FIDE CONGRESS – Madrid 2010

Topic 2:

THE JUDICIAL APPLICATION OF EUROPEAN COMPETITION LAW

NATIONAL REPORT ON THE CZECH REPUBLIC

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I. INTRODUCTION

We provide below a report on the judicial application of (European) Competition Law in the Czech Republic. The structure of this report follows the questionnaire prepared by the General Rapporteurs. In addition, this introduction contains certain general observations regarding the topic discussed and the research undertaken in connection with the preparation of this report. Furthermore, the institutional framework within which the competition law is applied in the Czech Republic is briefly introduced.

The Czech Republic is a relatively new Member State (since May 2004) and also quite a small jurisdiction. Accordingly, the experience with the application of the European competition law is rather limited. This holds true especially as regards Czech civil courts which most likely have not yet decided any case where would be either Article 81 or 82 EC consistently applied.[1] Most knowledge and experience as regards the application of competition law in general as well as with the European competition law in particular rests with the Czech Office for the Protection of Competition (in Czech: *Úřad pro ochranu hospodářské soutěže*; hereinafter the "**Office**"). The Office is a specialized independent administrative authority

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[1] This observation follows from the fact that, to the authors' knowledge, there has been no such case reported. In addition, for the purposes of preparation of this report, the authors arranged for replies from all 8 Czech regional courts, the two superior courts (in Prague and Olomouc) and the Czech Supreme Court. None of the courts mentioned any case where would be either Article 81 or 82 EC applied.

which is empowered to control and investigate cases regarding competition law and public procurement law violations and to impose penalties for such infringements.

Applications for judicial review of the Office's decisions[2] (administrative claims) are heard before the Regional Court in Brno within which there is a special three-member panel of judges who specialize on competition law even though they deal with other (non competition law) agenda too. Decisions of the Regional Court in Brno may be challenged by a cassation appeal lodged either by the pertinent undertaking or the Office to the Supreme Administrative Court.

As it will be seen in more detail in the body of this report, private competition litigation, where EC competition law questions would be dealt with, is almost non-existent in the Czech Republic at present. In the author's opinion, this fact follows mainly from relative lack of knowledge about the EC competition law among civil law judges who generally perceive the (public) competition law as the domain of administrative courts rather than the civil ones. In addition, there are no special procedural rules for competition law cases that would facilitate such litigation. Private competition litigation is quite rare even as regards domestic competition law cases. Cases with the competition law potential are usually dealt with as the so-called 'unfair competition' cases pursuant to the Czech Commercial Code with which civil courts have more extensive experience.[3]

II. REPORT ON THE JUDICIAL APPLICATION OF COMPETITION LAW IN THE CZECH REPUBLIC

1. Was competition law privately enforced in your country before Regulation 1/2003 entered into force?

Competition law was privately enforced in the Czech Republic before Regulation 1/2003 entered into force. It shall be, however, emphasized that such enforcement was rather scarce.

[2] The administrative proceedings before the Office are two-instance. The first instance decision may be appealed to the chairman of the Office.

[3] Pursuant to prevailing opinion, some 2001 Competition Act violations may at the same time represent 'unfair competition' offences contrary to Section 44 of the Czech Commercial Code (see e.g. Jindřiška Munková, Právo proti nekalé soutěži. Komentář. [Law against unfair competition. A commentary] 2nd ed., Prague: C.H. Beck, 2001, p. 32-33).

Prior to entry into force of Act. No 143/2001 Coll., on protection of competition ("2001 Competition Act") on 1 July 2001, the Czech legislation (i.e. the previous Act No. 63/1991 Coll.) contained a special provision (Section 17) that provided explicitly for private actions against persons who violated that Competition Act. The 2001 Competition Act does not have such a special provision but that does not mean that private actions for competition law infringements would not possible or that they would not take place.

2. If yes, was competition law applied as the main or principal issue of the dispute (*à titre principal*) or only as a subsidiary issue (*à titre d'incident*)?

There were certain cases where competition law was applied as the principal issue of the dispute, i.e. the claimant based his claim on competition law arguments. Such claims were mostly damages claims based on competition law infringement. A violation of competition law in the form of abuse of dominant position seems to be invoked in this regard more frequently than restrictive (cartel) agreements. There were also some cases when competition law arguments were used as a defense (a subsidiary issue) against claims lodged by claimants. Given the lack of precise information on private competition law cases in the Czech Republic, it cannot be concluded whether cases with competition law as *à titre principal* or *à titre d'incident* were more frequent.

3. Were stand-alone actions possible/frequent? Were follow-on actions possible/frequent?

Both stand-alone and follow-actions were possible. Both types of such actions also took place but it cannot be said that they were frequent. Private competition litigation is rather infrequent in the Czech Republic in general.

4. Has the entry into force of Regulation 1/2003 substantially increased the possibility to bring actions in practice or the number of actions brought?

The entry into force of Regulation 1/2003 did not increase the possibility to bring private competition actions in practice or the number of actions brought. Private competition law cases still remain scarce.

5. Was there a need to modify the national competition law and/or the procedural legislation to facilitate the application of Regulation 1/2003?

There were certain modification to the 2001 Competition Act adopted in association with the entry of the Czech Republic into EU and the concurrent commencement of application of Regulation 1/2003. These modifications did not, however, concern private competition litigation aspects of Regulation 1/2003. They rather empowered the Office to apply Articles 81 and 82 EC in a similar form of procedure as it applies Czech competition law and they were, accordingly, of rather technical nature.

In order to comply with duties stemming form Sections 15(2) and 16 of Regulation No. 1/2003 certain changes were made in regulations concerning organization of courts' administration. Namely, pursuant to Section 8(e)(kk) and 8(f)(hh) of Instruction of Ministry of Justice No. 505/2001-Org., on internal and office order for district, regional and superior courts, as amended, the respective courts' officials shall notify the EC Commission and the Office about initiation of proceedings where Article 81 and 82 EC is applied and send them the final decisions in such cases.

6. Has your national legislation been modified to take into account the recommendations included in the Commission's White Paper and Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust rules? Are any of these recommendations already part of your national law? Are there concrete legislative proposals to implement any of these recommendations?

Czech legislation has not been modified to take into account the recommendation included in the Commission's White Paper and Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust rules. Some of those recommendations are, however, already of the Czech law. For instance, the Czech law does not contain any strict rules for standing of claims and, in general, anybody injured by an illicit conduct of another can bring a claim against it. Accordingly, indirect purchasers can bring competition law cases. There is no requirement to prove fault in damages claims under the Czech Commercial Code by the damaged person seeking damages because the liability for damages under that Code is based on an objective concept for which subjective motivations (intent, negligence) are not, in principle, relevant. In addition, civil courts are bound by decisions of the Office (as well as

the EC Commission) concerning competition law infringements (see in this regard the response to Question 11. below). Also, limitation periods in case of repeated or continuous infringements do not end before the actual end of the objected to conduct. A detailed position of the Czech Republic to the Commission's White Paper and recommendations contained therein is provided in the Office's Position to the White Paper on Damages actions for breach of the EC antitrust rules.[4]

The Office prepared an amendment to the 2001 Competition Act which was then submitted to the Czech Government that was supposed to enhance private competition litigation in the Czech Republic.[5] That amendment was designed to mirror provisions dealing with the so-called 'unfair competition' competition cases or the former Section 17 of Act No. 63/1991 Coll., on protection of competition ("1991 Competition Act"), which contained (prior to its repeal) similar provisions. Unfair competition is regulated in the Commercial Code (Sections 44 *et seq.*) and its primary purpose is to provide consumers and competitors with a redress in cases when certain enterprise acts in the course of its business activities against good morals (*bonos mores*) of competition. Accordingly, persons (both natural and legal) injured by anticompetitive behaviour were to be explicitly given a right to bring actions claiming cease and desist orders or removal of effects of competition law infringement, to request damages, recovery of unjust enrichment and provision of satisfaction for non-monetary harm. The Office also proposed that associations of undertakings or consumers should have been empowered to bring 'representative claims' for cease and desist orders (but not for damages). The draft amendment also provided for a reversal of burden of prove concerning the alleged existence of competition law infringement in case an individual consumer filed an action. There was no such reversal proposed in respect of cases initiated by enterprises. This amendment was, however, rejected by the Czech Government.[6]

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[4] Available at http://www.compet.cz/hospodarska-soutez/metodiky-a-dokumenty/ (accessed on 25 October 2009).

[5] See the Office' Position to the White Paper on Damages actions for breach of the EC antitrust rules, para. 4.

[6] *Kreiselová, I.* Soukromé vymáhání soutěžního práva opět, ale trochu jinak. [Private Enforcement of Competition Law Again But In a Little Different Way] In: Úřad pro ochranu hospodářské soutěže, Information List No. 4/2008, October 2008; available at http://www.compet.cz/informacni-centrum/informacni-listy/2008/ (accessed on 25 October 2009).

7. Is private litigation in competition cases dealt with by ordinary civil/commercial courts or by a specialized court? Is there a difference depending on whether competition law is applied *à titre principal* or *à titre d'incident*?

Private litigation in competition cases in the Czech Republic is dealt with by ordinary civil/commercial courts. Accordingly, in this regard there is no difference depending on whether competition law is applied *à titre principal* or *à titre d'incident*. The way in which competition law is applied in the litigation can, however, influence which court will have subject-matter jurisdiction, i.e. whether it is a district court or a regional court.

The Civil Procedure Code distinguishes between matters (i) that are subject to the first-instance jurisdiction of district courts and (ii) that are decided in the first instance by (one-level-up) regional courts. Generally, all matters are decided by district courts unless it is stipulated otherwise by law. Matters where regional courts decide in first-instance are enumerated especially in Sections 9(2) and 9(3) of the Civil Procedure Code.

Pursuant to Section 9(3)(k) of the Civil Procedure Code, regional courts decide in the first instance in commercial matters including, *inter alia*, 'matters of protection of competition'. This provision is, however, a residue relating to the 1991 Competition Act, which was repealed as of 1 July 2001 by the Competition Act. 1991 Competition Act provided for special remedies associated with private actions in the area of protection of competition in its Section 17. As mentioned above, in the newly adopted Competition Act no provision similar to the former Section 17 of the 1991 Competition Act has been introduced despite the recent attempts by the Office to amend the 2001 Competition Act.

In light of the foregoing, some respectable Czech legal commentators consider the said provision of the Civil Procedure Code obsolete.[7] That opinion is not, however, further argued or explained. Especially, it is not spelled out why Section 9(3)(k) of the Civil Procedure Code could not be construed as applying to any commercial disputes that deal *materially* with 'protection of competition'.[8] We believe that disputes concerning competition

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[7] *Bureš, J. et al.*, Občanský soudní řád. Komentář. [Civil Procedure Code. A Commentary] Vol. 1, 7th ed., Praha: C.H. Beck, 2006, p. 37.

[8] Firstly, it is obvious that the repeal of Section 17 of the 1991 Competition Act did not mean that private law claims arising from competition law infringements could not have been brought. They might have been brought under the general provisions of commercial law liability (see Section 2 of

law infringements are subject to the first-instance jurisdiction of regional courts pursuant to Section 9(3)(k) of the Civil Procedure Code.[9] This is not only a possible construction of law but it is also desirable because disputes regarding protection of competition are usually very complicated and district courts may not have enough expertise and resources to adequately deal with them even if amounts at stake are low. In any case, Section 9(3)(k) of the Civil Procedure Code may become explicitly applicable should a similar provision as the former Section 17 of the 1991 Competition Act be adopted again as has been contemplated (see the response to Question 6. above).

Should competition law be applied only *à titre d'incident*, then the subject-matter jurisdiction would depend on the cause of action of the main claim. Under Section 9(3)(r) of the Civil Procedure Code commercial disputes where monetary amount in dispute exceeds CZK 100,000 are generally decided by regional courts as first-instance courts.[10] In 'minor' cases, however, district courts would decide in the first instance.

As competition cases are dealt with by ordinary civil/commercial courts, there are no specialist courts or tribunals that would deal with private competition litigation in the Czech republic. In addition, even the degree of non-institutionalised inside specialization within the courts (i.e. the fact that certain panels and/or judges are allocated to that type of disputes) seems to be low. Matters in the 'protection of competition' (see above) will likely be allocated to those panels/judges that deal with 'unfair competition' cases which are more frequently litigated in the Czech Republic. The lack of specialization comes as no surprise, if the current underdevelopment of private competition litigation in the Czech Republic is taken into account.[11]

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this chapter above). Secondly, the footnote in the legislative text referring to Section 17 of the 1991 Competition Act does not have any direct normatively binding force as footnotes are not, under settled Czech case-law, part of the legislative text.

[9] The same opinion was expressed also in *Neruda, R.*, Náhrada škody způsobené protisoutěžním jednáním jako způsob soukromého vymáhání antimonopolního práva. [Claims for Damages Caused by Anticompetitive Conduct as a Method of Private Enforcement of Antimonopoly Law] Právní rozhledy, 12 (2005), p. 439.

[10] Section 9(3)(r) indent 6. of the Civil Procedure Code; and provided that the parties to the dispute are entrepreneurs within the meaning of the Commercial Code, which shall be the case in most – but not necessarily – all competition law cases.

[11] As regards the underdevelopment of private competition litigation in the Czech Republic and experiences of Czech civil courts with application of competition law see e.g. *Kindl, J.* Czech Republic. In: *Koeck, H.F. and Karolluss, M.M. (eds)* The Modernisation of European Competition Law. Initial Experiences with Regulation 1/2003. FIDE XXIII Congress Linz 2008, Congress Publications Vol. 2,

8. Is private litigation in practice essentially circumscribed to specific practices or industries (e.g. supply exclusivity of petrol stations; motor vehicles distribution, etc.)?

As mentioned above, private competition litigation in the Czech Republic is rather scarce. It cannot be said, however, that it would be limited to any specific practices or industries. On the basis of replies from Czech civil courts and related materials of the Office it seems that those relatively few cases that dealt with competition law spanned over various industry sectors and concerned various competition law infringements, even though abuse of dominant position cases seem to be more frequent.

As regards sectors concerned, the sector of telecommunications is one of the sectors where private competition litigation took place more frequently. There were two follow-on damages claims both initiated subsequently to the Office's finding of an abuse of dominant position by the 'aggrieved' operator on the respective relevant markets. In one such case Vodafone (a mobile operator) sued two other companies that (allegedly) abused their collective dominant position. The decision of the Office finding the abuse was cancelled in subsequent judicial review proceedings and the case seems to continue to be tried as a 'stand-alone' case.[12] Information about the other case is not publicly available and it is still pending in certain respects.

There was also one case, eventually settled, which concerned the sector of public bus transport in which one company entering new route sued its rival in order to get access to a bus station operated by that company. That case was (prior to its settlement) litigated with an argument that the dominant undertaking was abusing its position by refusing to provide access to its bus station. Other cases took place in a heavy industry sector (steel), distribution of beer, taxi services, heat and health insurance.

Nomos – facultas.wuv, Vienna, 2008, 33-44, at pp. 41-44, or *Bejček, J., Neruda, R., Šilhán, J.* Czech national report for the Amsterdam Congress of LIDC in October 2006 – an answer to question A, available at: http://www.ligue.org/en/homepage/workshops/nat._reporters (accessed on 29 October 2009).

[12] Úřad pro ochranu hospodářské soutěže, Information List No. 4/2008, October 2008, p. 14.

9. Has the national court to stay its proceedings once the National Competition Authority ("NCA") has initiated proceedings on the same matter, until a decision has been reached?

Civil proceedings before Czech courts are separate and independent from administrative proceedings before the Office. Accordingly, Czech courts may proceed with cases submitted to them irrespective of whether there is some administrative proceeding pending before the Office or not. This applies also to the question of stays of such court proceedings, i.e. Czech courts have no duty to stay proceedings once the Office has initiated proceedings on the same matter. This does not mean however that a particular court cannot take parallel proceedings that are taking place before the Office into account. The court may, for instance, seek various guidance from the Office, e.g. concerning issues associated with application of Article 81 and 82 EC[13] or on other questions it deems important for deciding the case on the basis of its general investigation powers.

A Czech civil court may also stay proceedings pending before it if there has been initiated administrative proceedings before the Office and wait for the final decision of the Office.[14] The Office was requested by a court once to open proceedings. It did not do so because in its opinion it was obvious that no competition law infringement occurred. The Office was also asked by a court in one other case to deliver its written opinion on validity of certain vertical agreements from competition law perspective. Again, no formal investigation was not commenced by the Office.[15]

10. Has the NCA to stay its proceedings once a national court has initiated proceedings on the same matter, until a decision has been reached?

The Office (the Czech NCA) is not bound in any respect to stay proceedings it has initiated due to the fact that some national court has initiated proceedings on the same matter. In fact,

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[13] Section 20a(3)(e) of the 2001 Competition Act. No Czech court has, however, used this option provided for in 2001 Competition Act so far. See also *Kindl, J.* Czech Republic. In: *Koeck, H.F. and Karolluss, M.M. (eds)* The Modernisation of European Competition Law. Initial Experiences with Regulation 1/2003. FIDE XXIII Congress Linz 2008, Congress Publications Vol. 2, Nomos – facultas.wuv, Vienna, 2008, 33-44, at p. 43.

[14] Section 109(2)(c) of the Civil Procedure Code.

[15] *Kindl, J. and Petr, M.* Global Cartel Litigation – Czech Republic, Section 12.1; a draft chapter for a multi-jurisdictional Kluwer publication, not yet published.

strictly speaking no Czech court can initiate proceedings on exactly the same matter. It may indeed deal with a case concerning the same competition law infringement proceedings about which are pending before the Office but it would be concerned only with private law consequences of such illicit conduct, esp. claims for damages or return of unjust enrichment, while the Office would deal exclusively with public law consequences of such conduct (i.e. it declares such conduct illegal, prohibits it, imposes fines and order remedies, if applicable). In other words, the factual background of proceedings before the Office and a civil court may be the same and yet the proceedings would deal with different aspects. It is, therefore, quite natural that the Office can proceed with the proceeding it has initiated irrespective of potentially parallel court proceeding. It is also necessary as the limitation periods in which the Office can impose penalties for competition law infringements or rather initiate proceedings concerning such infringements[16] are in no way suspended due to pending related civil proceedings.

Similarly as in the case of civil courts (see the answer to Question 9 above), the Office may, however, stay its proceedings if it deems that the issue that is addressed before the court needs to be solved prior to final finding of the Office, i.e. it represents the so-called preliminary question.[17] To the authors' knowledge, the Office stayed its abuse of dominant proceedings once due to the existence of civil court proceedings at that time pending before a regional court. The Office considered the issue addressed in those proceedings (i.e. whether a dependant customer of a dominant supplier was indebted to the dominant company for deliveries or not) might have been relevant for the issue of objective justification of the conduct of the dominant undertaking in question.

11. Are national courts bound by the final decisions adopted by a NCA declaring that a certain practice amounts to an infringement? Is the response the same where the NCA rules that the practice does not infringe competition law?

Pursuant to Art. 135(1) of the Civil Procedure Code, the Czech courts are bound, *inter alia*, by decisions of competent state bodies that an administrative offence was committed and as regards the identity of the perpetrator. Since 2001 Competition Act violations (and similarly

[16] Section 22b(3) of the 2001 Competition Act.

[17] Sections 57 and 64(1)(c) of the Administrative Procedure Code.

Article 81 or 82 EC violations) are administrative offences of penal nature, the Czech civil courts are bound by the decision of the Office that a breach of the said Act or EC Treaty Articles occurred.

On the other hand, should the Office decide that certain practice did not infringe competition law and, accordingly, that no administrative offence was committed, civil courts are not bound by such a decision. A civil court may, therefore, in theory come (for the purposes of its proceedings) to a different conclusion as regards the assessment of the practice in question. In this regard the respective civil court has to, however, take the decision of the Office into consideration, even though it is not formally bound by it,[18] and explain why it diverges from it. In practical terms, it seems highly unlikely that a Czech civil court would come to a different view (i.e. that a competition law infringement occurred) in case it was provided with a reasoned decision of the Office that did not find such an infringement. This does not mean, however, that the court might not object to the concerned practice on other grounds (e.g. unfair competition under Section 44 *et seq.* of the Commercial Code).

12. Is the NCA bound by the final decisions adopted by a national court declaring that a certain practice amounts to an infringement? Is the response the same where the national court rules that the practice does not infringe competition law?

Final civil courts' judgements are generally binding on public authorities to the extent they bind the parties to the respective courts' proceedings.[19] Accordingly, it may be argued that national courts' decisions would be binding upon the Office. This seems to hold especially in cases where the parties concerned are the same as those that participated in the respective civil court proceedings. But even in cases where the scope of persons affected by the Office's proceedings is broader or different, the above mentioned provision of the Civil Procedure Code seems to require the Office to respect the court's decision even though it does not release it from its duty to carry out its own investigation so that the facts of the case are established to the utmost certainty and to let the parties to provide their opinion on the matter and consider that carefully. If it establishes that there are some new facts or evidence,

[18] Section 135(2) of the Civil Procedure Code.

[19] Section 159a(4) of the Civil Procedure Code.

that were not addressed in the prior court proceedings, it may, in our opinion, come to a different conclusion than the respective court provided that its different opinion is properly reasoned. If there are no new facts or evidence it shall respect the conclusion reached in the respective court's decision. This conclusion seems to ensue from the above mentioned provision and from the principle of legal certainty.[20] Some legal commentators are, however, of the view that administrative authorities could reach different conclusions regarding administrative offences despite the fact that a civil court previously came to an opposite conclusion. They even argue that if the competent administrative authority (such as the Office) comes later on to a different conclusion than the court, it may represent a basis for action for renewal of the respective court proceedings under Section 228(1)(a) of the Civil Procedure Code.[21] Given the foregoing, the actual normative status of national courts' decisions with respect to the proceedings before the Office is unclear. To the authors' knowledge, the Office was not yet confronted with the above issue.

13. If not, what is the value for a national court of a final decision adopted by a NCA and vice versa?

As regards the practical impact of NCA's decision that no competition law infringement was committed (which is not strictly binding on the court) on the proceedings before a national court see the answer to Question 11 above. In the course of answering Question 12 above, we mentioned that the actual normative status of Czech courts' decisions for proceedings before the Office is unclear. Even in case they would not be binding for the Office, they would, however, have persuasive force and the Office would be obligated to deal with them in the course of its proceedings and to address them in the reasoning of its decision. As mentioned above, the Office was not yet confronted with such a situation.

14. Is the final review of all the disputes (civil and administrative) related to competition law under the jurisdiction of a single court of last instance? Are there mechanisms to avoid inconsistencies in the case law?

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[20] See in this regard e.g. Czech Constitutional Court's judgment of 27 August 2004 in case Ref. No. I US 647/02 (N 120/34 SbNU 245).

[21] *Bureš, J. et al.*, Občanský soudní řád. Komentář. [Civil Procedure Code. A Commentary] Vol. 1, 7th ed., Praha: C.H. Beck, 2006, p. 622.

No. The final review of disputes relating to competition is not under the jurisdiction of a single court of last instance. As mentioned in the introduction to this report, the Office's decisions concerning competition law infringements are subject to judicial review, firstly, by the Regional Court in Brno (a special administrative panel of three judges) and, secondly and finally, by the Supreme Administrative Court. On the other hand, civil disputes relating to competition law remain within the jurisdiction of ordinary civil/commercial courts. Accordingly, the court of last instance for such civil disputes is the Supreme Court. There are no formal mechanisms to avoid inconsistencies in the case law between these two courts of last instance.

15. Does your legal/constitutional system allow courts to be bound by administrative decisions —as provided for in Article 16 of Regulation 1/2003 in respect to the Commission's decisions—? In the absence of a specific legal provision such as Article 16 of Regulation 1/2003, what is or could be the value for a national court of a final decision adopted by a NCA of other Member State? And of a judgment of the court of another Member State?

Czech courts are bound by decisions of the Commission finding infringements of Articles 81 or 82 EC. This conclusion follows not only from Article 16(1) of Regulation 1/2003 but it could be reached also on the basis of Section 135(1) of the Civil Procedure Code. The courts are not, however, bound by decisions of national competition authorities of other Member States (unless there is a international treaty in place that would provide for recognition of such decisions in the Czech Republic). They may take them into account as persuasive evidence. In addition, the Office supports the Commission's position that decisions of other EU national competition authorities shall be binding upon Czech courts subject to public order objection.[22] Judgments of courts of other Member States would be treated in line with Regulation 44/2001, as amended, and they shall be, therefore, generally recognized without need of any special procedure.

16. Is there any form of discovery, either pre-trial or court-ordered based on fact-pleading? If not, what mechanisms are available under your national law to obtain evidence from the opposing party? Are they sufficient?

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[22] Office's Position to the White Paper on Damages actions for breach of the EC antitrust rules; paras 34-37.

The *inter partes* disclosure is not provided for in the Czech law.[23] Under Sections 128 and 129(2) of the Civil Procedure Code, the court is, however, empowered in the course of proceedings to request any natural or juridical person (including the defendant) to provide the court with specific information relevant for the case at hand or hand-over a particular document it has in its possession. If the requested party fails to response to the court's request, it may be subject to both disciplinary and criminal sanctions.[24] These provisions certainly do not allow any 'fishing expeditions'. In practice, they are not, however, sufficient to avoid the other extreme, i.e. the situation when parties with justified case but limited access to evidence are unable to prove their case. In fact, in this regard the Office "*admits that current legal framework in the Czech Republic may pose serious obstacles to potential plaintiffs*".[25]

In general, it is up to the parties to a dispute to provide the court with evidence they intent to rely on. Obviously, this imposes burden primarily on the claimant who has to not only sufficiently specify the facts but also provide (or at least suggest) evidence it wants to rely on. The court may take a pro-active role and seek evidence on its own only in very limited circumstances which would most likely not apply in competition law cases. Written evidence needs to be submitted to the court files. If a party wants to hear some persons as witnesses it has to propose them together with adducing their contact details. The court will then decide whether it will interrogate them and if so, it will order the persons to appear before the court and give evidence. The persons so called have a duty to appear before the court and speak the truth.[26] If they do not do so, they may be prosecuted both in a disciplinary and a criminal way. If the court considers that certain factual questions need expert assessment, it may appoint an expert or an expert institution to assess that question and work out an expert report.[27] In appropriate cases, the court may rely only on explanations by persons with sufficient expertise (i.e. not formal expert reports) if there are

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[23] See also Office's Position to the White Paper on Damages actions for breach of the EC antitrust rules; para. 18.

[24] Pursuant to Art. 53 of the Civil Procedure Code, the court may impose a fine if up to CZK 50,000 against such party. In case of serious and repeated ignorance of the court in this regard, a crime of contempt of court (Section 169b of the current Criminal Code, effective until 31 December 2009, or Section 336 of the new Criminal Code, effective as of 1 January 2010) may be committed.

[25] Office's Position to the White Paper on Damages actions for breach of the EC antitrust rules; para. 19.

[26] Section 126(1) of the Civil Procedure Code.

[27] Section 127(1) of the Civil Procedure Code.

no doubts about the correctness of such explanations.[28] Expert evidence provided by the parties is considered only written evidence and, in practical terms, it does not have the same 'force' as the expert evidence by the court-appointed expert.

17. In case of follow-on litigation, can private parties claim access to the administrative file to prepare their action before the national court? If so, will they also have access to documents that have been declared confidential by the NCA and to internal documents of the NCA?

Generally, only parties to proceedings before the Office have unlimited access the file that is kept in connection with the proceedings. Under the Czech law,[29] in abuse of dominant cases only the dominant undertaking is a party to such proceedings. In cartel cases the investigated participants in the cartel are parties to the Office's proceedings. Aggrieved parties (be it competitors or customers) do not have such procedural position and, accordingly, do not have a general right to inspect Office's files. The Office may, however, grant access to its file to any interested persons who would demonstrate that they have sufficient legal interest or other serious reason for being provided with the access. The Office cannot, however, grant such access if it would infringe rights of the parties to the proceedings, of other affected parties or public interest.[30] This possibility might be used in follow-on litigation as the parties to such litigation can be presumed to have a legal interest in inspecting the files as their content may influence the outcome of follow-on litigation. In any case, they would not, however, be allowed to inspect confidential documents (commercial secrets of the investigated parties or other affected persons). Internal documents of the NCA might have been so provided if they were made part of the file and only to the extent they do not contain confidential information. To the authors' knowledge, the Office has not yet granted access to any antitrust proceedings files to anyone who was not a party to such proceedings.[31]

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[28] Section 127(4) of the Civil Procedure Code.

[29] Section 21a(2) of the 2001 Competition Act.

[30] Section 38(2) of the Act No. 500/2004 Coll., Administrative Procedure Code, as amended.

[31] *Kindl, J. and Petr, M.* Global Cartel Litigation – Czech Republic, Section 12.4; a draft chapter for a multi-jurisdictional Kluwer publication, not yet published.

In addition, civil courts may request the Office that it submits its complete investigation file to the court for the purposes of the proceedings before the court.[32] The Office expressed its readiness to do so once it closes its proceedings (i.e. after the final decision was issued).[33] This option may, however, face some practical difficulties given the fact that most of Office's final decisions are challenged by the parties before administrative courts, wherefore the Office has to submit its file to them, in order to allow for a judicial review of its decision. In such cases, the Office is not in possession of the administrative file and cannot provide it even if requested.

18. Who bears the burden of proof of the existence of an infringement in private litigation cases? What does the plaintiff have to prove to claim damages? Does the burden of proof shift during the proceedings? Are there legal presumptions affecting the burden of proof?

In contentious civil proceedings (including competition cases) parties are required to offer evidence to prove their allegations.[34] The court subsequently decides upon which evidence will be considered. If it, however, decides not to deal with certain offered evidence, the court must explain in detail why such evidence was superfluous or irrelevant for the case at hand. The court is not limited to evidence offered by the parties. It may also seek evidence on its own, if it considers it important for establishing facts of the case at hand and the existence of such evidence is obvious from the court's file.[35] In practice courts deciding commercial matters leave it entirely to the parties to suggest evidence. If parties do not offer sufficient evidence necessary to prove certain facts, the court decides on the basis of evidence that was produced and presented to it and in accordance with rules concerning burden of proof.[36] Failure to offer sufficient evidence (and accordingly failure to prove certain facts) may lead to an unfavourable outcome with respect to the whole or part of the proceedings.[37]

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[32] Section 129(2) of the Civil Procedure Code.

[33] *Kindl, J. and Petr, M.* Global Cartel Litigation – Czech Republic, Section 12.4; a draft chapter for a multi-jurisdictional Kluwer publication, not yet published.

[34] Section 120(1) of the Civil Procedure Code.

[35] Section 120(3) of the Civil Procedure Code.

[36] Ibid.

[37] *Bureš, J. et al.*, Občanský soudní řád. Komentář. [Civil Procedure Code. A Commentary] Vol. 1, 7th ed., Praha: C.H. Beck, 2006, pp. 570-571.

Pursuant to settled Czech case-law, the extent of burden of proof, i.e. the scope of facts that certain party has to prove, is, in principle, determined by the substantive-law norm that relates to the legal relationship in question.[38] Such legal norm also determines who has to prove what facts, i.e. who bears the pertinent burden of proof.[39] For instance, in damages claims in commercial matters it is generally up to the claimant who seeks compensation to aver and prove that it incurred certain loss as a result (in causal connection with) of illegal behaviour of the defendant.[40] On the other hand, it is up to defendant to prove that there were certain exculpating circumstances. Put in other words, a party has to prove those facts favourable to it that it presents to the court as true.[41]

As a civil law system, the Czech civil procedural law does not formally distinguish between the legal burden of proving in the above sense and the evidential burden in a way common law systems do.[42] Nevertheless, in Czech procedural practice it is not uncommon to use terms such as 'shifting', 'transferring' or 'reversing' burden of proof. It is quite commonly accepted in the Czech academia that this terminology is not suitable since the 'burden of proof' is the legal burden and it cannot 'shift' depending on the actions of the counterparty to a dispute.[43] And yet, if certain party adduces enough evidence which, if remained uncontradicted or unrebutted by counterevidence, is sufficient to persuade the judge that certain facts are true (*prima facie* evidence), in practical terms it would be up to the other party not only to disagree with that evidence but also to adduce counterevidence or convincingly doubt veracity of the presented evidence. If the latter party fails to do so, the court could find in favour of the other party taking into account all evidence at court's

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[38] E.g. the judgment of the Supreme Court of 22 August 2001, Ref. No. 30 Cdo 1082/2001, www.nsoud.cz, or the judgment of the Supreme Court of 27 February 2001, Ref. No. 25 Cdo 1167/99, www.nsoud.cz.

[39] *Bureš, J. et al.*, Občanský soudní řád. Komentář. [Civil Procedure Code. A Commentary] Vol. 1, 7th ed., Praha: C.H. Beck, 2006, p. 569.

[40] All elements of the illegal conduct of the defendant would have to be proved by the plaintiff. Accordingly, if it, for example, seeks damages for abuse of dominant position, it would have to prove the existence of the dominant position of the defendant on the relevant market as well as the existence of its abuse.

[41] See e.g. the judgment of the Supreme Court of 10 October 2000, Ref. No. 22 Cdo 2670/98, www.nsoud.cz.

[42] In this regard see e.g. *Nazzini, R.*, The Wood Began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 Cases, E.L. Rev. 31(4) (2006), 518-539, at p. 523-526.

[43] *Winterová A. et al.*, Civilní právo procesní, [Law of Civil Procedure] 4th ed. Praha: Linde, 2006, p. 280-281.

disposal. Only in cases where certain material facts remained entirely unproved, i.e. the court can infer neither that the facts are true nor untrue (*non liquet*), the case would be decided on the basis of the allocation of the 'legal' burden of proof, i.e. the party that had the burden to aver and prove the facts in question would lose the case.[44]

There are no special evidentiary rules that would relate to disputes concerning protection of competition. There seems to be only two 'presumptions' that may be relevant in competition litigation. Firstly, Section 10(3) of the 2001 Competition Act provides that it is presumed that an undertaking(s) having less 40% market share in a relevant market is *not* dominant, unless proved otherwise. Nevertheless, it is always up to the party claiming dominance of the other to prove so (even if the market share of the other party is over 40%) and, accordingly, the said presumption in fact only means that it would be more difficult to prove dominance below 40% market share. Secondly, Section 54(2) of the Commercial Code reverses burden of proof in cases where a consumer sues enterprise(s) for breach of unfair competition rules. This may become relevant because certain anticompetitive conduct may represent at the same time a violation of the 2001 Competition Act (if competition is appreciably restricted) and an unfair competition offence, i.e. an act against good morals of competition, pursuant to Section 44 of the Commercial Code.[45] In such cases, it would be up to the enterprise sued by the consumer to adduce evidence that it did not commit an unfair competition offence. The reversal of burden of proof does not apply in disputes between enterprises.

In addition, it is worth mentioning that Section 136 of the Civil Procedure Code may be considered a special evidentiary rule. Pursuant to that provision, the court may determine the amount (quantum) of a certain claim on the basis of its, in principle, discretionary assessment, if that amount cannot be precisely determined either at all or only with disproportionate difficulties. This provision may be of help when a claimant establishes that it suffered a loss as a consequence of illicit conduct of the defendant but the exact amount of the loss suffered cannot be established. This rule might well become relevant in competition case where a loss incurred as a result of distortion of competition may be difficult to

[44] Ibid., pp. 247 and 277.

[45] E.g. *Munková, J.* Právo proti nekalé soutěži. Komentář, [Law against unfair competition. A commentary] 2nd ed. Praha: C.H. Beck, 2001, p. 32-33, where the author gives examples of abusive exploitative discrimination of customers or collective boycotts.

measure. At present, however, the practical impact of this provision is limited.[46] In addition, it shall be mentioned that the court's discretion under Section 136 of the Civil Procedure Code is not unfettered one. The court's assessment must be based on the facts of the case at hand that allow the court to make certain (even though they may be approximate) conclusions as regards quantum of the pursued claim.[47]

19. What form of orders or remedies are available (i) in private actions before the courts; and (ii) in administrative proceedings by the NCA (e.g. declaration of infringement; declarations as to compliance with Article 81(3); annulment of agreements or of particular clauses; injunctions to restrain repetition of infringements; positive injunctions; interim measures in advance of final judgment; damages, etc.)?

In administrative proceedings before the Office the outcome of the proceedings may be such that the Office declares that the investigated conduct (whether a restrictive agreement or an abuse of dominant position) was illegal and prohibits the performance of the objected agreement (including concerted action or decision of association of undertakings) or of the objected abusive conduct as to the future.[48] It may also terminate the proceedings in case the investigated party(-ies) offered commitments that it deem sufficient to address the competition concerns associated with the objected to conduct.[49] The Office can impose penalties for such infringements up to CZK 10 million or 10% of the turnover of the undertaking concerned.[50] The Office can also order a remedy to remove distortions of competitions caused by the respective restrictive agreement or the abuse of dominant position and set out a period for the affected undertakings to comply with such an order.[51] The 2001 Competition Act does not provide any specific form such a remedy may take. Accordingly, the Office may, at its discretion, order any remedy it deems appropriate. Such remedy needs, however, to be strictly necessary to the purpose provided for in the 2001

[46] Office's Position to the White Paper on Damages actions for breach of the EC antitrust rules; para. 41.

[47] Judgment of the Supreme Court of 21 February 2008, Ref. No. 32 Odo 871/2006, www.nsoud.cz

[48] Sections 7(1) and 11(2) of the 2001 Competition Act.

[49] Sections 7(2)-(4) and 11(3)-(5) of the 2001 Competition Act.

[50] Sections 22 and 22a of the 2001 Competition Act.

[51] Section 20(4) of the 2001 Competition Act.

Competition Act (i.e. re-establishing of effective competition on affected markets) and proportionate to achieving that end.

In addition, the Office is empowered to order interim injunctions in the proceedings pending before it prior to the end of such proceedings.[52] Such an injunction order may have various forms, including both negative (an order to refrain from something) and positive (an order to do something) one. An interim injunction may, however, only be issued if it is necessary for settling provisionally relations between the parties to the proceedings or if there is a concern that the enforcement of final decision will be endangered. The Office, for instance, ordered an interim injunction in an abuse of dominant position case against Lesy České republiky, s.p. (a state-owned company administering state-owned forests) which consisted in a prohibition of any conduct that would limit business of the dominant company's commercial partners under contracts on silvicultural activities and on sale of wood that Lesy sought to terminate.[53] In another case where the Office investigated alleged coordination between various press publishers in the form of collective boycott of one press distributor, the Office ordered several press publishers to re-establish deliveries of various Czech newspapers to the concerned press distributor.[54]

In private actions before courts parties can, in principle, claim damages, return of unjust enrichment or declaration of invalidity of agreement(s). They can also request cease-and-desist order and (in certain circumstances) restitution into the situation prior to illicit conduct.[55] Civil courts are also empowered to order preliminary or interim injunctions in advance of a final judgment.

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[52] Section 61 of the Administrative Procedure Code.

[53] Office's decision Ref. No. S 1/05-A-466/05-OHS of 20 January 2005. The interim injunction was subsequently cancelled by the Office's decision Ref. No. S 1/05-A-2509/05-OHS of 4 April 2005 (www.compet.cz), so it lasted less than three months.

[54] Office's decisions Ref. No. 238/02-2510/02-OK, 238/02-2511/02-OK, 238/02-2512/02-OK, 238/02-2513/02-OK all of 27 December 2002. These decisions were cancelled by the Office's decisions Ref. No. S 238/02-311/03-ORP, S 238/02-312/03-ORP, S 238/02-313/03-ORP, S 238/02-314/03-ORP all of 27 January 2003 (www.compet.cz), i.e. the interim injunctions lasted approx. one month.

[55] Such specific circumstances are present e.g. when the case concerns the so-called 'unfair competition' offence (Section 53 of the Commercial Code).

As regards damages claims, they seem to be the most typical form of remedy aggrieved parties may seek in competition cases. As regards the form of compensation and some other issues relating to damages claims see the reply to Question 36.

In civil cases, parties may also seek return of unjust enrichment that occurred, *inter alia*, on the basis of invalid contracts (including restrictive agreement) or on the basis of 'unfair means' which could include certain anti-competitive conduct (especially that one that would concurrently represent an 'unfair competition' offence pursuant to Section 44 of the Commercial Code).[56] Unjust enrichment shall be, in principle, returned in the form it was obtained. Should that not be possible, a compensation in monetary form shall be provided instead.[57]

Civil courts can also issue declaratory judgments. In competition related cases this may be relevant if a party would seek that certain restrictive agreement is declared invalid (void). Claims for such declaratory judgments are, however, allowed only when the claimant can prove compelling legal interest in obtaining the sought declaration.[58] Such compelling legal interest is not, in principle, present if a violation of someone's right already occurred and the claimant can, therefore, instead of seeking declaratory judgment submit meritorious claim seeking some form of performance, e.g. damages, unjust enrichment or cease-and-desist order. It may be nevertheless possible in cases where it would provide basis for settlement of legal relations between the parties in dispute and so it would prevent further escalation of dispute or in cases when claim for performance does not fully capture the whole scope of dispute between the parties concerned.[59]

As regards preliminary or interim injunctions these can be ordered by civil courts both in the pre-action stage (prior to initiation of meritorious proceedings) and in the course of proceedings about some claim in advance of the final judgment.[60] An injunction can have similar forms as the one which may be issued by the Office (see above). Also, the

[56] E.g. Sections 451 and 457 of the Civil Code and Section 53 of the Commercial Code.

[57] Section 458(1) of the Civil Code.

[58] Section 80(c) of the Civil Procedure Code.

[59] *Bureš, J. et al.*, Občanský soudní řád. Komentář. [Civil Procedure Code. A Commentary] Vol. 1, 7th ed., Praha: C.H. Beck, 2006, pp. 356-357.

[60] Sections 74 *et seq.* and 102 of the Civil Procedure Code.

circumstances when it can be issued are similar, i.e. such injunction may be only issued if it is necessary for settling provisionally relations between the parties to the dispute or if there is a concern that the enforcement of final judgment will be endangered.[61] The latter condition would not have much practical relevance in competition-law matters (as a pre-action measure) as it usually requires that there is a court decision or other legal act that could lead to a successful judicial enforcement.[62] As regards the former condition, it is for the petitioner to prove the existence of the need to settle provisionally the relations between the parties. Other circumstances relevant for the case (esp. the justifiability of the claim itself) need not be at that stage proven but it is required that they are at least 'displayed', i.e. it is shown that on the basis of the that time file materials (usually only the petitioner's pleadings) they seem likely.[63]

Petitioner has to pay a deposit of CZK 100,000 when it asks for a preliminary injunction in commercial matters.[64] If that amount is not paid, the motion would be rejected. The deposit is there to serve as a security for potential damages claims against the petitioner in connection with its liability for unjustified preliminary injunction.[65]

The court has to decide about the motion for preliminary injunction without delay and, in any case, no later than in seven days.[66] The court does not hear parties prior to deciding upon the motion and it decides on the basis of the facts as provided at the time of its (first-instance) decision.[67] If the court orders the injunction in a situation when it was requested prior to submitting the action, it also imposes a duty upon the petitioner to lodge a claim with the court to commence the proceedings within a certain deadline.[68] If the claim is not

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[61] Section 74(1) of the Civil Procedure Code.

[62] See e.g. *Bureš, J. et al.*, Občanský soudní řád. Komentář. [Civil Procedure Code. A Commentary] Vol. 1, 7th ed., Praha: C.H. Beck, 2006, pp. If the claimant fears of impossibility of enforcement of decision in the initiated proceedings it may petition for an (preliminary) injunction within the proceedings pursuant to Art. 102 of the Civil Procedure Code (*ibid.*, at p. 288).

[63] Section 75c(1) of the Civil Procedure Code. See also *ibid.*, at p. 299.

[64] Section 75b of the Civil Procedure Code.

[65] Section 77a of the Civil Procedure Code.

[66] Section 75c(2) of the Civil Procedure Code.

[67] Section 75c(4) of the Civil Procedure Code.

[68] Section 76(3) of the Civil Procedure Code.

lodged within the set deadline, the injunction terminates[69] and the petitioner may be liable for damage caused by the issued injunction in the interim.

20. Are the administrative limitation periods for the imposition of penalties different from the term within which it is possible to bring an action for breach of competition law before the national court? What is the time limit to bring an action for damages?

Administrative limitation periods for the imposition of penalties are different from the term within which private actions for breach of competition law. As of 1 September 2009, the administrative limitation periods are provided for in new Section 22b(3) of the 2001 Competition Act which provides that responsibility for an administrative offence under the 2001 Competition Act ceases if the Office does not commence proceedings within 5 years since the moment it acquired knowledge about such offence but in any case no later than within 10 years since when the offence was committed.[70] The moment when the Office 'acquired knowledge' of certain offence is determined objectively rather than subjective, i.e. the actual knowledge by Office's employees is not relevant, instead it is some objective moment when the Office obtained information about circumstances of the offence (e.g. receipt of complaint or carrying out of on-site investigation) what is relevant. In case of lasting offences which span over longer periods, the above mentioned periods start, broadly speaking, from the moment when the particular offence ended.[71]

As liability for competition law infringements is, in principle, governed by the Commercial Code the general limitation period is four years since when the respective action could have been firstly brought before the court.[72] This applies to actions concerning all types of remedies discussed under the Question 19 above. Pursuant to Czech law, preservation of limitation period is not a *procedural* (pre)condition for filing a claim and continuing in the

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[69] Art. 77(1)(a) of the Civil Procedure Code.

[70] Prior to 1 September 2009 the periods where shorter, *viz.* there were two periods for the final imposition of a fine (i.e. not only for commencement of administrative proceedings) – a subjective one of three years from the Office's knowledge about the offence and an objective one of 10 years period from the date of the offence (Section 22(5) of the 2001 Competition Act prior to Act No. 155/2009 Coll.).

[71] See e.g. Supreme Administrative Court's judgments Ref. No. 5 A 164/2002-44 of 22 February 2005 or Ref. No. 2 As 21/2005 – 72 of 1 March 2006 (www.nssoud.cz).

[72] Sections 397 and 391(1) of the Commercial Code. There are different limitation periods provided for in the Civil Code. They would not, however, be applicable in vast majority of competition law cases.

proceedings; it is a substantive law concept.[73] If the applicable limitation period elapsed *and* the defendant invoked it, the claimant cannot be successful with its claim. In such a case the court would not, however, suspend the proceedings but reject the claim on the merits. In damages claims in matters of protection of competition, the limitation period is, as mentioned above, four years[74] and, pursuant to Section 398 of the Commercial Code, it starts to run from the moment the aggrieved party had either actual or constructive knowledge about its loss and about the liable party (subjective limitation period). In any case, the limitation period elapses after ten years since when the violation of legal duty that led to the damage occurred (objective limitation period).[75] Statutory limitation periods for bringing private law (damages) claims continue to run irrespective of whether the Office (or the Commission) conducts proceedings regarding anticompetitive practices in question or not.[76] Their run is suspended only by submitting the claim with court or by a similar legal act (e.g. filing a request for arbitration, if applicable).

21. Are there special rules for competition law issues in relation to standing? Can indirect purchasers claim redress?

There are no special rules concerning standing in relation to competition law disputes. Generally, any person that was affected by some competition law infringement in its legal sphere (e.g. it was damaged, the tortfeasor was unjustly enriched to its detriment etc.) can bring the appropriate action before a court. There is no distinction in this regard between direct and indirect purchasers' claims. Accordingly, even indirect purchasers can bring an action claiming, for instance, damages that they incurred as a result of the complained anticompetitive conduct. They may be in a more difficult evidentiary position than the direct

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[73] See e.g. *Kučera, Z.* Mezinárodní právo soukromé [International Private Law], 6th ed., Brno: Doplněk 2004, p. 269. Pursuant to Section 13(1) of the Private International Law Act, limitation periods (negative prescription) are, however, governed by the law that governs the obligations to which a negative prescription may apply.

[74] Section 397 of the Commercial Code.

[75] See also *Bejček, J., Neruda, R., Šilhán, J.* Czech national report for the Amsterdam Congress of LIDC in October 2006 – an answer to question A, Section 2.1., available at: http://www.ligue.org/en/homepage/workshops/nat._reporters (accessed on 29 October 2009).

[76] In order to promote follow-on actions, the Office supports in its Position Paper regarding the White Paper on Damages actions for breach of the EC antitrust rules (available at www.compet.cz) establishing of special limitation period for such cases which would trump general rules (para. 46 of the said Paper).

purchaser would be but that does not affect their standing. As regards the passing on defense see the reply to Question 39 below.

22. Are there collective redress mechanisms allowing for the aggregation of individual claims for competition law infringements? Do your national procedural rules allow for (i) representative actions being brought by a specified body?; (ii) class actions generally; (iii) the consolidations of claims?

As mentioned already above, there are no specific procedural rules concerning private enforcement of competition law. The Civil Procedure Code, which contains general rules regarding private litigation, does not provide for any possibility of class actions. Several individual actions may, however, be consolidated into a single proceeding.[77]

It should firstly be mentioned that nothing prevents several persons to bring a joint action against the same defendant. If, however, the court would consider such joining of actions inconvenient, it may decide to separate the cases. Secondly, the court is generally allowed for reasons of expediency to join several proceedings if they are factually connected or if they involve the same participants.[78] Thirdly, the court may allow another claimant to enter the proceedings if the first claimant requests so and the entering claimant consents to it.[79]

The Civil Procedure Code also recognizes the so-called intervenors (side participants) who may enter the proceedings to support a party to the dispute if they have a legal interest in the outcome of the case.[80] They have similar procedural rights as the main participants, but the final judgment is not substantively addressed to them and they cannot infer any substantive rights out of it.[81]

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[77] See also *Bejček, J., Neruda, R., Šilhán, J.* Czech national report for the Amsterdam Congress of LIDC in October 2006 – an answer to question A, Section 2.1. *in fine*, available at: http://www.ligue.org/en/homepage/workshops/nat._reporters (accessed on 29 October 2009) and *Kindl, J. and Petr, M.* Global Cartel Litigation – Czech Republic, Section 13; a draft chapter for a multi-jurisdictional Kluwer publication, not yet published.

[78] Section 112(1) of the Civil Procedure Code.

[79] Section 92(1) of the Civil Procedure Code.

[80] Section 93 of the Civil Procedure Code.

[81] *Ibid*. Concerning the binding effect of judgements, in disputes based on unfair competition, the judgments are also binding for other persons in situation similar to that of the claimant [Section 159a(2) of the Civil Procedure Code, see below].

The authors are not aware of any such a consolidation of claims based on breach of competition law.

For the sake of completeness, one shall also add that the legal provisions relating to unfair competition matters address to a certain extent collective claims. Unfair competition is defined in the Commercial Code as a conduct in an economic competition which is contrary to the good morals of the competition and is eligible to cause harm to other undertakings or customers.[82] Anybody who asserts to have been injured by unfair competition needs to bring a claim directly before courts.[83] Because of the broad definition of unfair competition, certain anticompetitive conduct may represent at the same time a violation of the 2001 Competition Act (if competition is appreciably restricted) and an unfair competition offence, i.e. an act against good morals of competition, pursuant to the Commercial Code.[84] In such overlapping cases, the respective provisions would apply in potential litigation if the claim was raised on the basis of unfair competition rules.

Firstly, the Commercial Code provides for a kind of 'representative actions' in unfair competition matters since it allows consumer or undertaking associations to lodge claims for restraining or restitutionary orders. Consumer associations cannot, however, claim damages on behalf of their members.[85]

Furthermore, the Civil Procedure Code contains specific provisions concerning unfair competition claims[86] that may to a certain extent resemble collective actions.[87] Section 83 of the Civil Procedure Code sets forth a *lis pendens* impediment to multiple unfair competition claims concerning the same conduct of identical undertaking being raised against the same defendant. Pursuant to that provision, a commencement of proceedings concerning a claim

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[82] Section 44(1) of the Commercial Code.

[83] Section 53 *et seq* of the Commercial Code.

[84] E.g. *Munková, J.*, Právo proti nekalé soutěži. Komentář. [Law against unfair competition. A commentary] 2nd ed., Prague: C. H. Beck, 2001, pp. 32-33.

[85] Section 54(1) of the Commercial Code.

[86] These provisions also apply to certain disputes stemming from consumer protection and transformation of companies; see Section 83(2) of the Commercial Code.

[87] For more details see e.g. *Winterová, A*. Hromadné žaloby (procesualistický pohled) [Collective actions (a procedural-law point of view)]. Bulletin advokacie, 10 (2008), pp. 21-27.

for restraining or restitutionary order in unfair competition cases sets a bar on another similar claim against the same defendant by a different plaintiff. Such other plaintiff could, however, lodge a separate damages claim which would be most likely suspended until the firstly commenced proceedings is finished. Those other plaintiffs could also participate in the firstly commenced proceedings as intervenors (side participants, see above) because the outcome of that proceedings would impact their own claims.

Furthermore, pursuant to Section 159a(2) of the Civil Procedure Code, the final decision on the merits in the firstly commenced proceedings is binding for all other similar claims against the same defendant and, accordingly, represents a *res iudicata*.

The Office suggested in the course of amending the 2001 Competition Act that similar provisions should also apply in antitrust litigations but its proposals were not implemented in the legislative process;[88] they are thus still applicable only with respect to 'unfair competition' cases.

23. If such possibilities do exist, can claimants having suffered damages in another Member State bring an action in your country? Would they have to prove that they had a direct relation with the defendant or would it be sufficient if they had this direct relation with the defendant's mother/sister company?

As mentioned above in Question 22, class actions are not possible under the Czech law. As far as claimants from other Member States are concerned, the jurisdiction of courts is governed by the Act on International Private and Procedural Law, under which the competency of Czech courts is given when they have jurisdiction under Czech laws,[89] i.e., broadly speaking, if the defendant has its seat or branch or property in the Czech Republic or the event that led to the occurrence of damage happened in the Czech Republic, and by

[88] Kreiselová, I. Soukromoprávní vymáhání soutěžního práva opět, ale trochu jinak. [Private Enforcement of Competition Law Again But In a Little Different Way] In: Úřad pro ochranu hospodářské soutěže, Information List No. 4/2008, October 2008; available at http://www.compet.cz/informacni-centrum/informacni-listy/2008/ (accessed on 29 October 2009).

[89] Section 37(1) of Act No. 97/1963 Coll., on International Private and Procedural Law, as amended.

the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [90]

24. Can a party claim full damages from one of the members of a cartel based on joint and several liability?

It is a general rule of Czech tort law that if the damage is caused by several persons, all of them are jointly liable.[91] The injured party can therefore claim full damages from any of the members of the cartel.[92] In this case, if such a member of a cartel takes the position that he has been asked to pay more then his share,[93] he needs to notify the other debtors – members of the cartel and ask them to pay their shares.[94] If he, however, pays the full damages (and the court shall order him to do it if the plaintiff so requests), he may ask the others to pay to him their shares and thus compensate him; if some of the members of the cartel are not able to pay their share, it ought to be divided among the others.[95]

25. What is the level of the costs and/or fees of legal procedures as compared with the cost of filing a complaint before the NCA?

Costs of procedure comprise in particular expenses of the parties to the proceedings and their lawyers, including remuneration of their attorneys-at-law, court fees (see below) and expenses on evidence.[96] Every party bears its own costs.[97] At the end of the proceedings,

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[90] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[91] Section 438(1) of the Civil Code. Under exceptional circumstances, the court may decide that the liability is not joint, but individual, and that each of the debtors needs to pay only his share of the overall debt [Section 438(2) of the Civil Code].

[92] Section 511(1) of the Civil Code.

[93] Pursuant to Section 511(2) of the Civil Code, the shares of all the debtors are by default equal.

[94] Section 511(2) of the Civil Code.

[95] Section 511(3) of the Civil Code.

[96] Section 137 of the Civil Procedure Code.

[97] Section 140 of the Civil Procedure Code.

however, the party that was successful with its claim shall have the costs fully reimbursed by the losing party; if the party was only partly successful, it shall be reimbursed partially.[98]

As far as court fees are concerned, lodging a claim with a court is generally subject to the duty to pay court fees in accordance with the Act on Court Fees.[99] A court fee amounts, in principle, to 4% of the pecuniary amount in dispute. Minimum court fee is, however, CZK 600 (approx. 24 EUR) and maximum CZK 1,000,000 (approx. 40 000 EUR). Court fees are payable only in Czech Crowns. They have to be paid to the account of the appropriate court maintained by the Czech National Bank or, if the court fee does not exceed CZK 5,000, they may be paid in fee stamps.[100] If the court fee is not paid, the appropriate court shall request the claimant to pay it within a period it sets out. If the fee is not paid within that additional period, the proceedings shall be stopped.[101] Court's resolution suspending the proceedings for failure to pay court fees does not, however, represent a bar on resubmitting the claim again.

On the other hand, lodging a complaint with the Office is not subject to any fees. As complainants do not become parties to the proceedings before the Office, main costs associated with filing the complaint are those connected with preparation of the complaint itself.

26. Do the legal costs and/or fees deter claimants from bringing stand-alone actions? Idem from follow-on actions. Are there procedural mechanisms to avoid this?

When preparing the position of the Office to the White Paper, the Office issued a questionnaire for stakeholders, asking among others what are the obstacles restraining development of private enforcement; legal costs and fees were not mentioned.

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[98] Section 142 of the Civil Procedure Code. Under exceptional circumstances (in situations "*eligible for special concern*"), the court may decide that the losing party shall not reimburse the costs of the winning one, either in part or totally (Section 150 of the Civil Procedure Code).

[99] Act No. 549/1991 Coll., on Court Fees, as amended.

[100] Section 8 of the Act on Court Fees.

[101] Section 9(1) of the Act on Court Fees.

If nonetheless in a particular case the court fees or the risk of paying the costs of the other party (see Question 25) might deter potential plaintiffs from addressing the court, the court is empowered to lift this burden from them.

Concerning the court fees, chairperson of the panel of judges may decide (if the claimant so requests) that the claimant shall not pay the fees, taking into account the situation of the claimant, and under the condition that the claim is neither frivolous nor apparently not susceptible to succeed.[102]

If the conditions for lifting the burden of paying court fees are satisfied and the claimants request so in order to be able to fully protect their rights, the chairperson of the panel of judges shall establish them a counsel, who shall in complicated cases be an attorney-at-law;[103] such a plaintiff then does not have to pay the expenses and remuneration of the counsel.[104] The counsel may be established even before the proceeding is initiated or the claim drafted.

Even if the plaintiff was not successful with his claim, the court may still decide not to impose on him the duty to reimburse the costs of the winning party, or reduce the remuneration.[105]

There are no differences between stand-alone and follow-on actions, with a possible exception that in case of follow-on claims, they cannot by their very nature be regarded frivolous or apparently unable to be successful; requests for lifting the burden of paying court fees would thus be easier to substantiate.

27. Are there any specific substantive or procedural rules applicable to undertakings that have filed a leniency application? If so, are they only applicable to undertakings qualifying for full immunity?

[102] Section 138 of the Civil Procedure Code.

[103] Section 30 of the Civil Procedure Code.

[104] Section 138(3) of the Civil Procedure Code.

[105] Section 150 of the Civil Procedure Code.

The leniency program as such has not yet been enacted in form of a law; similarly to the European Commission's one, it has only been published as a notice of the Office. It is accessible at the web site of the Office.[106] There are therefore no specific rules applicable to undertakings that have filed a leniency application.

The Office is nonetheless currently preparing an amendment to the 2001 Competition Act, which should codify the basic principles of leniency, and in particular, stipulate its consequences for civil and criminal enforcement. The main motivation for this amendment is the new Criminal Code[107] in force since 1 January 2010, which explicitly declares that natural persons acting on behalf of an undertaking concluding a cartel (horizontal agreement) shall be criminally liable and punishable ultimately by an imprisonment up to 8 years.[108] The Office wants to make sure that immunity awarded in the administrative proceedings will also amount to immunity in the criminal one.

Concerning the private enforcement, the discussions of what kind of specific provisions concerning leniency need to be enacted have not yet been closed. They will probably cover the protection of corporate statements in the Office's file.

28. What is the average length of judicial proceedings before a final and binding judicial decision has been adopted and enforced? Compare with the proceedings followed before a NCA.

The statistical data concerning court proceedings are processed and archived by the Ministry of Justice. Unfortunately, there are no data available concerning specifically competition law, because the statistics cover both the antitrust and unfair competition litigation.

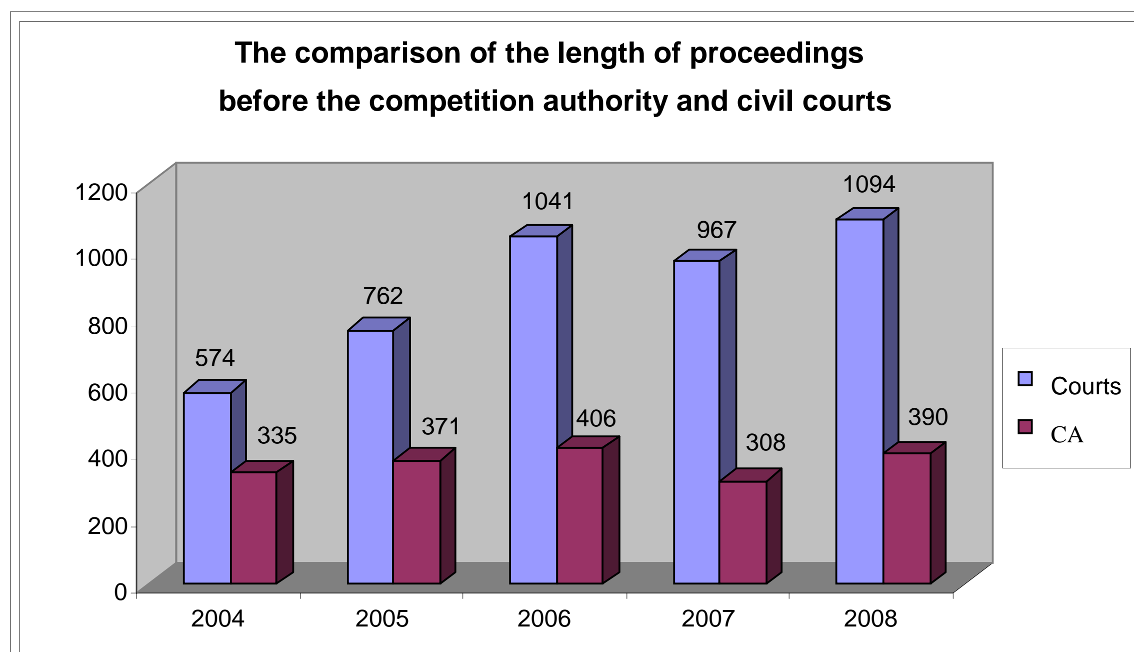
The average length of these proceedings (from their opening till the final judgement was in force) in the period 2004 – 2008 was 887 days. On the other hand, the average length of

[106] The leniency programme was also published in English; available at: http://www.compet.cz/en/competition/antitrust/new-leniency-programme/#c211 (accessed on 29 October 2009).

[107] Act No. 40/2009 Coll., Criminal Code, as amended.

[108] Section 248(2) of the Criminal Code.

proceedings before the Office (from initiating the formal investigation till the final decision was in force) was 362 in the same period. These data are summarised in the table below.



29. Is there any judicial settlement procedure? Can administrative proceedings conclude with a settlement? What would be, if any, the differences in the settlement procedure?

The court shall encourage parties to the proceedings to reach a judicial settlement (in Czech: *soudní smír*); in doing so, the chairperson of the panel of judges shall discuss the case with the parties and inform them about applicable law and the case-law of the Supreme Court.[109] The case can be settled during the first or second instance proceedings.

The judicial settlement is an agreement concluded by the parties in course of the proceedings, approved by the court; the court will approve it unless it is illegal.[110] Approved judicial settlement produces same legal effects as a judgement in force.[111]

[109] Section 99(1) of the Civil Procedure Code.

[110] Section 99(2) of the Civil Procedure Code.

[111] Section 99(3) of the Civil Procedure Code.

The authors are aware of at least two cases when the dispute, stemming out of an alleged abuse of dominance, was settled before the court.

As far as settlement in administrative proceedings is concerned, the Office started with this practice in 2008;[112] there are no specific legal provisions concerning administrative settlements and the Office has not yet issued even a notice in this regard. Its practice has, however, been consistent and it is possible to infer a few obligatory procedural steps from the case law.[113]

The participants themselves need to ask the Office for the case to be settled. There is no time limit to do so; so far, the request has been made before the statement of objections. It is not sure whether all of the participants to the proceedings need to make request because till today, all the settled cases have concerned only a single undertaking.

Next, the Office would discuss the case with the participants, indicating the possible outcome of the proceedings. The participants are then to plea liable for the conduct in question, its duration and qualification as a breach of competition law, declare that they will not be making any additional procedural motions and state the maximum amount of fine they are going to accept.

If the Office accepts this proposal, it will issue a decision declaring the (agreed) breach of competition law and impose the (agreed) fine; the fine will be 50 % lower than it would be without settlement.

30. Some of the obstacles to effective redress for victims of breaches of competition law are common to non-contractual claims in other areas (product or environmental liability; etc.). Are such claims easier/more frequent in your country? If so, why?

