cartel.

IV. Not imposing the ban to execute public contracts or concessions

16. If the Office does not impose the fine pursuant to the part I. of this Notice or if the Office reduces the fine pursuant to the part II. of this Notice, it is not possible to impose a ban to execute public contracts or concessions to the same undertaking.[10]

10 Article 22a (4) and (5) of the Act in relation with Article 22ba (3) of the Act.

V. Procedural rules

17. An undertaking, party to alleged cartel agreement, wishing to ask for immunity from a fine or for reduction of a fine, should apply to the Office for the Protection of Competition. Formal application can be made only by individuals entitled to represent or act on behalf of the undertaking.
18. Granting immunity from a fine imposition pursuant to the part I of this Notice or reduction of the fine pursuant to the part II of this Notice is possible only on the basis of an application submitted by an undertaking. The application for the immunity from a fine imposition has to be submitted no later than a day when the undertaking received the Statement of Objections. The application for the fine reduction has to be submitted within 15 days at the latest from the date when the undertaking received the Statement of Objections. Mentioned applications may be withdrawn within 15 days from the deadline for their submission. The application which has been withdrawn and information and evidence attached to the application are not taken into account during the administrative proceedings when determining the responsibility for administrative offenses.[11] The application which has been submitted after the set deadline will be assessed by the Office only in cases worth of special considering.[12]
19. The submission including application for immunity from fine or for the fine reduction is a voluntary Notice made by an undertaking or on its behalf regarding undertaking´s awareness of the cartel agreement and its role in the alleged cartel prepared specifically for purposes of the submission pursuant to this Notice.
20. The application and any information and evidence addressed to the Office or by the Office in connection with the application are exempted from the administrative file till the Statement of Objections is issued.[13] After the issuing of Statement of Objections, the access to parts of the file that include the application and any information or evidence addressed to the Office or by the Office in connection with the application is restricted. The access to such parts of the file is provided only to parties to the administrative proceedings or their representative when making copies or extracts is forbidden.[14]
21. The application can be submitted in writing[15], orally into the protocol or in electronic form undersigned with certified electronic signature.[16] Under the condition that the submission is confirmed within 5 days or eventually supplemented as listed in previous sentence, it is possible to make the submission through the other technical instruments or media such as teletype, telefax or public data network without certified electronic signature in particular.
22. Applicant for Leniency type I is obliged to inform the Office about the foregone applications for leniency programme submitted to other competition authorities or about the applicant's intention to submit application in future.
23. Upon request the Office issues acknowledgement of receipt of an application and acknowledgement of receipt of all subsequent submissions. The acknowledgement will include date and time of receipt of each submission.
24. The Office will disregard other leniency applications for granting the immunity from fines till the assessment of already submitted application related to the same alleged infringement is concluded. At the same time the Office will disregard any application for reduction of the fine till the assessment of all already submitted application for immunity from fines related to the same alleged infringement is concluded.
25. Final decision on immunity from a fine or reduction of a fine will be announced in the decision at the end of the administrative proceeding.

V.1 Procedural rules for application for immunity from fine imposition (Leniency type I)

26. The complete application must be submitted to the Office, containing all requested information (see below). However, any undertaking may confer on the Office with information and evidence in hypothetical terms, or may ask for protection of applicant's place in the fine non-imposition queue, allowing it to gather the necessary information and evidence (hereinafter referred to as "marker").
27. An undertaking making an application for immunity from fine must provide the Office with all relevant information and evidence concerning the alleged cartel that comes into the applicant's possession or under its control as stated in conditions for Leniency IA and IB.
28. An undertaking may initially present this information and evidence in hypothetical terms. Provision of information and evidence in hypothetical terms represents qualified form of preliminary consultation with the Office; in such case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of applying undertaking and of other undertakings involved in the alleged cartel need not to be disclosed until the evidence described in its application is submitted. However, the product or service concerned by the

11 Article 22ba (5) of the Act.
12 Article 22ba (7) of the Act.
13 Article 21c (3) of the Act.
14 Article 22ba (4) of the Act.
15 The submission is possible also through the data box of the Office (ID of data box: fs2aa2t).
16 Act No. 227/2000 Coll., on Electronic Signature, as amended.

alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified. The scope of detailed information and evidence submitted in hypothetical terms may be consulted with the Office.

29. Once the Office has received the information and evidence in hypothetical terms submitted by the undertaking and has verified that it meets the conditions set out for real Leniency type IA or type IB, it will inform the undertaking accordingly. Provision of information and evidence in hypothetical terms neither represent an application for immunity from fine pursuant to this Notice nor provides the undertaking with the reservation of place in the fine non-imposition queue allowing it to gather the necessary information and evidence in future (marker).
30. An undertaking wishing to make an application for immunity may initially apply for a "marker" which protects an applicant's place in the queue for a given period of time and allows it to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity as agreed with the Office. To be eligible to secure a marker, the applicant must provide the Office with its name and address as well as information concerning the parties to the alleged cartel, the affected product and territory, the duration of alleged cartel and the nature of the alleged cartel conduct. An undertaking applying for immunity from fine should justify an application for a marker.
31. Where a marker is granted, the Office determines the period within which the applicant has to complete the marker by submitting the information required to meet the relevant evidential threshold for immunity. If the applicant perfects the marker within the set period, the information and evidence provided will be deemed to have been submitted on the date when marker was granted.
32. Once the Office has verified that the evidence submitted is sufficient to meet the relevant evidential threshold for Leniency type I application, it will grant, without undue delay, the undertakings conditional immunity from fines in writing.
33. If the Office receiving the application finds that the applicant has not met the conditions set out for Leniency programme application IA or IB, it will inform the applicant of this promptly. In that case the applicant may ask the Office to consider its submission as Leniency application type II for reduction of the fine. The Office assesses such application as application for the fine reduction submitted at the time when the first application for immunity from fine was submitted.
34. If the Office having granted conditional immunity finds that the applicant has fulfilled all of the conditions attached to leniency programme application, the Office will not impose a fine upon the applicant.
35. If the applicant has not fulfilled the conditions attached to leniency programme during the proceeding, the Office will inform the applicant about such matter of fact; a sanction can be imposed on such applicant in the final decision.

