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More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

Please contact Ms Despina PACHNOU if you have any questions about this document
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

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Czech Republic

1. Access to file in general

1. The objective of this paper is to explain rules concerning the most important circumstances of the access to the file and the protection of confidential information within proceedings conducted by the Czech Office for the Protection of Competition (hereinafter referred to as “the Office”).

2. In the Czech jurisdiction there are general rules for access to the file and the protection of confidential information in administrative proceedings regulated by law. General rules comprising these procedural rights are provided by the Act No. 500/2004 Coll., the Code of Administrative procedure, as amended (hereinafter referred to as “the Administrative Code”).

3. Nevertheless, for the investigation and administrative proceedings of the Office (hereinafter referred to as “the competition proceedings”) there are some specific rules provided by the Act No. 143/2001 Coll., on the Protection of Competition and Amending Certain Acts, as amended (hereinafter referred to as “the Competition Act”).¹

4. For the facilitation to execute the right to compensation for damages caused by breach of the competition rules, specific documents from the file of the Office might be obtained within the procedure before civil courts also according to the Act No. 262/2017 Coll., on Damages in the Field of Competition, as amended (hereinafter referred to as “the Damages Act”). This act implements the Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

5. Regarding transparency rules in the Czech jurisdiction there is a general obligation for public authorities - state agencies, territorial self-governing bodies and public institutions to provide information stemming from the Act No. 106/1999 Coll., on Free Access to information, as amended (hereinafter referred to as “the Information Act”).² The Office is public institution and as such it has also this obligation to provide information even from the competition file. However, this general right to information is not unlimited. There are limitations on obtaining and disclosing certain information stemming directly from the Information Act and other Acts protecting primarily confidential information, effectivity of the investigation and rights of parties that provided information.

¹ The English translation of the Competition Act is available at: www.uohs.cz/en/legislation.html

² The English translation of the Information Act is available at: <https://www.mvcr.cz/clanek/preklady-vybranych-zakonu.aspx>

2. General rules on access to file in administrative proceedings

6. Access to the file in administrative proceedings is governed by the principle of privacy.³ This means that no one besides parties to the proceedings and relevant public authority can get access to the administrative file. Nevertheless, this principle can be breached if any special law or legal interest of the party claiming the access to the administrative file occurs.

7. The general rule regarding the access to the administrative file as it is specified in the Administrative Code is that only the parties to proceedings and their representatives have the right to access the administrative file.⁴ Other persons can access the file only if they prove their legal interest or another substantial reason and if the rights of any of the parties or other persons concerned or the public interest are not hindered thereby.

8. The right to access the file is also associated with the right to make notes and the right to have the file or parts thereof copied by the administrative authority. There is no specific limitation stemming from the Administrative Code or the Competition Act for what purposes the accessed information from the file of the Office can be used.

9. However, not all parts of the administrative file are fully accessible. Two types of confidential information are generally excluded from the access to the file according to the Administrative Code. These are firstly classified information and secondly facts, to which the confidentiality obligation according to specific law applies. This means that there is no general definition of such confidential information defined in the Czech jurisdiction but there are definitions of information that are protected from access to the administrative file within different Acts.⁵ As for the information which is commonly contained in the file of the Office and are not generally accessible according to the Administrative Code and Competition Act, these are foremost business secrets. The definition of a business secret is provided by the Act No. 89/2012 Coll., the Civil Code.⁶ In the Czech jurisdiction there is no obligation to provide notice to the party claiming confidentiality concerning disclosure of its confidential information contained in the file.

10. For the fulfilment of the right to a fair trial and even if the parts of the administrative file are protected from the access to the file due to their confidentiality, the party to the proceedings or its representative must be granted access to such protected parts if these have been or will be used as evidence. The access may be granted only if the parties have been instructed in advance about the consequences of breaching the confidentiality obligation regarding accessed confidential parts of the file. During the access to the file in this situation there is no right to make notes or to get copies from parts of the file that are

³ As opposed to the procedure before civil courts which is generally governed by the principle of publicity.

