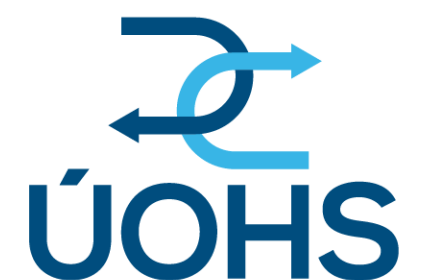


PRACTICAL PROCEEDINGS ISSUES RELATED BOTH TO THE CARTEL AGREEMENTS AND TO THE ABUSE OF DOMINANT POSITION

Office for the Protection of Competition (Office)

XX. XX. 2023

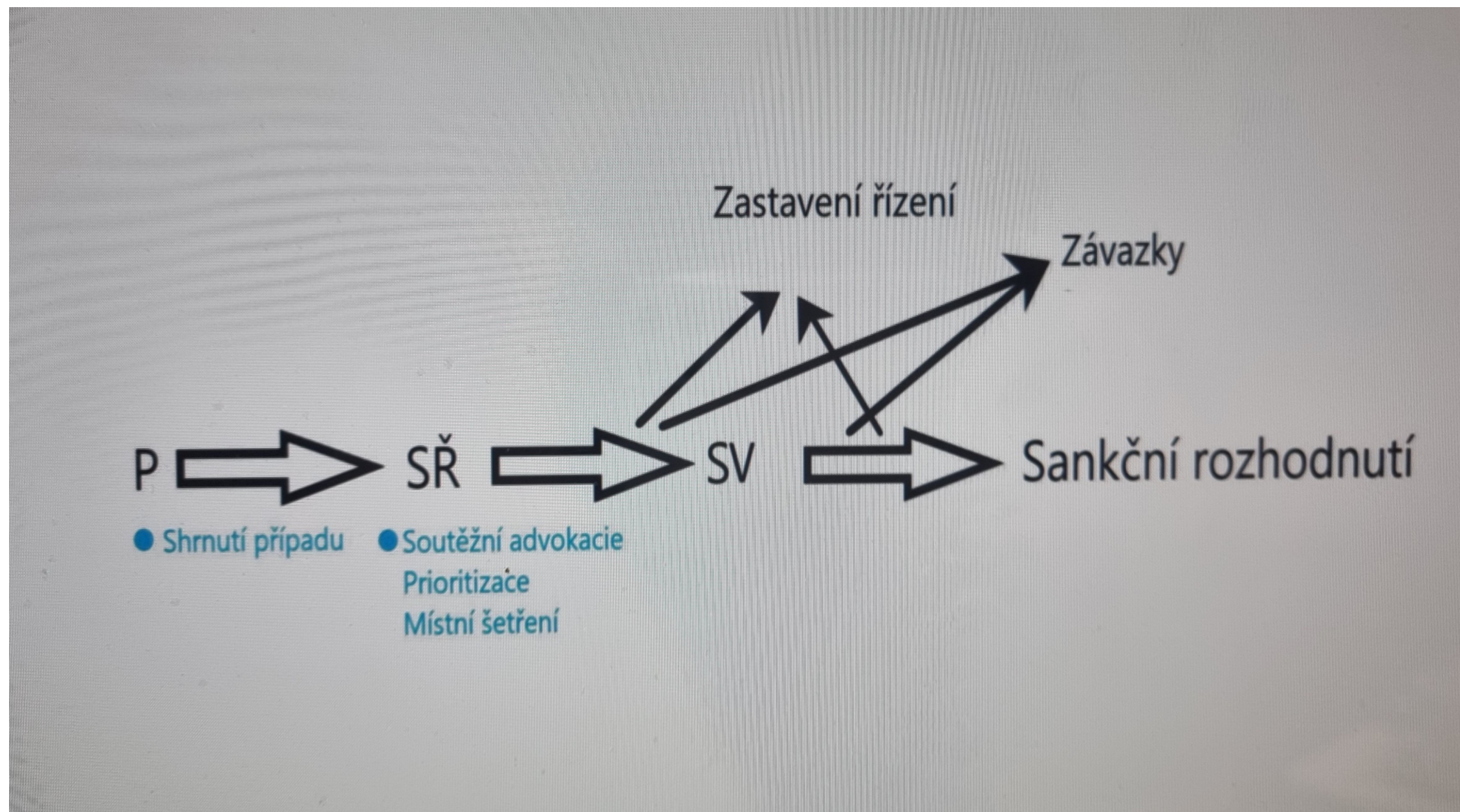


Content of the presentation

- I. Investigation process by the Office
- II. Powers and competences of the Office
- III. Administrative proceedings
- IV. Access to the administrative file and specific protection of certain documents
- V. Selected questions – investigation (dawn raid)

I. Investigation proces by the Office

Investigation phases by the Czech NCA



II. Powers and competences of the Office

As a rule, before proceedings are initiated

- **Complaint reception**
- **Sectoral inquiries** (art. 20 143/2001 Coll.)
- **Provision of information at the written request of the Office** (art. 21e 143/2001 Coll.)
- **Inspection of Business Premises** (art. 21f 143/2001 Coll.)
- **Inspection of Non-Business Premises** (art. 21g 143/2001 Coll.)