On the basis of statistical data produced by the Ministry of Justice, it is not possible to establish the relative number of claims for damages stemming out of product or

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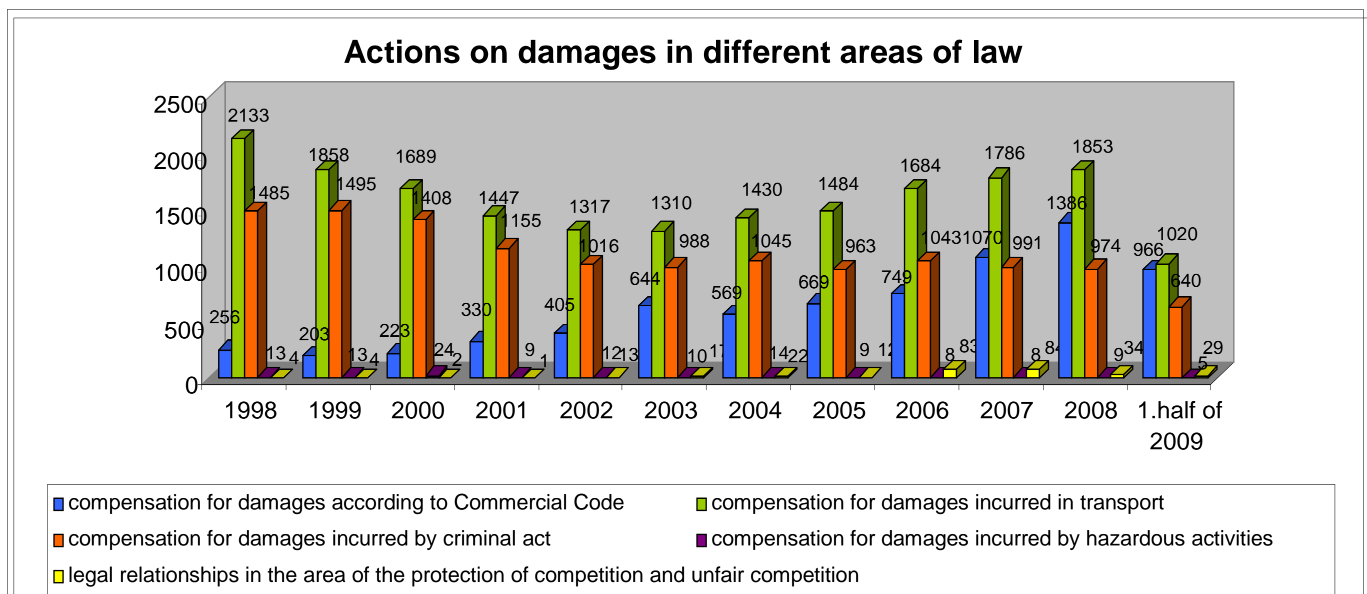
[112] Decision of the Office S 95/2008, 29 July 2008 (*Kofola*). See also *Kindl, J.* The Czech Office for Protection of Competition implements informal settlement procedures (Kofola - Albatros). e-Competitions, No. 25768.

[113] Decision of the Office S 52/2009, 28 June 2009 (*RWE Transgas*).

environmental liability. Vast majority of (sector specific) claims for damages, however, stems from issues involving transportation, followed by damages out of criminal liability. On the other hand, the number of cases in highly specialised areas, like unfair competition and antitrust or operation of hazardous activities, remain relatively low. The results are summarised in the table below.



31. Do national courts have to inform the NCA and/or the European Commission of any <u>claims</u> where competition law would have to be applied? Is the obligation established in Article 15.2 of Regulation 1/2003 to transmit <u>judgments</u> regularly complied with?

The Czech courts are obliged to inform the Office and the Ministry of Justice (which then informs the European Commission) only about proceedings where EC competition law is to be applied. Initiation of such proceedings ought to be notified, and at the end of it, a copy of final judgment transmitted;[114] this obligation, however, applies only to Regional and Superior Courts (i.e. courts of first and second instance in antitrust litigation), not to the Supreme Court of the Czech Republic, with which it is possible to lodge an extraordinary appeal.

[114] This obligation was set by the Instruction of Ministry of Justice No. 505/2001-Org, on Internal and Office Order for District, Regional and Superior Courts [Section 8(e)(kk) and Section 8(f)(hh)].

The Office has never received such a notification; the authors are, however, not aware of any private litigation judgement were EC competition law was applied. On the other hand, the Regional Court which reviews decisions of the Office regularly informs the Ministry of Justice on proceedings concerning EC competition law.

The courts are not obliged to inform the Office about proceedings concerning Czech competition law, and they do not do so. When the Office asked the Ministry of Justice in 2004 to order the courts to notify proceedings concerning Czech as well as EC competition law, the Minister refused to do so, stressing that the courts do not have any legal obligation in this regard. In 2009, the Office addressed the chairmen of all the Regional and Superior Courts as well as the Supreme Court, informing them that it would appreciate such a notification and asking whether they would object against it. Since none of the courts protested, and a few of them even promised to inform the Office about all the competition law related proceedings, the Office is going to ask again the Ministry of Justice to set such an obligation.

32. Have your national courts asked for Preliminary Rulings *ex* Article 234 EC in cases concerning Articles 81 or 82 EC? If not, why?

The authors are not aware of any such a case.

In case of judicial review of the Office's decisions, the Office has several times requested the Supreme Administrative Court to ask for Preliminary Ruling after the Regional Court annulled decisions of the Office and the Office appealed to the Supreme Administrative Court. The Supreme Administrative Court has so far maintained that such a reference was not necessary. The potential question was, however, not directly concerned with the interpretation of Articles 81 or 82 EC, but whether it was possible to apply Czech competition law in parallel with the EC one.[115]

As regards private enforcement, most of the cases that the authors are aware of are governed by Czech competition law, not the EC one, and it is therefore not possible to ask for Preliminary Ruling.

[115] In detail see *Petr, M.* The ne bis in idem Principle in Competition Law. European Competition Law Review 7 (2008), pp. 392 - 400.

33. Have your national courts requested your NCA or the European Commission intervention in judicial proceedings between private parties involving the application of competition law? How? Was their intervention required by one of the parties or decided *ex officio*? Are there any national procedural rules providing for the intervention of NCAs or the Commission in judicial proceedings?

There are no specific rules concerning intervention of the Commission in judicial proceedings; the Commission would do so directly on the basis of Art. 15(3) of the Regulation 1/2003. As far as the Office is concerned, in matters where EC competition law is to be applied, the intervention would be governed by Art. 15(3) of Regulation 1/2003 and Section 20a(3)(f) of the 2001 Competition Act, which transcribes the said provision.

There are no specific rules concerning intervention of the Office in proceedings where only Czech competition law is being applied. The Office has so far been asked twice by different courts whether in its opinion, certain contractual provisions constitute an anticompetitive agreement and certain conduct an abuse of dominance; the Office replied in writing. Such a document can be used as a piece of evidence before the court.[116] Since the courts have not been informing the Office about their proceedings, it was not possible for the Office to intervene by its own motion.

As far as the Commission is concerned, the authors are not aware of any intervention. When asked by the Office, none of the courts indicated that it has requested the Commission to intervene or that the parties requested them to do so.

34. Can any other bodies representing public interest (e.g. public prosecutor) and/or consumer associations bring judicial actions for breach of competition law? Can they intervene in judicial proceedings between private parties involving the application of competition law? How?

[116] Sections 125 and 129 of the Civil Procedure Code. See also *Kindl, J.* Czech Republic. In: *Koeck, H.F. and Karolluss, M.M. (eds)* The Modernisation of European Competition Law. Initial Experiences with Regulation 1/2003. FIDE XXIII Congress Linz 2008, Congress Publications Vol. 2, Nomos – facultas.wuv, Vienna, 2008, 33-44, at pp. 43-44.

Neither public prosecutors nor any other public authority can bring judicial actions for breach of competition law.[117]

As already mentioned above (Question 22), associations of consumers or undertakings might themselves bring an action legally based on unfair competition, requesting restraining or restitutionary orders; they cannot ask for damages. There is no regulation concerning submitting written interventions by theses associations. Hypothetically, they could also enter the proceedings as side participants (intervenors) if they were able to demonstrate their legal interest on the outcome of the proceedings and if the court allowed it (see Question 22).

35. Can competition law issues be solved by private arbitration or other forms of alternative dispute resolution mechanisms?

Competition law issues may be solved by private arbitration in the Czech Republic. The most often used arbitration court in the Czech Republic is the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic seated in Prague. The list of arbitrators of this arbitration court includes primarily Czech practitioners and academics some of which have certain experience with competition law. ICC Court of Arbitration is also quite often used in contracts involving Czech companies.

The Czech law concerning arbitrations does not contain any special rules relating to antitrust matters. According to the Arbitration Act,[118] the parties may agree on arbitration in any property (broadly construed) disputes if it would be possible to settle the dispute,[119] provided that they would fall under appropriate arbitration agreement or arbitration clause. Given that, it is unlikely that a competition law dispute arising solely in tort (with no contractual relations between the parties) would be subject to arbitration. Parties to such dispute could, however, *ex post* (after the dispute arose) agree in writing on solving the dispute through arbitration rather then via civil courts. In matters involving contracts,

[117] Unless they themselves were harmed by it.

[118] Act No. 216/1994 Coll., On Arbitration Proceedings and Enforcement of Arbitral Awards, as amended.

[119] Sections 2(1) and 2(2) of the Arbitration Act.

arbitration could be used also on the basis of *ex ante* concluded arbitration clauses. It shall be sufficient to draft the arbitration clause so that 'all disputes arising out of or in connection with' the contract at hand in order to cover also antitrust claims. The arbitration clause shall cover also the issue of validity of legal relations being in dispute.[120] If there is a valid arbitration agreement in place, the civil court shall deny jurisdiction if the defendant objects to lodging a claim with the court.[121]

To the authors' knowledge, there is no authority on the arbitrability of competition law issues in the Czech Republic. There is, however, no impediment (other than inexperienced arbitrators) to applying the 2001 Competition Act or Articles 81 and 82 EC by arbitrators. In fact, they shall apply such norms *ex officio* since they represent public law norms. In practical terms, it is, however, unlikely that arbitrators would dwell into competition law issues (at least in stand-alone actions) due to the number of economic issues involved, unless the parties argued the case that way. Arbitrators have similar powers as civil courts but they cannot rely on state enforcement and, accordingly, if it is necessary to compel either party to some actions the arbitrators have to refer to courts.[122] In addition, only courts may issue preliminary injunctions if it shows up that the enforcement of arbitral award might be endangered.[123]

Provisions of the Civil Procedure Code can apply *mutatis mutandis* to proceedings before arbitrators, including provisions concerning fact-finding, the allocation of burden of proof etc.[124] Usually, however, arbitration proceedings are much less formal with arbitrators setting up their own procedural rules or following the rules of the appropriate arbitration court. Contrary to court proceedings, the arbitration is not public.[125]

Arbitrators are similarly bound by decisions of competition authorities as are the Czech courts (see Question 11).[126]

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[120] Section 2(4) of the Arbitration Act.

[121] Section 106 of the Civil Procedure Code.

[122] Section 20(2) of the Arbitration Act.

[123] Section 22 of the Arbitration Act.

[124] Section 30 of the Arbitration Act.

[125] Section 19(3) of the Arbitration Act.

[126] Section 135 of the Civil Procedure Code in connection with Section 30 of the Arbitration Act

It would also be possible to employ other alternative dispute resolution mechanisms to settle antitrust disputes, they are, however, not explicitly regulated by the Czech law. The particular form of an individual alternative dispute resolution would thus depend on the agreement between the parties concerned.

36. What are the kinds of damages that can be awarded following a successful claim for breach of competition law (i.e. compensatory, punitive, disgorgement, etc.)?

There are no specific legal provisions concerning damages stemming out of breaches of competition law. It needs to be mentioned that in Czech civil law, conditions of liability are set differently in the Commercial Code and in the Civil Code. It is generally accepted (even though there has so far not been any final judgement in this regard) and uncontested among Czech legal commentators that in case of breach of competition law, the liability and the definition of damages would have been governed by the Commercial Code,[127] under which it is relatively easier to raise a claim, in particular because the plaintiff is not required to demonstrate defendant's fault.

Under the Czech law, damages are by their very nature compensatory. The default form of compensation is monetary, but if the entitled person requests so and it is possible and customary within the area of their activities, the damages may be settled by restitution to the previous state (*restitutio in integrum*) instead of the monetary compensation;[128] this will, however, hardly be the case in cartel litigation.[129]

The injured parties are entitled to be compensated for the actual loss suffered (*damnum emergens*) and for the lost profit (*lucrum cessans*),[130] including additional expenses they incurred due to the anticompetitive conduct.[131] The damages are to be paid with interests.

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[127] See e.g. the discussion in *Neruda, R.* Náhrada škody způsobené protisoutěžním jednáním jako způsob soukromého vymáhání antimonopolního práva. [Claims for Damages Caused by Anticompetitive Conduct as a Method of Private Enforcement of Antimonopoly Law] Právní rozhledy 12 (2005), p. 435.

[128] Section 378 of the Commercial Code.

[129] When asking for non-monetary compensation, it would be possible to claim compensation only for actual loss suffered, not the lost profit.

[130] Section 379 of the Commercial Code.

As far as the loss of profit is concerned, instead of trying to ascertain it precisely, the claimant may ask for compensation equalling to profit commonly achieved in the area of his enterprise under fair business relationships;[132] this provision was, however, drafted for the purposes of compensation of injuries stemming from non-performance of contractual obligations, not for torts,[133] and it is disputable to what extent it can be relied on for the purposes of cartel litigation.

The plaintiff is entitled to interest covering the period when the debtor was in delay, i.e. from the day they were asked to pay a certain sum of money, till the day they actually paid it;[134] the interest can thus include even the pre-trial period. The plaintiff must nonetheless be able to quantify the damages or restitution in order to calculate the interest. The interest rate is set by a regulation of the Government.[135] For each half-a-year period, it equals to the repo rate, set by the Czech National Bank on the first day of such a period, increased by 7 %.[136]

The quantum of damages is limited to the amount that the defendant could have reasonably foreseen (or ought to have foreseen);[137] the standard of care is that of a professional undertaking.

Since the damages are by their very nature compensatory, the Czech law does not provide for the possibility of aggravation or punitive elements of damages; the punishment is reserved solely for public enforcement, in particular to fines imposed by the Office.

Similarly, profits of perpetrators of anticompetitive conduct are generally taken into account only for the purposes of public enforcement; when setting fines, the Office should make sure

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[131] Section 380 of the Commercial Code; these additional expenses are in fact covered by the actual loss, as mentioned above.

[132] Section 381 of the Commercial Code.

[133] See also *Štenglová, I. et al*. Obchodní zákoník. Komentář. [Commercial Code. A commentary] 11th ed. Prague: C. H. Beck, p. 1115 *et seq*.

[134] Section 369 of the Commercial Code.

[135] Section 369(1) of the Commercial Code, Section 517 of the Civil Code.

[136] Regulation of the Czech Government No. 142/1994 Coll., Section 1.

[137] Section 379 of the Commercial Code.

that they are not lower than profit which the offenders achieved.[138] In private litigation, profits might be taken into account only in connection with unjust enrichment and restitution thereof, since anyone unjustly enriched is obliged to return the enrichment,[139] and if they were not acting in good faith, including benefits thereof.[140]

The authors are not aware of any final judgement concerning calculation of damages in cartel litigation in the Czech Republic.

37. What is the discretion of the courts on the calculation of damages? Is the existence of an administrative penalty, imposed either by the European Commission or by a NCA, taken into account when awarding damages?

Courts are primarily limited by the principle of full compensation; depending on evidence produced in course of the proceedings, they are obliged to decide on a quantum representing full compensation, which cannot be moderated (decreased) by the court. [141]

Should the calculation of damages be excessively difficult, the court may ascertain its amount on the basis of its deliberations (see also the reply to Question 18 *in fine*).[142] The authors are not aware of any competition related case when the court did so.

As the purpose of damages is to compensate the injured parties, the courts should not take into account the penalties imposed on the defendant undertakings. The authors are, however, not aware of any judgement substantiating this principle.

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[138] See Guidelines of the Office for the Protection of Competition on the Method of setting fines, available in English at: http://www.compet.cz/en/competition/antitrust/guidelines-on-the-method-of-setting-fines/#c249 (accessed on 29 October 2009).

[139] Section 451 of the Civil Code.

[140] Section 458 of the Civil Code. The benefits of monetary enrichment constitute the interests calculated for the period of time they were in "unjust" possession of the money.

[141] Section 386 of the Commercial Code. On the contrary, as far as liability under Civil Code is concerned, the court might under exceptional circumstance decrees the amount of damages to be compensated, but only if the injury was not caused intentionally (Section 450 of the Civil Code).

[142] Section 136 of the Civil Procedure Code; this prerogative is, however, used extremely rarely by the courts, that are to the contrary notorious for strictly requesting precise enumeration of all the claims.

38. Does the NCA take into account the compensation paid or to be paid by the company when determining the fine?

The Office published its Guidelines for setting fines in 2007[143] and, in proceedings commenced thereafter, it has been using them in order to set fines. These guidelines do not provide for the obligation to take into account the compensation paid, they only state that the fine shall not be lower than the harm caused (or profit gained) by the anticompetitive conduct.

In a recent (and so far solitary) case,[144] the Office imposed an obligation to compensate the consumers harmed by an abuse of dominance as a remedy and at the same time subtracted this amount from the fine; admittedly, it was relatively easy to calculate the amount of money to be paid as a compensation in this case. It was at the same time a settlement case (see Question 29), with the dominant being the only party to the proceeding, so that this approach was not disputed by anybody. It has, however, been the only occasion when compensation was taken into account when setting fines.

39. Is the passing on defense admissible as a defense before national courts in a competition law dispute?

There are no explicit legal provisions concerning the passing on defence in the Czech law; the authors nonetheless take the view that its availability stems from the compensatory nature of damages (see also Question 36). As far as direct purchasers managed to pass the overcharge on to indirect purchasers, they were in this respect not actually injured by the anticompetitive conduct, and hence they are not entitled to claim compensation as far as these passed-on damages are concerned.

Although this approach is simple in theory, the Czech courts have no practical experience with it. Since the passing on would be used as a defence, the defendants would be obliged to

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[143] The Guidelines are available in English at: http://www.compet.cz/en/competition/antitrust/guidelines-on-the-method-of-setting-fines/#c249 (accessed on 29 October 2009).

[144] Decision of the Office S 52/2009, 28 June 2009 (*RWE Transgas*).

substantiate that the overcharge was actually passed on, which might prove quite difficult without any presumptions to assist them.

Another level of complexity would be brought into these considerations by the obligation of anyone who might be injured to adopt all the precautions necessary to mitigate their loss. Anyone threatened by an injury ought to prevent the harm or to at least diminish its scale (the additional costs incurred in order to do so are to be compensated by the wrongdoer); if, however, these precautions are not taken, the defendant is not obliged to compensate the harm thus sustained.[145] Since the loss can indeed be decreased or even overcome by passing on, the defendant might in theory claim as a defence that the plaintiffs were in fact obliged to pass on, and if they did not do so, they have no right to be compensated in that extent; this is, however, only a hypothetical consideration, without any foundation in the case law.

The authors were not able to identify any case where the passing on defence had been used.

40. Identify three main elements which, in your view, hinder the development of private enforcement of competition law in your country.

A quite important, even though not purely legal, element hindering development of private enforcement of competition law may be general unwillingness to resort to courts which may be associated with a relatively long duration of court proceedings (especially in such complex cases as the competition ones are) and uncertainty as regards their outcomes. Even though the Office has on numerous occasions informed complainants that it was not going to initiate proceedings and that they were free to address courts, the Office is not aware of any case where a claim to court was eventually filed in that situation.

In antitrust litigation, where there is practically no civil case law in the Czech Republic and where judges are not specialised and have very low experience with competition law, potential claimants seem to be dissuaded from incurring costs in connection with lengthy and complicated procedures where the outcome of the proceedings is highly unpredictable.

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[145] Section 384 of the Commercial Code.

Apart from the length of court proceedings and lack of specialization and experience of judges with competition law cases, the third main element which the authors consider to hinder development of private competition litigation in the Czech Republic is the lack of any procedural mechanisms that would alleviate the burden of proof resting with the claimant in the antitrust claims. This is relevant especially in cases where most pieces of evidence about the illicit conduct are within disposition of the tortfeasors in question (whether cartelists or a dominant undertaking abusing its position).

41. Indicate at least three measures which, in your view, would facilitate the development of private enforcement of competition law in your country.

As already mentioned above, the Office conducted a survey in 2008 asking among other questions what was being felt as an obstacle preventing wider utilization of private enforcement. Most of the answers indicated that it was very hard to bear the burden of proof, in particular concerning quantification of damages.

This might be quite surprising because in cases where calculation of damages is excessively difficult, the court may resort to determining the amount in its discretion, without actually having the detailed proof of the quantum (see Question 37).[146] Since this prerogative is probably not being exercised in practice, it would seem useful to have at least a non-binding guidance for quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss, as the Commission puts forward in its White Paper.

Another problem, also connected with the burden of proof, is the access to evidence, which might be excessively difficult for potential plaintiffs. The rules of *inter partes* disclosure, as proposed by the Commission in the White Paper, were generally supported by the Czech legal community.

The third – and rather ambitious – measure that would, in the authors' view, enhance possibilities for private competition litigation in the Czech Republic would be improvement in specialization of judges that are to deal with competition law cases. This could be done

[146] Section 136 of the Civil Procedure Code; this prerogative is, however, used extremely rarely by the courts that are to the contrary notorious for strictly requesting precise enumeration of all the claims.

via specialized training for the respective judges probably organized by the Office. Such training would also likely increase a spirit of cooperation between the Office and courts and the judges involved might be then more willing to consult the Office in competition related cases. As the most radical step in this direction would be the establishment of a specialized competition court (similar e.g. to the Competition Appeal Tribunal in the UK), which would deal with private actions against competition law infringements, but the existence of such a specialized court would be quite untypical for the Czech court system and it is, therefore, unlikely that it would find sufficient political support.

42. The Commission and the European Parliament have been pushing for a "European" model of judicial application of competition law that would avoid the "potential excesses of the US system". Given the present underdevelopment of private enforcement in Europe, do you think it is possible to find right away a correct equilibrium or would it be necessary, to reverse the present atrophy of private enforcement in Europe, to introduce some positive incentives that could be eventually removed if excesses also appear?

The above mentioned survey of the Office in 2008 showed that even the community of lawyers specialised in competition law in the Czech Republic was not willing to accept a system giving too many incentives to potential claimants. Most of the respondents specifically warned against introducing the American style rules. They were rather in favour of measures removing the principal perceived obstacles, but against pushing the system any further. The proposals contained in the Commission's White Paper were considered and endorsed as reasonable and addressing the actual problems. The authors share this view.

Some of the most significant incentives associated with the "US system", e.g. the treble damages, would be incompatible with the basic principles of the Czech tort law and compensatory nature that damages (should) serve. Similarly, even though the authors generally support introducing some measures to alleviate the burden of proof in private competition actions (such as some form of *inter partes* disclosure and special rules governing calculation of damages; see the reply to Question 41), they would not support introducing wide US-style disclosure or discovery rules; not even for some initial or interim period. The authors believe that more limited disclosure rules may be sufficient in this regard.