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A Q&A guide to competition law in Czech Republic.

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Merger control

1. Are mergers and acquisitions subject to merger controls in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

Merger control in the Czech Republic is regulated by the Act On Protection of Competition (*No. 143/2001 Coll.*), as amended (Anti-trust Act), which also regulates restrictive agreements and practices, and abuses of dominant positions. The Anti-trust Act contains:

Substantive rules on horizontal and vertical co-operation between undertakings, including rules on the application of European block exemptions.

Rules dealing with the abuse of a dominant position.

Rules on merger control, such as the definition of mergers subject to review, turnover thresholds and notification requirements.

Procedural rules for the application of the above rules, including penalties and other enforcement measures.

Merger control is carried out by the Office for Protection of Competition (Anti-trust Office), which is the general authority for competition, public contracts and state aid. The competencies and organisation of the Anti-trust Office are governed by the Act On Competence of the Office for Protection of Competition (*No. 273/1996 Coll.*).

The Anti-trust Act is supplemented by a Decree of the Anti-trust Office (*No. 252/2009 Coll.*), which relates to the notification of concentrations, and stipulates the information which undertakings must present to the Anti-trust Office with an application for approval of a merger. In addition, a number of soft law rules have been issued by the Anti-trust Office, such as interpretative rules, guidelines and others in order to help undertakings acquaint themselves with the competition rules and the Anti-trust Office's decision-making processes.

Since the Czech Republic is a member of the EU, the competition rules broadly conform to EU legislation.

The English versions of the competition legislation relating to competition can be found at www.compet.cz/en/competition/legislation.

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

Concentrations that are subject to review are defined as (*Anti-trust Act*):

A merger of one or more undertakings that were previously operating independently in the market.

The acquisition of an enterprise of another undertaking (or a part of one) on the basis of a contract, auction or by other means. A part of an enterprise can include a part of an undertaking's enterprise with a certain turnover, even if it is not an independent organisational unit.

The acquisition of direct or indirect control of another undertaking by one or more entrepreneurs (or persons who already control at least one undertaking), in particular through:

acquisition of equity shares or business or membership interests; or

a contract or any other means allowing control.

Establishment of a joint venture, that is, an undertaking jointly controlled by two or more undertakings that functions on a lasting basis as an autonomous economic entity.

However, there are certain exceptions and the following transactions are not concentrations that are subject to review:

Where a bank receives a qualified stake in a legal entity in a set-off of the legal entity's debts to the bank, if the qualified stake is held for the duration of the legal entity's rescue operation and financial restructuring, and for a maximum of one year.

The temporary acquisition of interests in a target undertaking by an undertaking providing investment services where:

it is for a period up to one year;

it is for the purpose of the target undertaking's sale; and

voting rights attached to the interests are not used to influence competitive behaviour between undertakings.

The delegation of an undertakings' statutory bodies' powers to persons engaged in activities under certain statutory provisions, such as a liquidator or an insolvency trustee.

Thresholds

A concentration is subject to review, if either:

Both:

the aggregate net turnover in the Czech Republic in the last accounting period of all participating undertakings exceeded CZK1.5 billion (about US\$83 million); and

at least two of the participating undertakings had net turnovers in the Czech Republic in the last accounting period exceeding CZK250 million (about US\$13.9 million).

Or both:

the net turnover in the Czech Republic of a participating undertaking exceeded CZK 1.5 billion in the last accounting period; and

another participating undertaking had a worldwide net turnover exceeding CZK1.5 billion in the last accounting period.

Concentrations involving a community dimension, as defined in the Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, are not subject to review in the Czech Republic.

3. Please give a broad overview of notification requirements. In particular:

Is notification mandatory or voluntary?

When should a transaction be notified?

Is it possible to obtain formal or informal guidance before notification?

Who should notify?

To which authority should notification be made?

What form of notification is used?

Is there a filing fee? If so, how much?

Is there an obligation to suspend the transaction pending the outcome of an investigation?

Mandatory or voluntary. Notification is mandatory if the transaction falls within the definition of a concentration subject to review and the turnover thresholds are met (*see Question 2*).

Timing. There is no specific time limit for notification, but as a general rule the concentration must not be implemented before notification to and approval by the Anti-trust Office.

Formal/informal guidance. Informal guidance regarding procedural issues, particularly those relating to the Anti-trust Office's powers to review a given transaction (that is, the notification

criteria) and other issues connected with the planned transaction can be obtained from the Anti-trust Office in accordance with its Notice on Pre-notification Contact.

Responsibility for notification. The responsibility for notification depends on the type of transaction. In a merger, acquisition of an enterprise or joint venture, all the participating undertakings must notify jointly. In an acquisition of control, the undertaking gaining control must file the notification.

Relevant authority. The notification must be lodged with the Anti-trust Office.

Form of notification. The parties must submit:

a formal application for approval; and

a completed notification form, containing all requested information.

Alternatively, simplified proceedings begin on delivery of a simplified notification form (*see Question 4, Simplified proceedings*).

Filing fee. The filing fee is CZK100,000 (about US\$5,550).

Obligation to suspend. The controlled undertaking's competitive behaviour must not be influenced (for example, by the execution of voting rights) before the Anti-trust Office's decision approving the concentration enters into legal force. No step that would make the notified merger irreversible can be taken before the Anti-trust Office's approving decision.

4. Please set out the procedure and timetable.

Ordinary proceedings

Ordinary proceedings begin on the day the party delivers the application for approval of the concentration and the completed notification form. The undertakings can propose restrictions or conditions for consideration before the initiation of proceedings (*see Question 8*). The Anti-trust Office then announces the review proceedings in the Commercial Bulletin, specifying a time limit for third parties to raise objections to the concentration (usually less than one week).

In the first phase of proceedings, the Anti-trust Office examines whether the concentration is a qualifying concentration that meets the notification thresholds (*see Question 2*) and is therefore subject to its approval. If so, the Anti-trust Office applies the substantive test on the concentration (*see Question 7*). The Anti-trust Office issues a decision within 30 days from the initiation of the proceedings. If conditions are proposed by the undertakings within this 30-day period (*see Question 8*), the period for the issuance of the Anti-trust Office's decision is extended by 15 days. The Anti-trust Office then decides either:

The concentration is not subject to the Anti-trust Office's approval.

The concentration is subject to the Anti-trust Office's approval but does not raise serious concerns as a significant impediment to competition. The concentration is approved and the proceedings are terminated.

The concentration is subject to the Anti-trust Office's approval and raises serious concerns as a significant impediment to competition. The proceedings then continue into a second stage in which the Anti-trust Office examines the concentration in depth.

If the Anti-trust Office does not issue a decision within the 30-day time limit, the concentration is deemed to be approved.

If proceedings continue into the second stage, the Anti-trust Office notifies the parties involved of this in writing with a statement of objections and must issue a final decision within five months of the start of the proceedings. The undertakings can then propose restrictions or conditions for consideration not later than 15 days from delivery of the Anti-trust Office's statement of objections to the last of the parties to the proceedings (exceptionally this period can be prolonged by another 15 days) (*see Question 8*). If conditions are proposed by the undertakings, the period for the issuance of the Anti-trust Office's decision is extended by 15 days.

If no final decision is issued within this deadline the concentration is deemed to be approved. However, the Anti-trust Office can request the notifying parties to present further facts or evidence necessary for the decision. If so, the deadlines for the Anti-trust Office are suspended for the period between the day on which the party receives such a request and the day on which this obligation is fulfilled.

Simplified proceedings

The simplified notification proceedings can be used, if either:

The participating undertakings both:

do not have a combined share in a single market exceeding 15%; and

do not have a share exceeding 25% in any market that is vertically connected to a market in which another participating undertaking operates.

The undertaking is acquiring exclusive control over a joint venture in which it previously exercised joint control.

The simplified proceedings begin on delivery of a simplified notification form. The decision approving the concentration must be issued within 20 days from the initiation of the proceedings or the concentration is deemed to be approved. However, if the Anti-trust Office considers that it needs more information for the assessment, it can, within the same time limit, request submission of the full notification form. If so, the ordinary notification proceedings begin on delivery of the full notification form.

For an overview of the notification process, see flowchart, *Czech Republic: merger notifications*.

5. In relation to merger inquiries:

How much publicity is given?

At what stage of the procedure is information released?

Is certain information automatically kept confidential?

Can the parties request that certain information be kept confidential?

Publicity. The start of ordinary proceedings is published in the Commercial Bulletin and on the Anti-trust Office website. The start of simplified proceedings is only announced on the Anti-trust Office website (and if a standard procedure is started, it is published regularly). The Anti-trust Office's decisions are published on its website and in its the annual report. Decisions usually contain:

- the identity of the involved undertakings;
- a description of the undertakings' business;
- a description of the relevant market;
- an analysis of the concentration's effects and reasons for the decision.

Procedural stage. The start of proceedings is published without delay after delivery of the application for approval (*see Question 4*).

Automatic confidentiality. The Anti-trust Act ensures the non-disclosure of business secrets or confidential information. This non-disclosure duty applies to all Anti-trust Office employees and persons with any other relationship to it who perform an activity for the Anti-trust Office.

Confidentiality on request. Information or documents that notifying undertakings consider to be business secrets must be marked as such in the notification. If the Anti-trust Office agrees, the information is not published, although the undertakings must also provide complete versions of the documents from which the business secrets were removed.

The Anti-trust Office has also begun to consult with notifying undertakings over the final structure of the published decision and give the undertakings the opportunity to comment on the information being published. An undertaking's turnover is not explicitly published, but the range in which the turnover lies is put into brackets (as in the European Commission's decisions).

6. Can third parties be involved in the procedure and, if so, how? What rights do they have to make representations, access documents or be heard?

A third party can object against a notified concentration after the announcement of the start of proceedings and within the time limit (*see Question 4*). A third party can also suggest that the Anti-trust Office start an investigation into a breach of the Anti-trust Act. The Anti-trust Office then either accepts or rejects the suggestion or refers it to another body. When the Anti-trust Office initiates proceedings on a third party's suggestion, it informs them of the results of the investigation or issuance of a decision.

Third parties can also inspect the file if they prove a legal interest. However, documentation which contains commercial, banking or similar secrets protected by law, or business secrets identified by the undertaking, are excluded from inspection (*see Question 5, Confidentiality on request*).

7. What is the substantive test?

When deciding on the merger, the Anti-trust Office considers whether the concentration is a potential significant impediment to competition, primarily where it would create or strengthen an undertaking's dominant position. The Anti-trust Office looks at the following main issues:

The preservation and further development of effective competition.

The structure of the markets affected by the merger.

The market shares of the undertakings involved and their economic and financial power in the relevant markets.

The legal and other barriers to entry by other undertakings into the relevant markets.

The alternatives available to suppliers and customers of the undertakings involved.

The development of supply and demand in the affected markets.

The needs and interests of consumers.

The encouragement of research and development, the results of which are beneficial for the consumers and do not restrain competition.

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The Anti-trust Act does not set out specific conditions or restrictions that can be imposed on undertakings. The undertakings can propose restrictions or conditions for consideration at any point from before the initiation of proceedings up until 15 days from delivery of the Anti-trust Office's statement of objections to the last of the parties to the proceedings (exceptionally this period can be prolonged by another 15 days). If conditions are proposed by the undertakings within the first 30 days of the proceedings, the 30-day period for the issuance of the Anti-trust Office's decision is extended by 15 days. The same extension applies if the conditions are proposed in the second stage of the proceedings. Conditions may include the sale of a part of the undertaking's business, conclusion of a certain agreement or other measures.

9. What are the penalties for:

Failure to notify correctly?

Implementation before approval or after prohibition of the merger?

Failure to observe a decision of the regulator (including any remedial undertakings)?

Failure to notify correctly. If the concentration is approved on the basis of incorrect or misleading information provided by the undertakings concerned, the Anti-trust Office can annul its approving decision. Such proceedings must be begun within one year of discovery of the facts and within five years from their occurrence.

Implementation before approval or after prohibition. If the undertakings intentionally or negligently implement the concentration before notification or before the decision is issued, the Anti-trust Office can impose an administrative fine of up to CZK10 million (about US\$554,500) or 10% of their net annual turnover in the last accounting period for a legal entity (or other coercive measure). These fines can be re-imposed for failure to comply with any order. If the Anti-trust Office discovers that the concentration was implemented without notification or contrary to an enforceable prohibiting decision, it can impose on undertakings a duty to:

demerge;

sell ownership interests;

cancel the relevant agreements which were the basis for the transaction;

adopt other measures to restore competition.

The specific fines or measures depend on the gravity and length of the infringement or any repetition.

Failure to observe. If the undertakings do not observe the conditions, restrictions or covenants imposed by the Anti-trust Office in the approving decision, the Anti-trust Office can annul the decision approving the concentration. Such proceedings must be commenced within one year from the discovery of the facts and within five years from their occurrence.

10. Is there a right of appeal against any decision and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

An appeal against an Anti-trust Office decision can be filed by a complainant party of the proceeding under the Administrative Code of the Czech Republic. Such an appeal must be lodged with the Anti-trust Office within 15 days of the delivery of the decision to the appellant. The Chairman of the Anti-trust Office decides on such an appeal. Appellants can also seek judicial review of Anti-trust Office decisions by the Regional Court in Brno. This judicial review takes place within a specialised administrative justice system.

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

If the Anti-trust Office issues an unconditional approval, it approves the transaction in the form proposed and presented to it by the undertakings concerned. If there are restrictive provisions proposed in connection with the transaction, such as a non-compete clause, the Anti-trust Office usually complies with the practice of the European Commission and accepts the restrictions if they are temporary or otherwise limited. The restrictive provisions are judged in the light of their possible effect on the competition on the relevant markets.

12. Are any industries specifically regulated?

The controls applying to concentrations outlined above apply to every sector. However, certain further duties towards the relevant regulatory authorities must be taken into account when structuring and implementing concentrations in sectors such as telecommunications, energy or the financial markets.

Restrictive agreements and practices

13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

The Anti-trust Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their purpose or result the distortion of competition. The prohibition applies to all agreements regardless of the stage in the production and distribution chain and applies to both vertical and horizontal agreements.

In particular the Anti-trust Act prohibits agreements on:

Direct or indirect price-fixing.

Restrictions or control of production, sale, purchase, research, development or investment.

Market sharing or sharing of sources of supply.

Tie-in clauses.

Unequal treatment of competitors.

Group boycotts.

Agreements with only insignificant effects on competition are considered as not prohibited (*de minimis* rule) (see Question 16).

Breaches can give rise to both personal criminal liability and civil penalties on the undertakings involved (see Questions 24 and 25).

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

The prohibition also applies to informal practices such as concerted practices, decisions by associations of undertakings, informal agreements and so on.

15. Are there any exemptions? If so, please provide details.

Agreements that meet the following cumulative conditions are exempt from the prohibition:

They contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

They impose restrictions that are indispensable for the improvement of the production or distribution of goods or to promotion of technical or economic progress.

They do not allow the undertakings the possibility of eliminating competition in respect of a substantial part of the market relating to the object of the agreement.

It is for the parties to an agreement to determine whether these criteria exist and the Anti-trust Office does not grant individual exemptions. The Anti-trust Office can grant block exemptions, although none have been issued. The block exemptions adopted by the European Commission apply.

16. Are there any exclusions? If so, please provide details.

Agreements with insignificant effects on competition are considered as not prohibited. The Amendment to the Anti-trust Act (effective from 1 September 2009) abolished explicit exclusions based on competitors' market share and now only the *de minimis* rule applies. However, the Anti-trust Office applies the *de minimis* rule according to aggregate market share (*Notice of the Anti-trust Office on agreements with insignificant effect on competition*). Therefore the following agreements are not prohibited:

Horizontal agreements, if the aggregate market share of the participating undertakings does not exceed 10%.

Vertical agreements, if the aggregate market share of the participating undertakings does not exceed 15%.

These thresholds are lowered to 5% if the market is disturbed by the cumulative effect of several agreements. Mixed horizontal and vertical agreements are considered as horizontal agreements. The *de minimis* exclusion does not apply to hard-core cartels, such as agreements containing provisions on direct or indirect price-fixing, or market sharing or the sharing of supply sources.

17. Please give a broad overview of formal notification requirements. In particular:

Is it necessary (or, if not necessary, possible/advisable) to notify to obtain an individual exemption or other clearance?

Is it possible to obtain informal guidance before, or instead of, formal notification? If there is no formal notification procedure, can any type of informal guidance or opinion be obtained?

Who should/can notify?

To which authority should/can notification be made?

What form of notification is used?**Is there a filing fee? If so, how much?**

Notification. The current Anti-trust Act does not require notification for individual exemptions.

Informal guidance/opinion. The Anti-trust Office gives informal guidance in relation to cartels and other Anti-trust issues.

Responsibility for notification. Not applicable.

Relevant authority. The Anti-trust Office

Form of notification. Not applicable.

Filing fee. Not applicable.

18. Can investigations be started by:**The regulator on its own initiative?****A third party by making a complaint?**

Regulators. The Anti-trust Office can start investigations at its own discretion arising, for example, from media coverage and its own activities.

Third parties. Any person can complain to the Anti-trust Office and ask for an investigation into agreements distorting competition. The Anti-trust Office decides whether to accept, reject or refer such suggestions to another body.

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

When the Anti-trust Office starts a proceeding arising from a complaint, it must inform the complainant of the results of the investigation or issuance of a decision.

20. Please set out the stages of the investigation and timetable.

The main stages of the investigation are as follows:

Start of the investigation. This takes place either on the Anti-trust Office's own initiative or following a complaint.

Preliminary examination. This is for less severe cases. Possible processes in the preliminary stage include:

the Anti-trust Office delivers an opinion on possible distortion to competition to the undertaking and summons the undertaking to declare whether it is willing to undertake measures to restore competition in the determined period of 10 working days;

an undertaking expresses its intention concerning the above mentioned appeal;

the Anti-trust Office requires, to be delivered to the Anti-trust Office within one month:

a proposal of measures to be taken by the undertaking; and

a time-schedule for the fulfilment of the measures.

If the proposals are considered sufficient to fully remove the distortion to competition in a very short time no administrative proceeding is started and the Anti-trust Office takes no further action. If the proposals are not sufficient, or if none are given by the undertaking, the Anti-trust Office begins an administrative proceeding.

Administrative proceedings. See *Question 23*. Processes in the administrative stage include:

notification to the participating undertakings of objections to the agreement by the Anti-trust Office;

a 15-day period for the undertakings to propose measures to restore competition.

If the proposals are considered sufficient to fully remove the distortion to competition the administrative proceeding is stopped. If the proposals are not sufficient, or none are given, the Anti-trust Office continues the administrative proceeding and issues an order.

Issuance of an order. The order states:

whether competition has been distorted;

any possible prohibition of the agreement concerned;

any fine or other measures.

21. In relation to an investigation into a potentially restrictive agreement or practice:

What details (if any) of the investigation are made public?

Is certain information automatically kept confidential?

Can the parties (or third parties) request that certain information be kept confidential?

Publicity. The Anti-trust Office makes its proposed decisions public once they are in force. It can also publish information on the decision beforehand on its legal force or on the approval of measures proposed by the competitors (the individual proposals are not made public).

Automatic confidentiality. The general duty of confidentiality applies to all employees of the Anti-trust Office and the Anti-trust Act limits access to the proceeding's file. Commercial, bank or similar secrets protected by law are excluded from the file, unless required as proof in the proceeding, in which case only the proceeding participants or their representatives are entitled to access the confidential section of the file.

Confidentiality on request. Parties can identify information that is a commercial or business secret.

22. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

The Anti-trust Office's powers conform with Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Article 101 and Article 102 of the TFEU. In particular, the Anti-trust Office's can:

Request any information relevant for the investigation and verify the completeness, correctness and truthfulness of such information (it can also require documents such as summaries of financial data and so on).

Enter the premises, buildings, offices and vehicles used by the investigated undertaking within its business activities against the will of the undertaking.

Access the investigated undertaking's books and make copies of them.

Request explanations from the undertaking.

To open and/or seal boxes, offices, items in the investigated undertaking's business premises and other business places.

With prior court authorisation, enter the investigated undertaking's members or employees' homes if there is a reasonable suspicion that books or other business records are being kept there.

The Anti-trust Office can impose a fine for breaching the seal placed on documents of up to CZK300,000 (about US\$16,600) (or 1% of their net turnover for a legal entity).

The Anti-trust Office can also levy a fine up to CZK10 million (about US\$555,000) (or up to 10% of their net turnover for a legal entity) for failure to fulfil measures imposed by the Anti-trust Office in order to restore competition or any other duty imposed by the Anti-trust Office's decision.

23. Can the regulator reach settlements with the parties without reaching an infringement decision (for example, by accepting binding or informal commitments)? If so, please summarise the procedure and the circumstances in which settlements can be reached.

The Anti-trust Office can adopt commitments offered before (which are regulated by soft law guidance issued by the Anti-trust Office) or during the proceeding (which are regulated by the Anti-trust Act).

If the Anti-trust Office's investigation before the proceeding (*see Question 20, Preliminary examination*) shows a minor infringement with little or no effect on competition, the Anti-trust Office allows the undertaking to state within ten working days if they are prepared to remove the infringement. After this statement the Anti-trust Office appeals the undertaking to present commitments to eliminate the effect on competition to the Anti-trust Office within one month, together with determination of schedule for fulfilment of these commitments. If the commitments are sufficient, the administrative proceeding is not started.

For less serious infringements, infringements that have not yet taken place and infringements that do not contain hard-core restrictions on competition, infringing undertakings have 15 days from being notified of the Anti-trust Office investigation to propose commitments to eliminate the effect on competition that will bind all the parties to the infringement. If the Anti-trust Office considers these commitments sufficient it stops the proceeding and orders their performance. The Anti-trust Office continuously verifies performance of the commitments and can re-start proceedings if either:

The conditions materially change.

Participants break commitments.

Their decision was made on false or incomplete facts.

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice? In particular:

What orders can be made?

What fines can be imposed on the participating companies? What are the consequences if they are not paid?

Can personal liability, including fines, attach to individual directors or managers?

Is it possible to obtain immunity/leniency from any fines?

Can an entire agreement be declared void (that is, not only any restrictive provisions)?

Orders. If an undertaking has entered into a prohibited restrictive agreement, the Anti-trust Office's decision declares this and prohibits performance of the agreement. The Anti-trust Office can also impose fines and remedial measures with a reasonable deadline for their fulfilment. The remedial measures and the fines can be imposed concurrently.

Fines. Fines can be up to CZK10 million (about US\$554,500) for:

concluding a prohibited agreement;

failing to fulfil commitments or measures imposed by the Anti-trust Office.

For a legal entity the fine can be up to 10% of its net turnover over the last fiscal year. If the fine is imposed on an association of undertakings it can be up to 10% of the association's aggregate turnover. Fines can be imposed repeatedly.

Personal liability. An intentional breach of the competition rules is punishable by (*Criminal Code*):

imprisonment for up to three years;

finer;

prohibition of activity;

forfeiture of an item or other property.

For the most serious breaches, where there are damages of at least CZK5 million (about US\$277,250) or the breach causes another entity's bankruptcy and so on, an offender can be imprisoned up to eight years. Only natural persons can be liable as legal entities are not subject to criminal liability.

Persons engaged in restrictive activities can also be jointly and severally liable under civil law for damages caused.

Immunity/leniency. The Anti-trust Act does not have provision for a leniency programme. However, the Anti-trust Office has issued a Notice of the Anti-trust Office on the method of setting fines, which provides for leniency. There are two types of leniency for hard-core horizontal agreements. To qualify for the first and more generous provisions (Leniency I) an ordinary member of the cartel must co-operate and bring to the Anti-trust office information that either:

allows investigations at the premises of the involved undertaking(s) (the relevancy of such evidence is evaluated by the Anti-trust Office); or

proves the existence of a cartel where the Anti-trust Office was previously unable to do so.

No fine is then imposed on the co-operating party.

Under the second form of leniency (Leniency II), a cartel member confesses its participation and provides information with material significance but that does not qualify for the first leniency regime. Their fine is then lowered, for the first undertaking to admit participation, by 30% to 50%, for the second undertaking by 20% to 30% and for the third by up to 20%.

An undertaking can ask for a hypothetical evaluation of a leniency situation from the Anti-trust Office to see whether, in principle, it would be entitled to leniency. The undertaking can also ask for its place in the order of application for the leniency programme to be reserved if it needs time to gather information on a cartel.

Anti-trust Office practice also allows for a settlement procedure similar to Leniency II. It is mostly used where there is no other available form of leniency (that is, the prohibited agreement or practice is not a hard-core horizontal agreement).

Impact on agreements. If an agreement or provision breaches the rules on restrictive agreements set out in the Anti-trust Act, it is null and void. Once the agreement is declared to be in breach of the rules on restrictive agreements the Anti-trust Office prohibits performance of the agreement.

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, please summarise any special procedures or rules that apply. Are class actions possible?

There is no specific provision in the Anti-trust Act for third-party claims, although in 2008 the Anti-trust Office issued a paper in support of the White Paper on Damages actions for breach of the EC Anti-trust rules issued by the European Commission. Persons have a general liability for damage caused in breach of a legal duty, including duties under the Anti-trust Act (*Civil Code and Commercial Code*) and private enforcement is possible through a civil action without an Anti-trust Office decision.

However, the claimant must then prove the infringement and quantify the damage. In consequence, private enforcement is used extremely rarely and has never resulted in an award of damages.

Class actions are not possible in the Czech Republic and the length of civil proceedings makes private enforcement unattractive. There are various initiatives in the Czech Republic, following the EU, to make the private enforcement of competition law more attractive (*see Question 39*).

26. Is there a right of appeal against any decision of the regulator and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Participants can appeal if the Anti-trust Office formally decides to order the termination of the agreement, imposes conditions and obligations or stops the proceeding (*Administrative Code of the Czech Republic (Act No. 500/2004 Coll.)*). The appeal (*rozklad*) must be lodged with the Anti-trust Office within 15 days of the delivery of the decision to the appellant. The head of the Anti-trust Office decides on these appeals. Appellants can also seek judicial review of Anti-trust Office decisions by the Regional Court in Brno. These judicial reviews take place within a specialised administrative justice system (and the Regional Court decision can be appealed to the Supreme Administrative Court of the Czech Republic in some circumstances).

Monopolies and abuse of market power

27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, please give a broad overview of the substantive provisions and regulatory authority.

A dominant position is not prohibited as such. The Anti-trust Act only prohibits abuse of a dominant position and lists examples of behaviour considered an abuse of a dominant position (*see*

Question 29). This list, however, is not exhaustive. There are also attempts to regulate abuses of a significant market position not amounting to a dominant position but this regulation has yet not been adopted. The Anti-trust Office is responsible for supervising the competitive behaviour of undertakings, including abuse of a dominant position.

28. How is dominance/market power determined?

One or more undertakings (jointly) have a dominant position in the relevant market if their market power enables them to behave independently of other undertakings or consumers to a significant extent. A dominant position is presumed if an undertaking's market share equals or exceeds 40% of the relevant market (*Anti-trust Act*).

The Anti-trust Office assess market power primarily on the volume of sales or purchases in the relevant market for the goods in question (market share) achieved by the relevant undertaking (or undertakings in joint dominant position) during the period examined. It also considers other indicators, in particular the:

Economic and financial power of the undertakings.

Legal or other obstacles to entry into the market.

Level of vertical integration of undertakings.

Market structure.

The market shares of their immediate competitors.

29. Are there any broad categories of behaviour that may constitute abusive conduct?

The Anti-trust Act gives examples of behaviour that represents abuse of a dominant position. These are:

Direct or indirect enforcement of unfair conditions in agreements with other participants in the market.

Making contracts subject to the performance by the other party of supplementary acts with no connection to the contract's object.

Applying dissimilar conditions to identical or equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

Termination or limitation of production, sales or research and development to the prejudice of consumers.

Consistent offer and sale of goods for unfairly low prices, which results or may result in the distortion of competition (dumping).

Unreasonable refusal to grant other undertakings access for reasonable payment to transmission grids, or similar distribution networks or their infrastructure facilities, which are owned or used on other legal grounds by the undertaking in a dominant position.

30. Are there any exclusions or exemptions?

There are no explicit exemptions in the Anti-trust Act. The Anti-trust Office decides on an *ad hoc* basis whether certain behaviour constitutes an abuse of a dominant position.

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, please set out briefly the procedure.

It is not possible to request official clearance or guidance from the Anti-trust Office. However, the Anti-trust Office is open to informal meetings and discussions on undertakings' conduct. However, there is no formal legal basis for asking for such a meeting.

32. Where different than for restrictive agreements and practices, please explain how investigations are started, the procedures that apply, the rights of third parties, what details are made public and whether the regulator can accept commitments.

In principle, the Anti-trust Office starts the investigation at its decision, although a third party's complaint may provide the impetus. The course of investigation, rights of the parties or third parties to the proceedings and rules on publication are the same as for restrictive agreements and practices (*see Questions 13 to 21*).

The Anti-trust Office has 15 days to propose commitments to be taken by the undertakings to restore effective competition. The Anti-trust Office can terminate proceedings without issuing a decision if either:

The Anti-trust Office considers these commitments sufficient for the protection of competition.

The harmful situation is eliminated by their fulfilment.

The abuse did not result in substantial distortion of competition.

33. Please summarise the regulator's powers of investigation.

The Anti-trust Office's powers of investigation in relation to abuse of a dominant position are identical to those relating to restrictive agreements and practices (*see Question 22*).

34. What are the penalties for abuse of market power and what orders can the regulator make?

If an undertaking abuses its dominant position, the Anti-trust Office prohibits the abuse in its decision and a fine can be imposed of up to CZK10 million (about US\$554,500) or 10% of its annual turnover in the last accounting period for a legal entity. The new criminal code (*Act No. 40/2009 Coll.*), which enters into force on 1 January 2010, does not codify an abuse of a dominant position (despite the conclusion of a restrictive agreement) as a specific crime. However, since

there is no experience with the application of the new criminal code, it is possible that abuses of a dominant position may be prosecutable under any of the general clauses contained in the criminal code.

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, please summarise any special procedures or rules that apply. Are class actions possible?

See *Question 25*.

EU law

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

There are no differences between the powers of the Anti-trust Office while investigating infringement of national law or European Law. The Anti-trust Office always has the same powers conferred to it by the Anti-trust Act.

Joint ventures

37. Please explain how joint ventures are analysed under competition law.

Joint ventures are analysed according to their functions. If the joint venture serves the purposes of an independent economic unit, it is assessed under merger control. Joint ventures which co-ordinate the owners' competitive behaviour may qualify as a restrictive agreement or practice.

Inter-agency co-operation

38. Does the regulatory authority(ies) in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

The Anti-trust Office is a member of several international organisations of national competition authorities, including the European Competition Network and International Competition Network. The Anti-trust Office also takes part in many conferences relating to competition law and both formally and informally communicates with representatives of foreign competition authorities.

Proposals for reform

39. Please summarise any proposals for reform.

On 1 September 2009, broad amendments to the Anti-trust Act entered into force introducing:

The simplified merger control procedure (*see Question 4*).

Certain changes to the regulation of undertakings' administrative offences.

A proposal to regulate the abuse of significant market power and a proposal to support private enforcement (in compliance with EU initiatives) are currently in the legislative process. No other amendments to competition legislation are currently being discussed.

The regulatory authorities

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Outline structure. The Anti-trust Office is headed by the chairman and is further divided into four main sections:

Competition.

State aid.

Public procurement.

Legislative and international relations.

These sections are further divided into departments. The competition section is divided into

Cartels department.

Mergers department.

Services department.

Production department.

Department of the Chief Economist.

A more detailed structure of the Anti-trust Office can be found on its website (*see above*).

Responsibilities. The Anti-trust Office is one of the central state bodies and is fully independent in its decision-making activities. No other state bodies, including the government,

can interfere with decisions of the Anti-trust Office and there is no political control of its decisions. The Anti-trust Office is bound by governmental resolutions assigning it both legislative and non-legislative tasks.

The Anti-trust Office was established to protect and support competition and to oversee public procurement, state aid and other activities.

Procedure for obtaining documents. Documents can be obtained from the Anti-trust Office website (*see above*) or by mail.

Resource information

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Products: Competition 2010, PLC Competition Law - EU, PLC Cross-border, PLC Law Department, PLC US Law Department

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