Sectoral inquiries

- **Authorisations of the Office to:**
 - conduct investigation of level of competition in such markets and propose measures for the improvement,
 - cases of indications of possible distortions of competition in specific markets,
 - issue reports which contain recommendations for the improvement of competition.

Provision of information at the written request

- **Authorisations of the Office:**
 - to request documents and information,
 - business records = documents and information, including books of business, other business records, or other records that may be relevant to clarifying the subject matter of the proceeding.
- **Obligation of undertakings to provide information:**
 - within the deadline set by the Office,
 - in case of non-compliance = offence = fine (art. 22c 143/2001 Coll., repeatedly, up to CZK 10 000 000 or 10 % of turnover),
 - complete, correct and truthful,
 - in case of non-compliance = offence = fine (art. 22 and 22a 143/2001 Coll., up to 300 000 CZK or 1 % of turnover).

T-451/20 Meta Platforms Ireland v Commission – interim measures, sensitive personal data

- Dispute as to the nature of the Commission's request for information, where it requested the provision of documents identified by defined search terms, but some of which consisted of common or very common words such as: quality, growth, advertising, advantage.
- Facebook argued that the use of such keywords would reveal documents that are irrelevant or not necessary for the purposes of the investigation and would violate the fundamental right to privacy of the undertaking and its employees.

T-451/20 Meta Platforms Ireland v Commission – interim measures, sensitive personal data

- The court rejected the undertaking's (Facebook's) privacy claim.
- The court did not challenge the method of document selection and upheld the ad hoc procedure for verifying documents that may contain sensitive personal data.
- Facebook Ireland shall identify which documents contain sensitive personal data and transmit them to the Commission on a separate electronic medium.

T-451/20 Meta Platforms Ireland v Commission – interim measures, sensitive personal data

- Then, the documents will be placed in a virtual data room, accessible to as limited a number as possible of members of the investigation team in the presence (virtual or physical) of an appropriate number of the undertaking's lawyers.
- In the event of disagreement as to the relevance of a particular document, the lawyers will have the right to explain the reasons for their disagreement.
- In the event of a continuing disagreement, Facebook Ireland will be able to request the Director for Information, Communication and Media at DG Competition to resolve the disagreement.

Inspection of Business Premises

■ Authorisations of the Office to:

- enter the business premises of the undertakings under investigation,
- verify whether the documents and records are business records,
- review business records,
- copy or gain in any form copies or abstracts from business records,
- seal business premises,
- request, to the extent necessary, the cooperation of selected persons of undertaking.

■ Obligation of undertakings to:

- submit to an investigation by the Office on the business premises,
- provide the necessary cooperation to the Office.

Inspection of Non-Business Premises

- **Conditions:**

- reasonable suspicion of the existence of business records in non-business premises,
- prior authorization by the court.

- **Authorisations of the Office and obligations of undertakings:**

- similar to the investigation on business premises (except for sealing).

III. Administrative proceedings

■ In general:

- Act. No. 500/2004 Coll., Code of Administrative Procedure
- Act No. 143/2001 Coll., on the Protection of Competition
- Act No. 250/2016 Coll., on Responsibility for the Administrative Offences and the Procedure on it, as amended,
- initiation, as a rule, ex officio,
 - (in the case of mergers of undertakings, proceedings on the application or proposal for authorisation of the merger),
- the possibility not to initiate proceedings after a preliminary examination of the matter,
 - = low level of harmfulness, so-called prioritisation.

Main changes

- **End of the conduct** – Act No. 417/2021 Coll. with effect from 1 February 2022 brought a change consisting in the so-called „end of conduct“
 - the continuation of the conduct for which the proceedings for a continuing, ongoing or collective infringement of competition have been initiated, even after the initiation of such proceedings = single act until the statement of objections.

Main changes

▪ New methodology of penalties

- refining the current approach of the Office to imposing fines,
- new explicit regulation of the procedure, criteria and considerations used by the Office when imposing sanctions on public authorities, associations of undertakings and the simultaneous imposition of a fine and a ban on public procurement,
- increase in fines for the most serious anti-competitive conduct (in particular hardcore cartels on prices, market sharing, output limitation and bid rigging),
- application to cases committed after the entry into force of the new methodology, i.e. after 1 January 2024.