V.2. Procedural rules for application for reduction of the fine (Leniency type II)

36. An undertaking applying for the fine reduction to the Office must provide the Office with all information and evidence relating to the alleged cartel available to it as specified in Leniency type II conditions. The evidence and information submitted as substantiating the application must be clearly and explicitly marked.
37. If the Office comes to the conclusion that the information and evidence submitted by an undertaking constitutes "added value" and the applicant fulfilled the conditions attached to leniency programme, it will inform the applicant in writing of conditional fulfilment of the conditions and of the framework within which the fine could be reduced. If the Office comes to the conclusion that information and evidence submitted by the undertaking do not constitute "added value" and/or the undertaking did not fulfilled the conditions for the fine reduction, the Office will inform the undertaking.
38. If the Office conditionally granted the undertaking the reduction of a fine and the undertaking has fulfilled the general conditions for leniency programme during the whole proceedings, the

Office will grant the undertaking the reduction of a fine in its final decision.

39. If the undertaking did not fulfil conditions for leniency programme application during the proceedings, the Office will inform such undertaking and in the final decision the fine will not be reduced pursuant to the Article 22ba (1b) of the Act.

V.3. Summary applications

40. In cases where the Commission is the most suitable authority to deal with the case in accordance with Article 14 of the Commission's Notice on Cooperation[17], the undertaking that has applied or is applying for Leniency type IA, IB or II to the Commission may file "summary applications". In that case the applicant may submit the general (complete) application to the Commission, whilst submitting the summary application to the Office. Summary applications must include at least:

a. The name and address of the applicant submitting the summary application;
b. Information about the alleged cartel (the other parties to the alleged cartel identity, the affected products and services, the affected territory, the location of evidence, brief description of conduct, duration of alleged cartel, other necessary information);
c. Information about the application submitted to the Commission (date of submission, particular contact details of DG Competition, the explanation why the Commission is assessed by the undertaking as the most suitable authority for such case);
d. Information about other leniency applications (name of the competition authority to which the application was or will be submitted and contact details), and
e. any additional information.

41. Having received a summary application, the Office will confirm the receipt to the undertaking and issue a marker for summary application stating the date and time of its receipt. The Office will inform the undertaking submitting the summary application, if the undertaking is the first to submit the summary application related to alleged cartel agreement to the Office.
42. Should the Office having received a summary application decide to request specific further information and evidence, the applicant should provide such information promptly. Should the Office decide to act upon the case, it will determine a period of time within which the applicant must make a full submission of all relevant evidence and information included in the summary application so the application could fulfil the above mentioned conditions for granting the immunity from fine or for the fine reduction. If the applicant submits such information within the set period, the information provided will be deemed to have been submitted on the date when the marker for summary application was granted.
43. The Office examines the submitted information and evidence in the order in which the markers for summary applications were granted to each of the undertakings. The Office examines if submitted documentation fulfil conditions for granting the immunity from fine or for the fine reduction.
44. Summary applications are also applications pursuant to Articles 19, 20 and 21 of this Notice and are handled in the same manner.
45. The summary application can be submitted also using a template prescribed by ECN[18]. Such template is fully in accordance with the requirements of the summary application described in Article 40. Summary application using the template can also be submitted to the Office in English only.[19]

VI. Final provisions

46. If the Office discovers that application relates to illegal conduct under the provision of Article 22b (3) of the Act about termination of responsibility for an administrative offense, the leniency programme applications shall not be taken into consideration.
47. Matter of fact that either protection from fines was granted or the amount of the fine was reduced cannot safeguard the competitor against private legal consequences of its participation in cartel agreement.
48. Responsibility for criminal offense in the form of breaching the competition rules pursuant to the Article 248 (2) alinea 1 of the Act No. 40/2009 Coll., Criminal Code, as amended (criminal offense of conclusion the cartel agreement) is terminated if the offender fulfils conditions for granting the immunity from fine or the fine reduction pursuant to the Act. Therefore, it is necessary for the particular offender, a natural person, to be actively involved in the undertaking´s fulfilment of leniency conditions.
49. This Notice became effective on 4 November 2013 and is applicable on all applications submitted after this date.

17 Notice of the Commission on Cooperation within the European Competition Network, OJ C 101, 27 April 2004, page. 43.

18 The template is available on http://ec.europa.eu/competition/ecn/mlp_revised_2012_annex_en.pdf.

19 In case the Office further investigates the case, additional summary application with all related documentation must be submitted in Czech or Slovak.