⁴ Where the party to the proceedings has no representative, the file may be accessed both by the party and the party's so called supporter (If a person needs help in making a decision because of his/her mental disorder, although not necessarily limited in his/her legal capacity, he/she can arrange a supporter for providing of legal support).

⁵ There is special protection from access to the file regarding leniency and settlement applications and related documents that are unique for competition proceedings. See part III of this report.

⁶ Article 504 defines business secrets as information involving competitively significant, identifiable, valuable and in relevant business circles normally unavailable facts related to the enterprise, whose confidentiality is ensured by its owner in his own interest.

confidential. Nevertheless, this type of access to the file shall apply only in competition proceedings wherein sanctions might be imposed. In merger procedure there is no possibility to access confidential information in the file even for parties to such procedure.

11. In any case where the Administrative Authority declines request to access the file or part thereof⁷ it does so in a form of resolution which shall be notified to the requesting party. Such resolution might be appealed within 15 days. If the resolution is confirmed by the appellate administrative authority, there still exists the possibility to submit an action against such resolution to the court. If the decision of the Office refusing access to the file is found illegal within the court review, the court might order by its decision that the Office has a duty to grant access to the file accordingly.

12. It can be summarized that the general access to the file in any administrative proceeding is constitutionally granted by the right to a fair trial which is utmost important. As such, it could be proportionally restricted only on the basis of other legitimate right enshrined in the Czech legal system. Therefore, as a general rule, any refusal of the access to the file in administrative proceedings must be reviewable by courts that have ultimate access to any document in the file and document related to the file as well.⁸ In accordance with abovementioned, every document in the file regardless its type or confidentiality must be provided to court in case of review.

3. Specifics of competition proceedings and access to file in administrative law

13. The access to the file in competition proceedings in the administrative regime is granted directly by the Office. There is no need to issue any special decision in this regard if the access is granted. On the other hand in case of refusal to access the file, the Office shall issue a resolution according to the Administrative Code. Such refusal might be appealed to the Chairman of the Office. If the Chairman rejects such appeal, an administrative action for court review may be filed.

14. With regard to the practical methods of accessing the file of the Office it can be summarized that files are accessed in the Office premises on its devices via special software. Access is provided always with the presence of an authorized officer who can handle the accessed file. All Office files are nowadays in electronic form only.⁹ There is general possibility to receive the file copied on an electronic storage device but excluding documents that are accessible without possibility to make copies thereof.

15. The competition proceedings can be divided generally to four relatively separable stages. Firstly, it is a preliminary investigation of the Office before the initiation of the administrative proceeding, secondly it is an administrative proceeding before the Statement of objections is issued, the next one is an administrative proceeding after the Statement of objections and the last stage begins after the final decision of the Office is issued. The scope of the right to access to the file or its part may be different depending on the stage of the proceedings.

⁷ For example if such information is not accessible as it is business secret.

⁸ Courts are under this condition able to review also immunity and leniency applications prior they are put in the file (which takes place after the Statement of objections is issued).

⁹ If some documents are received or secured in paper form, they are electronically converted to the electronic form by special certified procedure and after such conversion put in the electronic file.

16. Besides the different accessibility of the file according to the stage of the competition proceedings, there is also different level of right to access the file depending on status of the party who demands it. Different rights are granted to the parties to the proceedings and their representatives, to the third parties claiming damages, third parties in general and to public authorities as well as courts.

17. Last but not least, the access to the file might be restricted with regard to specific document in the file. It depends on the type and category of such document. Some documents in the file have higher level of protection within the general right to access the file in the Czech jurisdiction. In this regard the most important in competition proceedings is specific protection, leniency applications and corresponding documents and protection of settlements. Specific protection has also such document that is directly created for the purposes of the competition proceedings and documents among parties and their external lawyers – legal professional privilege.

18. According to the Competition Act, those parts of the file which contain business, bank or similar confidential information protected by law,¹⁰ are excluded from the access to the file provided to the parties to the proceeding. But simultaneously, if such protected confidential parts exist in the file, they must include also corresponding documents from which such secret is removed or sufficiently detailed abstracts giving information about at least the character and content of protected confidential parts.

19. In this regard the Competition Act imposes an obligation on any person, whose confidential information is in the file of the Office, to provide both documents containing such confidential information and also documents from which such information was removed or eventually sufficiently detailed abstract. Should the person fail to do so, it shall be deemed as there is no confidential information protected by law.

20. During proceedings concerning infringement or prohibition according to the Competition Act and after the Statement of objections is issued, only the party to the proceedings or its representative may access those parts of the file that contain confidential information protected by law which have been or will be used as an evidence, provided that they are informed in advance of the consequences of the breach of confidentiality about such facts and they sign a report regarding this notification. They have no right to make notes or to get copies form parts of the file that are protected as confidential.¹¹ Even if the third party proves its right to access the file based on the legal interest, the above mentioned confidential information cannot be accessed in the administrative regime.

21. Within the competition proceedings, special protection is granted to immunity and leniency application as well as other documents and information that were submitted to the Office in relation to such applications. This also applies to requests and notifications which the Office sent to the applicants in connection with their applications. All such documents and information are excluded from the administrative file of the Office until the Statement of objections is issued. This in fact means that before the Statement of objections is issued even parties and their legal representatives could not access such documents as they are not part of the file. The Office does not disclose even information about existence of immunity

¹⁰ This corresponds to the protection of confidential information according to the Administrative Code and clearly states that for the competition law proceedings business, bank or similar confidential information are protected as confidential information. See point 4 of this report.

¹¹ It is generally similar obligation and the right as the one stemming from Administrative Code. See point 10 of this report.

or leniency applications and related documents and information within the relevant competition investigation to anybody prior the Statement of objections is issued with the exception of their full disclosure to the court for the purposes of judicial review.¹²

22. Moreover, even after the Statement of objections is issued and also after the investigation is closed, the application for immunity or leniency and also settlement application are accessible only to parties and its representatives in special regime, the same as under which the other confidential documents in the file are accessible.¹³ The same level of protection from access to the file is granted to all other documents and information that were drawn up and submitted in relation with one of those applications and also requests and communications of the Office sent to the applicants in relation with such application. Pre-existing documents that have not been created for the purpose of submitting such application and exist independently to it are not protected from access to the file even if submitted in relation with any of these applications.

23. There is special procedure according to the Competition Act how to review if the immunity, leniency or settlement applications are accessible. The court might request the Office for disclosure of such applications for the purposes of verification whether its non-disclosure is justified on the basis of its content. In this case the Office shall enable through its authorized officer to access such application by the court. After that the authorized officer draws up a report containing a court's finding in respect of the content of the application and the justification of its non-disclosure.

24. The Competition Act provides also specific protection for ongoing investigations of the Office and also for its ongoing sectoral inquiries. Documents and information specifically drawn up and submitted for such purposes to the Office or prepared by the Office are not disclosed to other public authorities till the competition proceedings is concluded. This shall not apply to the review of the Office activity before administrative courts. After the competition proceeding is closed such information might be disclosed to other public authorities, especially to the Police.

25. Sharing all kinds of information including confidential information and also leniency or settlement application as well as related documents with other agencies from the European Union member states and also with the European Commission is possible when their investigation includes also potential breach of the Article 101 or 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as "the EU Treaty") according to the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter referred to as "the Regulation 1/2003").¹⁴

26. According to the Regulation 1/2003, the key restriction is applied only when exchanged information can be used as evidence only for the purpose of applying the above mentioned articles of the EU Treaty and in respect of the subject-matter for which it was

¹² For example, if the legality of dawn raid is reviewed in early stage of competition proceeding and one of evidence sources from which stems the suspicion about possible cartel is immunity application.

¹³ Compare the point 20 of this report.

¹⁴ See Article 12 of the Regulation 1/2003.

collected by the transmitting authority.¹⁵ Moreover, natural persons are protected in the way that exchanged information may be used only as evidence when sanction is imposed on them if the law of the transmitting agency foresees sanctions of a similar kind in relation to an infringement of the Article 101 or Article 102 of the EU Treaty or, in the absence thereof, the information has been collected in a way which respects the same level of protection of the rights to defence of natural persons as provided for under the national rules of the receiving agency. However, in this case, the information exchanged may not be used by the receiving authority to impose custodial sanctions.

4. Access to file according to Damages Act

27. There is a special procedural possibility for third parties claiming damages caused by an infringement of competition rules to get access to information supporting their claims including access to relevant information and documents contained in the file of the Office. According to the Damages Act, such access may be required in the special civil law procedure before or during the proceedings concerning claims for damages caused by distortion of competition. Generally, the rules for providing or disclosing documents before and after the initiation of the proceedings are the same. Nevertheless, access to documents is not limited to damage claimants only. It can be required also by sued parties if it is necessary and proportionate after the initiation of proceeding on the merits. This should enable them access to information which would support their defence, typically information usable for calculation of the amount of damages or possibility to use the so called pass-on defence.¹⁶ Procedurally it is possible to use any disclosed document according to the Damages Act only for purposes of the proceedings on the merits or for purposes of another proposal for disclosure of a document.

28. In fact this right means that the Czech civil courts may impose an obligation to disclose all required documents and other evidence to the potential or actual competition damages claimant, subject to condition that it is necessary and proportionate for possibility to successfully claim damages. This obligation may be imposed to everyone who has or had control of the documents in question. Such person is obliged to provide them to the claimant or if the documents are no longer under his control to inform the claimant where, to his knowledge, the documents may be found. In this regard a rebuttable presumption is applicable, according to which a party had documents under its control if it had the right to access to the relevant file of the Office.

29. Generally, when assessing the possibility to disclose any documents according to the Damages Act, the civil court has to necessarily consider the nature of the documents in question, particularly whether such documents are really useful for the merits, the scope of disclosure and costs for sued party, as well as potential existence of business, bank or other protected secret. If there is no reason to reject or dismiss proposal for disclosure of documents in question, the court shall impose the obligation to provide or disclose all information and documents within appropriate period of time. In case of legitimate interest

¹⁵ Where the national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged may also be used for the application of national competition law.

¹⁶ It should be point out that with regard to access to the file of the Office, it is much easier for such parties to access that file according to the Administrative and Competition Act if they are parties to the competition proceedings.

of the Office or third parties on the protection of business, bank or other secret protected by law, the court can determine a limited number of persons which can access such documents. In addition, the court can determine one or more impartial persons for elaborating an extract that does not contain secret and can be disclosed or order any other suitable arrangement to keep such secret protected while providing relevant access for the damage claimant.

30. To prevent damages or other harm caused by the disclosure of provided documents, the claimant is obliged to provide the court a deposit of CZK 100,000. If this guarantee is not deposited, the court refuses the claim for documents disclosure. If there is no damage caused by disclosing the documents, the guarantee is returned to the claimant.

31. Some documents are not accessible according to the Damages Act at all and others may be accessed only after the investigation of the Office is terminated or after its decision in administrative proceedings becomes final. In this regard, it is possible to distinguish between three categories of documents to which eventual access is excluded or restricted. These are documents regarding immunity and leniency applications, documents regarding settlement applications and all other documents prepared only for purposes of administrative proceedings conducted by the Office.

32. The first two categories are completely protected from disclosure even after the investigation is concluded no matter how. Nevertheless, the damage claimant may demand the court to verify that the documents include protected information. Pre-existing documents that have not been created for the purpose to submit one of those applications are not protected from disclosure according to the Damages Act at all. The third category of documents may be disclosed only after the investigation is terminated.

33. The key idea of access to the file of the Office according to the Damages Act is that the damage claimant can obtain access to such documents preferably directly from the sued party or generally any other third person but not from the Office. Therefore, the access to the documents in the file of the Office is relatively limited and should be applied only as the last option if such documents are not accessible under the reasonable conditions by other means. Moreover, granting access to the documents in the civil procedure according to the Damages Act should not hamper the investigation of the Office.

34. When assessing disclosure of documents in the file of the Office, the court has to take into account possible conflict with the requirement for effective public enforcement of competition law. Such consideration is essential if the request for access to the file concerns documents prepared only for purposes of the investigation of the Office, if the court considers ordering the disclosure to the Office or when the Office sends to the court its position regarding such disclosure. Therefore, the Czech courts are obliged to notify the Office about their proposal for disclosure of documents in question and provide it with a period of time to eventual comment.

5. Access to information from file according to Information Act

35. The Information Act sets the rules for providing information and further regulates the terms of the right to free access to information. The Office as a public authority is one of the entities that have the duty to provide information according to this Act. It might concern information even from the file of the Office. Although, in fact, significant part of such information shall not be provided because of their protection based on other countervailing rights which regards mostly the nature and origin of requested information.

36. The general duty to provide information according to the Information Act is limited in several ways specified thereof. Based on confidential character of the information, it is not possible to provide information that is classified or information representing a business secret.¹⁷ Moreover, also information indicating industrial ownership, copyright protected information, social and healthcare insurance related information etc. is not possible to be provided.

37. The information acquired by the Office from the third person when performing its tasks as a part of the control, supervisory, inspection or similar activities shall not be provided. The Office shall provide only such information which originated from its work while fulfilling these tasks. In addition, the Office may not provide information which has been collected without using the public funds, i.e. it has been handed over by an individual who the law does not impose such duty on unless such individual agrees with providing the information.

38. There are specific situations in the Information Act based on which it is not strictly forbidden for the Office to provide requested information but it shall decide itself to restrict their disclosure. In this regard the most relevant reason for the Office to not disclose information is when the request concerns new information which came into being during the preparation of the decision of the Office. Nevertheless, this applies only until the end of the preparation works on a new decision.

39. When providing information according to the Information Act, the Office has to consider all the restrictions of the right to information and disclose the information requested only after exclusion of the inaccessible information specified by the law. The right to deny free access to the information shall continue only as long as the reason for denial stemming from the Information Act persists.

6. Conclusion

40. Within the Czech jurisdiction there are several options how to get access to the file of the Office or obtain information thereof. It can be either within administrative or civil regime as well as based on the right to free access to information. When assessing the accessibility to the file, the Office shall consider the type of such request, its legal basis and nature of documents in the file, status of an entity asking for the access and also the stage of its investigation. It can be summarized that access to the file of the Office according to the Czech legislation is established in the way which secures other specific rights. Among others, we can name the right to a fair trial, the right to a compensation of damages caused by unlawful conduct, the right to information and the right to privacy. Parties to the proceedings or their representatives may gain access to the file since the very beginning of the investigation. Moreover, after the Statement of objections it is possible for them to gain access even to confidential information representing evidence as well as to leniency or settlement applications.

41. There are thoughts that it could be more appropriate to change the current practice and allow access to the file for parties to the proceedings only after the Statement of objections is issued as it is applied in some other jurisdictions. This is one of the *de lege ferenda* issues that might be discussed if the Competition Act is being amended. Besides that, third parties may also gain access to the file according to the Administrative Code, the

¹⁷ See Articles 7 and 9 of the Information Act.

Information Act and specifically when claiming damages according to the Damages Act. Nevertheless, with regard to the need to ensure effectiveness of the investigation of the Office, leniency and settlement applications are fully protected from disclosure to third parties. Only courts for the review purposes may get full access to such documents. So far the case law shows that it is relatively challenging for third parties to prove their legal interest justifying their access to the file within the administrative regime. With regard to disclosure according to the Damages Act, so far there hasn't been so many experiences with the possibility to claim access to the file in the civil regime as the Damages Act has been effective for only two years. Moreover, it is questionable whether the request for the guarantee of CZK 100,000 is appropriate because, in fact, it could deter smaller claimants from requesting this type of access to the file.

42. To summarize the issue, the Czech legislation on access to the file works effectively and is well-balanced. Although it may appear that current system slightly prefers the effectiveness of the investigation of the Office compared to the right to damages compensation, it should be noted that this setup is based on conditions laid out by the Damages Directive.