Statement of objections

- **Statement of objections is:**
 - newly in art. 2 143/2001 Coll.,
 - preceded the decision of the Office,
 - written notification to the parties to the proceedings about a possible distortion of competition, in which the Office provides a description of the act, identifies the main evidence, the legal classification of the act and the administrative.
 - After SO the parties must be allowed a to access the file (special regime – Business secret, Leniency, Settlements) and possibility to submit their objections

Types of decisions of the Office

- **Prohibited agreements, abuse of dominant position:**
 - decision on the termination of the proceedings
 - commitments in favour of restoration of effective competition,
 - decision prohibiting anticompetitive conduct in the future, imposing a fine or remedies.
 - decision that no infringement has been found
- **Supervision of public authorities:**
 - decision on the termination of the proceedings – commitments in favour of restoration of effective competition,
 - decisions declaring distortion of competition, imposing fines or remedies.

Review of the Office's decision-making

▪ Review of the first-instance decision

- right of the parties to the proceeding
- review of the first instance decision by the Chairman of the Office (second stage, opinion of the Appeals Committee)
 - confirmation, correction, annulment and referral back to the first instance for reconsideration

▪ Judicial review

- action against a decision in the administrative courts = right of the parties to the proceeding
 - Regional Court in Brno
 - Supreme Administrative Court

Criminal Legislation Related to Competition

- **Criminal Code (Act No. 40/2009)**
- The special crime of "violation of regulations on competition rules"
 - regulation of unfair competition
 - regulation of the protection of competition
- **Cooperation with criminal prosecution authorities**
- **!!! Ne bis in idem** – principle under which a person cannot be punished and be subject to several procedures twice for the same facts.

IV. Access to the administrative file and specific protection of certain documents

Administrative file and provision of access thereto

- Each party to the proceedings/its representative shall be entitled to:
 - inspect the administrative file,
 - X other persons must show a legitimate interest or other compelling reason,
 - if the administrative authority denies a person access to the file, it must issue a decision to that effect.
- Parts containing trade, banking or other protected secrets **are excluded from inspection.**
 - The file shall include, in addition to the documents containing such secrets, the documents from which those secrets have been removed.
 - After the SO, the party to the proceedings shall have the right to inspect, but may not make copies!
 - file containing leniency and settlement information are excluded from file till SO. Than access as trade secret.

Trade Secrets (TS)

- **Undertakings have the right to protect their TS** that appears in the documents and information submitted to the Office.
- However, they are obliged to submit, in addition to the documents containing the TS, the documents from which it has been removed.
- The marking of TS can be particularly problematic in multi-party proceedings,
 - there must be multiple versions of the file with TS concealed from each other,
 - some information cannot be a TS protected from disclosure to the parties (e.g. mutual communication, concluded contract), can be protected as trade secrets in relation to third parties.

- **In general: it is appropriate to consider whether the information is of such a historical nature that it is no longer TS.**
 - **When marking TS, only what actually **cumulatively fulfils the characteristics of TS** according to the law may be marked!**
 - X efforts to mark TS extensively (full document)
 - The Office is entitled to examine whether all the characteristics of TS are fulfilled and to require undertakings to justify and prove them.
 - In case of failure to prove the fulfilment of the TS characteristics, the Office may publish the information.
 - **Disputes in clarifying TS can lead to significant delays in the proceedings!**
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Act 262/2017 Coll.

■ Competition Damages Act

- regulation of certain issues related to the obligation to compensate for the damage caused by breaching competition rules laid down by the Act regulating protection of competition, the acts of another Member State of the European Union regulating protection of competition, or the legislation of the European Union,
- application in cases of agreements between undertakings and abuse of the dominant position,
- notification by the Office to certain entities that they might be entitled to damages.

V. Selected questions – investigation (dawn raid)

Authorisation of an investigation

- A basic document, without which an investigation cannot be carried out, issued by the Chairman of the Office or another person authorised to do so under the internal regulations of the Office.
- **Possible problematic points:**
 - identification of the undertaking's business premises where the investigation is to be carried out – inspection of the premises, verification of information,
 - X wrong identification of business premises,
 - definition of the subject matter of the investigation – specific suspicions required,
 - X fishing expedition,
 - clues – appropriate to gather as wide a range of relevant information as possible (including from commonly available sources),
 - X findings leading to the investigation may not, however, be entirely clear or proven.