Settlement Procedure

Introduction

Settlement consisting in a reduction of the fine imposed on the party to the proceedings, which does not challenge the factual findings or legal qualification of certain conduct, which the Office for the Protection of Competition deems unlawful, i.e. in a reduction of the fine imposed on the party to the proceedings, which admits to the offence defined by the OPC, has been applied since 2008.

Over the time, there has been a development in the understanding of this instrument. In the first cases, settlement was considered (among other things) an investigative tool, based on which the OPC should have been able to obtain information, which it would obtain with difficulty without the cooperation of the parties to the proceedings. From the end of 2010 at the latest, it has been understood as a tool for achieving procedural savings – in case of a party to the proceedings, which pleads guilty, it cannot be assumed that it would appeal the decision of the OPC using remedies; therefore, the OPC "saves" capacities which it would have to utilize for the subsequent stages of the administrative and judicial proceedings and this reduction of the fine should motivate the party to the proceedings to acknowledge and allow these procedural savings to be achieved.

Along with this shift in understanding the institution of settlement, the "discount" on the fine has been reduced; while it amounted up to 80% in some older cases, since 2011 it has been 20% in all cases.[1]

The instrument of settlement was incorporated in the Act on the Protection of Competition in 2012. The OPC then began to prepare a notice in which it would define its approach to this instrument and set rules for the procedure of the Office and parties to the proceedings which would ensure its most effective use. After public consultation, this notice was published in 2013 (hereinafter referred to as the "Notice of the settlement procedure").[2]

Settlement Procedure

In relation to settlement, the provisions of the Competition Act are very brief and regulate basically only the "conclusion" of the entire process. If the OPC sends a Statement of Objections to the party[3] that this party committed an administrative offence – prohibited agreements,[4] abuse of dominant position[5] or unapproved merger,[6] and the party admits committing such a defined offence, the OPC shall reduce the fine by 20%.[7] The party must request the reduction of its fine in an application in which it admits committing the offence (hereinafter referred to as the "application for settlement");[8] the application must be submitted no later than 15 days from the receipt of the Statement of Objections.[9] Applications submitted later shall be taken into account only in cases of special importance.[10] However, existing experience of the Office with the instrument of settlement shows that maximum procedural savings can be achieved provided that the negotiations with the parties are initiated before the Statement of Objections. Firstly, admitting full liability for a competition offence is a relatively important decision which may be discussed at a number of levels of the corporate structure of the given undertaking and the statutory time limit of 15 days may be relatively short in some cases from this point of view. Secondly, if the parties express in advance the willingness to accept the legal and factual qualification of the case outlined to them by the OPC, the Office may process only a brief Statement of Objections containing the basic factual circumstances of the case, their legal qualification and references to the main evidence on them as well as the amount of fines which it intends to impose on the parties. Thirdly, for the OPC to be able to inform the parties of the basic factual and legal assessment of the case before the Statement of Objections, it is appropriate for such hearings to take place individually at this stage, without the presence of other parties. Fourthly, if a party agrees with the content of the Statement of Objections, it can be required not to propose any further evidence or other procedural steps. And finally, fifthly, if the application for settlement is submitted by all parties to the proceedings, it is very unlikely that they would file an appeal against a decision on the merits and therefore it is possible to issue a brief decision on the matter in

1 Details of the change in the approach of the OPC to settlement compare e.g. *Petr, M.* Narovnání v českém soutěžním právu. Antitrust, 2011, No. 4, p. 176.

2 Notice of the OPC of 8 November 2013 on the Procedure Focused on Speeding up the Administrative Procedure Using the Institute of Application for a Reduction of the Fine under Article 22ba (2) of the Act on the Protection of Competition (Settlement Procedure).

3 Provisions of Article 7 (3) in conjunction with Article 21b of the Act.

4 Provisions of Article 3 of the Act.

5 Provisions of Article 11 of the Act.

6 Provisions of Article 18 of the Act.

7 Provisions of Article 22ba (2) of the Act.

8 Provisions of Article 22ba (4) of the Act.

9 Provisions of Article 22ba (6) of the Act.

10 Provisions of Article 22ba (7) of the Act.

which the OPC shall give a summary of the facts and references to the main evidence, on which it is based as well as its legal classification.
In summary, in terms of procedural savings, settlement is the most effective method if all parties participate, if hearings with them are initiated before the Statement of Objections, if it is possible to issue only a brief Statement of Objections thanks to a preliminary acceptance of the view of the OPC by the parties, if the parties waive further procedural actions and if all of them file an application for settlement so it is possible to issue a brief decision in the matter.
Although the Act does not expressly count on such a specific procedure before the submission of an application for settlement, it is entirely under its discretion and it is not necessary to amend the Act. The purpose of the notice of the settlement procedure is to describe this procedure, define its conditions and individual steps and to define rules so that they bring the maximum benefit from the settlement to both the Office and the parties. This procedure is referred to as the settlement procedure.
Already at this point it should be emphasized that although hearings with the parties regarding the factual and legal classification of the assessed conduct and the amount of the fine for it are initiated before the Statement of Objections, the parties and the OPC do not negotiate on these aspects of the case, on the possibility of "agreeing" on a solution; the OPC only informs the parties what evidence it has collected, what factual conclusions it draws from it, how it legally classifies them and how it would impose a fine for them. Should the parties disagree with some of these assessments, the settlement procedure will be terminated. If the OPC concludes that the evidence must be supplemented, or its previous conclusions must be reassessed, it can be subsequently restarted; however, if the OPC insists on its conclusions despite the disagreement of the parties, it shall continue in the "standard" administrative proceedings without further ado.
Therefore, the settlement procedure does not aim for an "agreement" between the parties and the OPC as its name might suggest, but only aims for the conclusion that the OPC reduces fines imposed on the parties if they accept its assessment of the case and at the same time it may issue a brief decision in the matter.

Course of the Settlement Procedure

The assessment of whether a certain case is suitable for the use of the settlement procedure is solely at the discretion of the Office; if, after the completion of the preliminary factual and legal assessment, it concludes that it is a suitable case, it shall invite the parties to express their opinion whether they are interested in using the settlement procedure.
The settlement procedure must be utilized by all parties. Given that during proceedings with multiple parties it will be also appropriate for the hearings with individual parties to take place without the presence of other parties, it is necessary for all parties to express their interest in the settlement procedure but also to waive their right to participate in hearings which the OPC may hold with others. It should be stressed that such hearings may not include the presentation of evidence under any circumstances and the factual and legal conclusion of the OPC will not be reassessed during such hearings; their purpose is only to inform individual parties about these conclusions as well as the evidence on which they are based. Their procedural rights are not compromised in any way by not participating in separate hearings with other parties.
After the OPC briefly summarizes for the parties all basic facts of the case and the main evidence of them, their legal classification and the expected amount of the fine, which it intends to impose in its final decision, it shall invite the parties to express their opinion on whether they are still interested in continuing in the settlement procedure. If all parties show their interest, the OPC shall issue a brief Statement of Objections.
After the Statement of Objections, the parties have the opportunity to file an application for settlement which must contain "confession" of committing administrative offence, i.e. full and unconditional acceptance of responsibility for an administrative offence, the factual circumstances and legal assessment of which were stated in the Statement of Objections, and a statement regarding the fact that the party is familiar with the amount of the fine stated in the Statement of Objections and if all conditions stipulated by law and this notice are met, the fine shall be reduced by 20%, and with the fact that the undertaking is not proposing any additions to the evidence or the performance of any other procedural actions.
If the Office receives an application for settlement meeting all the described requirements from all parties within 15 days, it shall issue a brief decision in the matter in which it shall summarize the facts and references to the main evidence, on which it is based, as well as its legal assessment and in which it reduces the imposed fine to individual parties by 20%. In such a decision, the Office shall not impose a ban on public contracts or a ban on concession agreements even if the parties committed a bid rigging cartel.

Michal Petr
Vice-Chairman of the OPC

Notice of the Office for the Protection of Competition of 8 November 2013 on the Procedure Focused on Speeding up the Administrative Procedure Using the Institute of Application for a Reduction of Fine under Article 22ba (2) of the Act on the Protection of Competition (Settlement Procedure)

I. Introduction

1. Pursuant to Article 22ba (2) of the Act on the Protection of Competition (hereinafter referred to as the "Act"),[1] the undertaking has the opportunity to confess to committing an administrative offence which the Office for the Protection of Competition (hereinafter referred to as the "Office") defined in the Statement of Objections. In the event that the Office believes that regarding the nature and seriousness of the assessed administrative offence such a penalty is sufficient, it shall reduce the fine imposed to the undertaking, the amount of which was reported in the Statement of Objections, by 20%.[2]
2. The Office may reduce the fine pursuant to Article 22ba (2) of the Act only based on an application submitted by the undertaking, which must include its confession of an administrative offence that was defined in the Statement of Objections (hereinafter referred to as the "Application pursuant to Article 22ba (2)"). The Application pursuant to Article 22ba (2) must be delivered to the Office within 15 days from the date when the Statement of Objections was delivered to the undertaking; an application submitted later will be processed only in special cases.[3]
3. If the party admits to committing an administrative offence in the Application pursuant to Article 22ba (2) and therefore does not conflict with the factual conclusions of the Office or their legal assessment, it can be assumed that the decision of the Office in the matter in this extent will not be appealed. Thanks to the above development, the administrative proceedings may be shortened and the decision of the Office will come into force sooner which will contribute to faster restoration of effective competition; resources, which the Office will not have to spend on the proceedings regarding appeals, can then be used to investigate other cases, thus also contributing to a more effective enforcement of competition law. In light of these positive benefits, it is appropriate to reduce the fine imposed on the party.
4. The purpose of the Application pursuant to Article 22ba is only to achieve procedural efficiencies, and thanks to them more effective enforcement of competition law. Therefore, it is not a tool of investigation and thus significantly differs from the institute of leniency which is incorporated in Article 22ba (1) of the Act and specified in the Leniency Programme.[4]
5. However, procedural savings are maximized only if the activity of the parties is not limited only to the submission of the Application pursuant to Article 22ba (2) but it is showed already in earlier stages of the administrative procedure and also if all parties are involved. In this notice the Office therefore defines a specific procedure in the administrative proceeding that allows the parties to use the instrument of the Application pursuant to Article 22ba (2) (hereinafter referred to as the "Settlement Procedure") most effectively**.** The use of the settlement procedure allows maximum acceleration of the administrative proceedings and simplification of some procedural acts. Given that all parties agree with the factual findings of the Office and with their legal assessment, it will be possible to issue a brief Statement of Objections and a brief decision in the proceedings.
6. An application pursuant to Article 22ba (2) may be submitted even if the parties do not use the settlement procedure. In this case, however, there is no guarantee that it will be possible to achieve all benefits brought by the settlement procedure beyond the

1 Act No. 143/2001 Coll., on the Protection of Competition and on amendment to certain Acts (Act on the Protection of Competition), as amended.
2 Provisions of Article 22ba (2) in connection with Articles 4 and 6 of the Act.
3 Provisions of Article 22ba (4 and 7) of the Act.
4 Notice of the Office on the application of Article 22ba (1) of the Act on the Protection of Competition (hereinafter referred to as the "Leniency Programme"). The leniency programme and the settlement procedure can be used simultaneously within a single administrative proceeding.

reduction of the fine, particularly a significant shortening of the proceedings and the issue of a brief Statement of Objections and decision in the matter. This notice will further address only the settlement procedure, not the submission of the Application pursuant to Article 22ba (2) outside this procedure.

II. Settlement Procedure

II.1. Applicability of the settlement procedure and its course

7. The settlement procedure will generally be applied in several steps:
   a. Initiation by the Office – sending the call to the parties to determine their interest in using the settlement procedure;
   b. Commencement of the settlement procedure by the Office;
   c. Oral hearings with individual parties within the settlement procedure;
   d. Notice of the interest of the parties to continue with the settlement procedure;
   e. Issue of a brief Statement of Objections by the Office;
   f. Application for settlement – application of the parties for a reduction of the fine within the settlement procedure;
   g. Issue of a brief decision in the matter.
8. The settlement procedure in accordance with this notice may be initiated within ongoing administrative proceedings, but no later than the day on which the Statement of Objections within the meaning of Article 7 (3) in conjunction with Article 21b of the Act was delivered to the parties.
9. The settlement procedure can be used only within administrative proceedings concerning a matter relating to an administrative offence of an undertaking committed by the undertaking entering an agreement in conflict with Article 3 (1) of the Act, in conflict with Article 11 (1) of the Act abusing its dominant position or performing merger in conflict with Article 18 (1) of the Act.[5] The settlement procedure may also be used in cases where the Office applies EU competition law in addition to the Czech law.
10. In administrative proceedings conducted by the Office with multiple parties, it is possible to gain all benefits that the settlement procedure brings only provided that all parties to the proceedings are involved. Therefore, the Office will not initiate the settlement procedure with only some of the parties.

II.2. Initiation of the settlement procedure

11. The Office determines at its sole discretion whether it is appropriate to use the settlement procedure in a particular case. The Office always makes the decision whether its initiation is appropriate and useful on a case-by-case basis. When considering the possibility of using the settlement procedure, the Office takes into account in the particular 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 such sanction will be sufficient even after their reduction with regard to the nature and seriousness of the

5 Provisions of Article 22ba (2) of the Act.

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

12. The initiation of the settlement procedure in a particular case always depends on the discretion of the Office. The Office initiates the settlement procedure by a written request for the expression of interest in its utilization addressed to all parties (hereinafter referred to as "the Call"). In the Call, the Office shall specify a time limit within which all parties must express their opinion.
13. The settlement procedure cannot be initiated before issuing the Call, not even in the case that some or all parties declare their interest in using the instrument of the Application pursuant to Article 22ba (2) in the given administrative proceedings.
14. In order to achieve maximum procedural savings, the Office shall initiate the procedure as soon as the status of inquiring gives a sufficient idea of the administrative offence and responsibility for it.
15. Successful achievement of the purpose of the settlement procedure essentially assumes the realization of oral hearings with the parties. In administrative proceedings with multiple parties, it is desirable to hold oral hearings within the settlement procedure always with a particular party without the participation of the other parties. In order for such bilateral oral hearing to take place, it is necessary that the other parties waive their right to participate in such a hearing.[6] This does not affect their right to participate in the presentation of evidence by the Office during or outside an oral hearing.
16. In administrative proceedings with multiple parties, the settlement procedure may only be initiated if – with regard to the Call of the Office – all parties express their interest in using the settlement procedure and simultaneously waive their right to participate in future bilateral oral hearings held within the settlement procedure between the Office and other parties.
17. In the case that none of the parties to the administrative proceedings express their interest in using the settlement procedure within the stipulated time period or if in proceedings with multiple parties none of the parties waive their right to participate in future bilateral oral hearings within the settlement procedure between the Office and other parties, the Office will not initiate the settlement procedure and will continue in the administrative proceedings.[7] The Office shall notify all parties of this fact.
18. In the event that all parties express their interest in using the settlement procedure within the stipulated time period in their responses, and in the event of proceedings with multiple parties all parties also waive their right to participate in future bilateral oral hearing within the settlement procedure between the Office and other parties, the Office shall initiate the settlement proceedings via a written Notice of the Office on the initiation of the settlement procedure sent to all parties to the administrative proceedings.

II.3. Oral hearing within the settlement procedure

19. After the settlement procedure is initiated, the Office will hold an oral hearing with individual parties in order to determine whether it is possible to reach an early submission of the application for a reduction of the fine within the settlement procedure in the given case. Hearings within the settlement procedure are fundamentally bilateral, without the presence of other parties and brief reports from these hearings are made.
20. During oral hearings conducted within the settlement procedure, the Office will briefly summarize the basic facts of the case and the main evidence of them,[8] their legal assessment and the expected amount of the fine which it intends to impose on the party in the final decision.
21. If the Office finds during the hearing within the settlement procedure that further evidence is required in the given administrative proceeding,[9] it shall terminate the settlement procedure.
22. Upon termination of oral hearings within the settlement procedure, the Office shall invite the parties to express their interest to continue with the settlement procedure. Notice of interest to continue with the settlement procedure must be submitted by the party within the time period stipulated by the Office; it must state that after becoming familiar with the factual and legal qualification of its conduct and the expected amount of the fine the party is still interested in continuing with the settlement procedure. Expression of the interest to continue with the settlement procedure is not the Application

6 Provisions of Article 49 (1) of Act No. 500/2004 Coll., Administrative Code, as amended (hereinafter referred to as the "Administrative Code").

7 It is not excluded that the Office will invite competitors to express interest in using the settlement procedure multiple times within a single administrative procedure.

8 In the case of settlement hearings regarding a cartel agreement, the Office will also state during the bilateral hearings whether an application for the leniency programme was submitted in the given case, however, it will not allow access to this application for that moment, it will not disclose its full content or which party submitted this application and how many applications for the leniency programme have been submitted in the given administrative proceedings.

9 In cases where the settlement procedure is terminated during its course due to the fact that new facts appear in the proceedings, the Office usually invites the parties after further presentation of evidence with regard to these new facts to express again whether they are still interested in initiating the settlement procedure, or attempts to initiate the settlement procedure respectively again.

pursuant to Article 22ba (2) or confession of liability for anticompetitive conduct. If a party fails to submit the notice within the stipulated time period, it is considered that the party is not interested in continuing in the settlement procedure; in which case the Office will terminate the settlement procedure.

II.4. Statement of Objections within the settlement procedure

23. After the Office receives the Notice of interest to continue with the settlement procedure from all parties to the proceedings, it shall issue a brief Statement of Objections containing the basic facts of the case, their legal assessment and reference to the main evidence on them as well as the amount of fines which it intends to impose on the parties.

II.5. Application for settlement

24. Within 15 days of receipt of the Statement of Objections, the parties must file an application for a reduction of fines meeting the requirements under the Act and this Notice (hereinafter referred to as "Application for Settlement"); applications submitted after this time period shall be processed by the Office only in special cases.[10]
25. The application for settlement must contain confession of the commission of the administrative offence, i.e. full and unconditional acceptance of responsibility for the administrative offence, the factual circumstances and legal assessment of which were stated in the Statement of Objections, and a statement regarding the fact that the party is familiar with the amount of the fine stated in the Statement of Objections and if all conditions stipulated by law and this notice are met, the fine shall be reduced by 20%, and with the fact that it is not proposing any additions to evidence or the performance of any other procedural actions.
26. If none of the parties submit the application for settlement meeting all prescribed requirements according to law and this notice within the stipulated time period, the Office will terminate the settlement procedure.

II.6. Decision in the matter within the settlement procedure

27. If the Office receives an application for settlement that meets all the requirements prescribed pursuant to the Act and this notice within the specified time period from all parties, it shall issue a brief decision in the matter, in which it shall summarize the facts and references to the main evidence, on which the case is based, as well as their legal assessment and in which it will reduce the fines imposed on individual parties by 20%;[11] in such a decision, the Office shall not impose a ban to execute public contracts or concession agreements.[12]

II.7. Termination of the settlement procedure

28. The settlement procedure ends by issuing a brief decision in the matter.
29. A party may, without giving any reason, until the time of submission of the Application for Settlement, notify the Office that it is no longer interested in participating in the settlement procedure. In this case, the Office will terminate the settlement procedure.
30. The Office may terminate the settlement procedure without giving a reason until it issues a brief decision in the matter.[13]
31. If the settlement procedure ends differently than with the issue of a brief decision in the matter, the Office shall send a written Notice of Termination of the Settlement Procedure to all parties and will continue with the proceedings.

III. Final provisions

32. Documents that become part of the administrative file in connection with the settlement procedure will remain in the file even if the settlement procedure was terminated. The Office shall not take these documents into account when deciding on the liability for an administrative offence in the event that the settlement procedure is not concluded by issuing a brief decision in the matter.
33. This notice shall take effect on 8 November 2013 and applies to all proceedings commenced after 1 December 2012 provided that no Statement of Objections has been issued in course of them yet.

10 Provisions of Article 22ba (7) of the Act.

11 A reduction of 20% is calculated by the Office from the resulting fine according to the Principles of the Office for determining the amount of fines and after any reduction of fines according to the leniency programme. A reduction in the fine according to the leniency programme and settlement is not calculated cumulatively, but gradually, and with a combination of Leniency type II (reduction in the fine of up to 50%) and settlement (reduction of the fine by 20%) a maximum reduction of the fine by 60% can be achieved.

12 Provisions of Article 22ba (3) of the Act.

13 The Office will terminate the settlement procedure in the case that it is obvious from the hearings with the parties to the settlement procedure that it will not be able to find common agreement regarding the investigated conduct or if new evidence is found and it will be necessary to present additional evidence or re-qualify the investigated conduct.

Selected Cases in which the Leniency Programme or Settlement Were Used

Although the institutes of leniency and settlement were not incorporated into the Act on the Protection of Competition until 2012 as mentioned on other pages of this Information Bulletin, the Office did not hesitate to use them in practice in suitable cases earlier. In the following text, we bring a selection of the most important cases, to the detection and resolving of which the leniency programme or the settlement procedure contributed. Given that leniency is a tool of investigation and settlement primarily a means to enhance procedural efficiency, they can be used as complementary tools and the Office has already done so in two administrative proceedings. On the other hand, restriction of leniency only to horizontal cartel agreements is apparent from the above summary, while settlement may be used for more efficient completion of cases of abuse of dominant position, vertical agreement or un-notified mergers of undertakings.

Cartel of manufacturers of gas-insulated switch gears

The first use of the leniency programme within a horizontal cartel[1] occurred in 2007 when the Office imposed a fine amounting to hundreds of millions CZK on companies of the ALSTOM, AREVA, Fuji, Hitachi, Mitsubishi, Toshiba and Siemens groups for a prohibited price-fixing agreement, market division and deliveries of gas-insulated switchgear systems (GIS). The cartel was effective in the Czech Republic in the years 1991-2004. ABB Group was also a member of the cartel, however, it used the leniency programme, reported the agreement to the OPC and cooperated in the investigation. Thanks to its application, it was not penalized.

After many years of litigation, however, the decision of the Office was abolished by the Regional Court in Brno in June 2012. Although the court upheld the very existence of the cartel and its impact on the Czech market and rejected a number of objections relating to procedural errors, lengths of time limits, etc., it identified the assessment of the individual offence liability of the companies from individual holdings and related calculations of sanctions for individual members of the cartel as incorrect.

1 The Office introduced the leniency programme already in 2001 and it used it for the first time in the Pinelli case in 2004. It was a vertical resale price maintenance agreement. The early version of leniency allowed application even in these cases.

Vertical agreements of Kofola Holding

The first use of settlement in administrative proceedings of the Office took place in 2008 in order to accelerate the completion of administrative proceedings relating to prohibited vertical resale price maintenance agreements which were concluded by companies of Kofola group and their distributors. During this first application of settlement, rules governing a reduction of the penalty were not yet clearly constituted. Therefore, Kofola paid only CZK 13.552 million for its anticompetitive conduct which was less than half of the fine which it would have been facing if settlement had not been used.

Companies of Kofola group fully cooperated with the Office from the moment when it was clear that the Office had sufficient evidence to prove anticompetitive conduct. They confirmed the existence of the alleged conduct, its duration and also recognized the legal classification of the conduct. The parties also submitted additional evidence documenting the extent of anti-competitive conduct.

Cartel of manufacturers of CRT screens

Upon application for leniency, a cartel of manufacturers of CRT screens was detected and punished. In November 2010, the Office imposed fines in the amount of CZK 51.787 million for this cartel agreement on Chunghwa Picture Tubes, Ltd., Koninklijke Philips Electronics N.V., Technicolor S.A., Panasonic Corporation, MT Picture Display Co., Ltd. and Toshiba Corporation. Thanks to the application of Leniency type I, the fine was completely waived for Samsung and based on Leniency type II the penalty for Chunghwa was reduced by 50%.

The above companies entered into and fulfilled a cartel agreement in the market for colour TV screens (CPT) in the years 1998-2004. Some of these companies participated in this agreement for a shorter period of time which the Office also took into account in its decision.

Manufacturers of CRT (CDT and CPT) met for bilateral and multilateral negotiations for a number of years; negotiations and contact between them began before 1998 and continued until about 2006. The meetings took place in a number of Asian and European countries. Prior to 1998, there were mainly informal ad hoc meetings between the manufacturers of CRT. Subsequently, CRT manufacturers began to meet in a more organized and systematic manner. At these meetings, there were mainly negotiations on prices and

exchange of commercially sensitive information. Price negotiations consisted in setting target and minimum prices, price range and pricing rules or maintaining the agreed prices. Compliance with the agreed prices was subsequently checked by the parties.
Fines for individual members of the cartel were as follows: Chunghwa Picture Tubes, Ltd. CZK 6,400,000, Technicolor S.A. CZK 13,858,000, Panasonic Corporation CZK 10,373,000, MT Picture Display Co. Ltd. CZK 9,430,000 and Toshiba Corporation CZK 11,726,000. It was not possible to impose a fine on Philips and LG Electronics because the statute of limitations had expired (these companies failed to comply with the given agreement after 1 July 2001). The decisions were confirmed by the judgement of the Regional Court in Brno in February 2012.

Cartel of manufacturers of detergents

The first parallel use of leniency and settlement in one administrative proceedings occurred during the investigation of a cartel agreement concluded by the Henkel Group and companies Procter & Gamble – Rakona, s. r. o., and Reckitt Benckiser (Czech Republic), spol. s r. o. in the market for laundry detergents, fabric softeners and detergents for manual washing of dishes. In February 2011, the Office imposed a fine totalling CZK 29.274 million on this cartel. Companies from the Henkel Group gained immunity thanks to the fact that they informed the Office under the leniency programme and no fine was imposed on them. Reduced sanctions of CZK 23.778 million, and CZK 5.496 million respectively, were imposed on the competitors Procter & Gamble – Rakona, s. r. o., and Reckitt Benckiser (Czech Republic), spol. s r. o. Procter & Gamble – Rakona, s. r. o. applied for Leniency type II during the proceedings and the fine was reduced by 50%. Both competitors also used settlement and received an additional 20% discount on the fine. In this case, the settlement process was used for a horizontal cartel for the first time in the Czech Republic.

According to the findings of the Office, during regular meetings and contacts the above manufacturers of detergents implemented a price increase of some laundry detergents, set price ranges for pricing of laundry detergents and mutually coordinated and restricted the frequency and value of promotional activities, particularly the amount of discounts granted from the price of laundry detergents, prices of fabric softeners and prices of dish washing detergents.

Czech Waste Management Association influenced the market

The Czech Waste Management Association (hereinafter referred to as "CWMA") asked the Office for the application of the settlement procedure within the first-instance administrative proceedings in 2011. In its proposal for settlement, CWMA acknowledged its responsibility for the criticized conduct as well as its legal classification and duration of conduct. At the same time, it confirmed that the given conduct had ended. The amount of the fine was determined after considering the legal background and the basic principles of the imposition of fines at CZK 495,000. Due to the fact that the party fulfilled all conditions for settlement, the Office reduced the fine by 20 percent to the amount of CZK 396,000. The proceedings ended within seven months of its initiation. The party did not file an appeal and the first instance decision entered into force.
CWMA adopted and applied prohibited and invalid pricing decisions of the association of undertakings which led to distortion of competition in the market of waste management in the Czech Republic. Specifically, CWMA annually established, announced and sent the expected percentage increase in the cost of waste management for the following year to members and published the information via media (Internet, Odpady magazine and more). In its decision, the Office stated that CWMA had violated the Act on the Protection of Competition in the period from 11 November 2004 until 1 October 2008. The Office classified the assessed conduct as a single continuing offence.

Cartel in waste management

The most recently closed case, in which both leniency and settlement were used, was a cartel in waste management. In its first-instance decision in November 2012, the Office imposed fines in the total amount of CZK 96,579,000 for a bid rigging cartel on .A.S.A., spol. s r. o. (CZK 24,289,000), van Gansewinkel, a. s. (CZK 10,870,000), SITA CZ a. s. (CZK 19,753,000) and AVE CZ odpadové hospodářství s. r. o. (CZK 41,667,000).
In terms of the sum of provided evidence, sensitivity of the relevant market for waste management for consumers, use of a large number of Leniency type II

applications and utilization of the settlement procedure, it is one of the most important cases in the history of the Office.

The companies .A.S.A. and AVE applied for the leniency programme in course of the administrative proceedings. In exchange for providing substantial evidence of anticompetitive conduct, their sanctions were reduced by 50%, and 30% respectively. Moreover, all parties requested the application of settlement where they admitted their illegal conduct within the limits specified by the Office for which their sanction was reduced by 20%. Thanks to the settlement, the administrative proceeding was concluded with final effect already in the first instance.

The factual aspect of the case lay in the fact that the competitors operating in the waste management market and some even in the field of road maintenance were dividing the market by manipulating tendering procedures which led to a distortion of competition. The Office discovered the prohibited agreement based on its own investigation and in September 2010 it launched administrative proceedings with .A.S.A., SITA and van Gansewinkel. In 2011, AVE was added to the administrative proceedings. Within its investigation, the Office found out that the above competitors used mutual contacts and exchange of information between 2007 and 2011 to divide customers when they coordinated their activities in public procurement in the field of waste management and maintenance of roads respectively. Agreements were not entered into by all parties at the same time. Instead, there were six bilateral agreements associated with individual procurement processes in waste management and in the case of .A.S.A. and AVE even with contracts for the road maintenance. During an unannounced visit to the premises of the companies, the Office secured evidence that showed that there were contacts between the individual competitors that gradually grew into close coordination of the process towards customers, thus anticompetitive conduct.

Unauthorized merger of KAREL HOLOUBEK – Trade Group a. s. and Karlovarská teplárenská, a. s.

The settlement procedure may be used across the entire spectrum of administrative proceedings regarding violation of competition law. Proceedings due to the unapproved merger of undertakings are not an exception. At the beginning of 2013, the Office thanks to the settlement concluded the administrative proceedings with KAREL HOLOUBEK – Trade Group a. s. for its merger with Karlovarská teplárenská, a. s. before the submission of a proposal for its approval and before the issue of the final decision of the OPC by which the above merger could be permitted. The undertaking acknowledged its responsibility for illegal procedure, the legal classification and duration of the criticised conduct due to which the sanction was reduced by 20% to CZK 530,000.

In 2010, the Office allowed the merger of KAREL HOLOUBEK – Trade Group a. s. (hereinafter referred to as "KHTG") and Karlovarská teplárenská, a. s. The merger was approved on 29 December 2010 and came into force on the same day. Within the administrative proceedings, the OPC found that KHTG has been controlling 51% of election votes of Karlovarská teplárenská since 1 July 2002 based on an agreement on the loan of shares. The party demonstrably exercised its voting rights at general meetings during the years 2002-2010. During the same period, representatives of KHTG participated and influenced the conduct of the Board of Karlovarská teplárenská. According to the Act on the Protection of Competition, in cases where there is a merger, which is subject to approval of the Office, it may not take place until the Office issues a decision that allows the merger. In the present case, the unlawful condition lasted for more than 8.5 years.

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OFFICE FOR THE PROTECTION OF COMPETITION