Conclusions and recommendations arising from the judgments of the NSS

- **What should the Office do before conducting a dawn raid:**
 - carefully weigh and verify the information it has received from the complainant,
 - sufficiently explain in the official record why it considered which finding (indication) to be 'suspicious',
 - include all relevant information in the official record (and not only in his statements before the administrative courts),
 - specify in the administrative file and in the official record of the findings all the information, including the sources from which he drew.

- **In general: high success rate of the Office before the courts in cases of actions for unlawful interference!**

T-249/17 Casino, Guichard-Perrachon Achats & Marchandises Casino SAS (AMC) v Commission

- Partial annulment of the Commission's decision to conduct investigations into several French undertakings in the distribution sector.
- The Commission did not establish sufficient prima facie evidence to justify the suspicion of an exchange of information on the undertakings' future business strategies:
 - infringement of the right to the inviolability of the home,
 - general and non-strategic statements made to the public cannot be considered sufficient, on their own and without further evidence, to justify an investigation!

T-249/17 Casino, Guichard-Perrachon Achats & Marchandises Casino SAS (AMC) v Commission

- The Commission's powers are not unlimited and due regard must be paid to the fundamental rights of the companies under investigation.
- The Commission has no obligation to:
 - disclose to the undertaking all information in its possession about the alleged infringements,
 - define the relevant market precisely,
 - make a precise legal classification of the infringements,
 - indicate the period during which the infringements took place.

T-249/17 Casino, Guichard-Perrachon Achats & Marchandises Casino SAS (AMC) v Commission

- Of the information which justified the inspection, the inspection decision must only include information showing that the Commission had serious indications of an infringement, without, however, the indications in question being disclosed.

Failure of an undertaking to cooperate in an investigation:

- **Failure of an undertaking to fulfil an obligation:**
 - breaking the seal placed in the course of the investigation,
 - failure to provide the necessary cooperation to the Office during the investigation,
 - breach of the obligation to abide inspection in premises.
- **Penalty:**
 - up to CZK 300 000,
 - in the case of a legal entity or a natural person engaged in business as an undertaking, up to 1 % of the net turnover achieved by the undertaking for the last completed accounting period.

Non-cooperation between undertakings in practice

- **Year 2022: non-cooperation to a greater or lesser extent e.g.:**
 - termination of an Office inspection as a result of advice from an undertaking's lawyer (both before and after the inspection was initiated and relevant evidence was obtained),
 - submission of an apparently brand new mobile device by an undertaking's representative,
 - submission of a mobile device / laptop with altered / deleted content,
 - deletion of e-mails by undertaking's IT employee after the start of the investigation itself.

Non-cooperation between undertakings in practice

- The persistence of the undertakings' representatives in the given position even after being warned by the inspectors of the Office that they are obstructing the exercise of the Office's legal powers and that they are threatened with sanctions for such conduct.
- **Non-cooperation does not pay off! 2022 result:**
 - 5 decisions: total fine of CZK 25 329 000.

Specific situations that may arise in practice

- **Preventing an investigation from being carried out:**
 - making it impossible to carry out an investigation in different ways and at different stages,
 - the most problematic stages
 - beginning of the investigation – handing over documents, explaining the reason and purpose of the investigation, etc.,
 - other problematic phases
 - requesting access of inspectors to computers, mobile phones, etc,
 - finding evidence which, for example, according to the undertaking under investigation, does not fall within the scope of the investigation,
 - signing a report on the conduct of the investigation with which the undertaking's representative does not agree.

- **Inability to initiate an investigation due to e.g.:**
 - non-admission to business premises,
 - refusal or failure to communicate.

- **Desirable procedure of the inspectors of the Office:**
 - all specific circumstances must always be recorded in the official record,
 - in particular which of the employees/management were reached, how was the investigation conducted, the instructions given to the staff present and a warning of the possible sanction in the event of failure to allow the investigation to take place.

- **The undertaking does not prevent the investigation itself from being carried out, but complicates its proper conduct by, for example, refusing to do so:**
 - providing part of the business records,
 - to make available parts of its business premises.
- **Basic argument = the unrelatedness of the business records to the suspicion under investigation**
 - the need to always verify that the business records are indeed unrelated,
 - in case the undertaking's claim proves misleading:
 - examination of the records in question,
 - recording the undertaking's false claim.
- **In general: all the specific circumstances of the case must always be recorded in the official record!**

Further practical questions for investigations

- **Evidence of a competition infringement unrelated to the scope of the dawn raid at hand:**
 - a specific category of evidence
 - randomness of finding,
 - connection with other anticompetitive activity of the undertaking,
 - specific description of how it was found.
- **Written communication with external lawyer:**
 - protected – legal professional privilege (LPP)
 - inspectors shall proceed to review business records so as not to violate LPP protection,
 - it can be verified at random whether the LPP is actually a LPP.

Thank you for your attention!



E-mail: