



ST. MARTIN CONFERENCE 2011

TWENTY YEARS OF THE CZECH COMPETITION LAW

29 November – 1 December 2011

Holiday Inn, Brno

Czech Republic



OFFICE FOR THE PROTECTION OF COMPETITION

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OPENING REMARKS OF THE CHAIRMAN

Ladies and gentlemen,

I would like to welcome you at the fifth St. Martin Conference organised by the Office for the Protection of Competition^{*)}. This year is particularly special, because it is connected with the celebration of 20 years existence of this important institution. After twenty years of Office's activities, we dare to call the period 1991 – 2011 as an important era of development of the Czech competition law and policy.

Twenty-year anniversary is a significant milestone and great opportunity to assess development and current state of competition in national and international extent, the overview of the Office's trends and opportunities that are followed. We would like to share this reflection with you at St. Martin Conference 2011.

Conference program was drawn in order to reflect all activities of the Office. After opening speeches, the competition session will focus on more economic approach to restricted agreements, private enforcement and cartel agreements in public procurement, i.e. bid rigging. The topics of public procurement session are dedicated to the development of public procurement at the community level as well as at the national. Final session of the conference will focus on future of significant market power and its relation to competition law and on new trends in the field of state aid.

The current issue of information bulletin of the Office for the Protection of Competition that you are holding in your hands is a catalogue of St. Martin Conference 2011. It will guide you through the whole conference program and it will introduce our distinguished speakers. Moreover each of the specialized parts of the conference is introduced by an expert's contribution.

I believe that wide range of foreign and national experts and speakers will bring success to the conference and not only you will hear interesting contributions, but I hope you will also participate in rich and fruitful discussions.

I wish you inspiring experience for next days at St. Martin Conference 2011 in Brno.

Petr Rafaj

Chairman of the Office for
the Protection of Competition



^{*)} hereinafter also referred to as "ÚOHS" or "the Office"



Bishop's Courtyard (Miloslav Bouška)

OPENING SPEECHES

Dear guests,

This year is very difficult to write introductory word or greetings related to the Act on Public Procurement, as the discussion on the amendment is very lively these days. The change that was proposed by the Ministry for Regional Development, along with key experts under my leadership, was approved in May and in these weeks is discussed in Parliament of the Czech Republic. While writing this contribution, I am also preparing myself for a key meeting of Governmental Economic Committee. When you read it, it will be a bit clearer how the amendment would look like before the President's signature.

Our amendment to the Act on Public Procurement provides a number of changes, we can consider the decrease of limits for public procurement as a key change together with greater transparency and reduction of qualification requirements that create a contract "fit to one supplier".

The aim of the amendment proposed by the Ministry is THE BEST OFFER FOR THE BEST PRICE. And this shall be ensured by the main points of amendment:

- As broad competition as possible
- As many bids as possible
- The significant increase of published public information (on Internet)
- Prohibition of tools that were used to reduce the number of registered bids in public tenders

During the whole preparation of the amendment we tried to achieve maximum transparency. Be it at the stage when the Experts Group worked on the text, or when we provided the working results to a public discussion. After the incorporation of many suggestions, we sent out the amendment to standard interdepartmental comment procedure in the end of March. At the end we faced a bit unpleasant confirmation of the old true, that "the sheep will not build the fence themselves". Other similarities occurred during the parliamentary debate. But I strongly believe that we can bring the amendment to a successful and viable end.

Kamil Jankovský
Minister for Regional Development



Ladies and gentlemen, Dear friends,

I am glad to greet participants of the St. Martin Conference on 20 years of the Czech competition law. I consider the conference organized by the Office for the Protection of Competition to be a great opportunity to exchange opinions and experience with the competition law and policy among particular authorities, administrative bodies and expert public.

Together with twenty years of the competition law the Office for the Protection of Competition indeed celebrates its twentieth anniversary. It is a reason to congratulate. During the twenty years of its existence the Office became respected institution with remarkable reputation, which is upheld by the number of high-quality decisions. Also in this case, the situation outside the metropolis of the Czech Republic proved to be a success. It seems that it is highly desirable to have a seat of a organization like antimonopoly authority in Brno, capital of justice of the Czech Republic. As a lawyer and Moravian patriot I am naturally delighted and I am glad to confirm extensive expert communication between our regional office and the competition authority.

I wish all participants of the St. Martin Conference on 20 years of the Czech competition law a lot of new and valuable information concerning competition and pleasant three days staying in the most beautiful region of the Czech Republic, South Moravia.



Michal Hašek

Governor of the South-Moravian Region

Distinguished participants, Dear guests,

On behalf of the city of Brno, let me welcome you at the St. Martin Conference of the Office for the Protection of Competition. This year it represents meeting of experts, representatives of competition authorities and business from the Czech Republic and abroad celebrating 20 years of the Czech competition law.

I would like to remind you that the Office for the Protection of Competition is seated in Brno, not in Prague, the capital of the Czech Republic and centre of key institutions of state administration. It declares its independence in decision making. Not by chance, Brno is also a seat of the most important courts.

The activities of the Office for the Protection of Competition are particularly in these economically difficult times for the Czech Republic crucial. The Office is creating conditions for the development of competition and exactly competition between undertakings is an essential mechanism of a functioning market economy and increase the efficiency of the entire economy. And this is really crucial for our future.

20 years of the functioning of the competition authority has changed the Czech economy from the ground up. The transformation process was very complicated and enriched our economic dictionary of previously unknown words – from restitution through coupon privatization to tunnelling. All actions in the national economy not only in 90's, but also for example after the accession of the Czech Republic to the European Union, had to be reflected by the competition authority and new tasks and competences were increasing. Due to a need to adapt quickly on significant changes and situation and thanks to the international exchange of experience the Office for the Protection of Competition is today highly skilled and respected institution not only in the Czech Republic.

As for its 20th birthday, I only wish to deal successfully with all new challenges of globalized economy of the 21st century.



Roman Onderka
Mayor of the City of Brno

CONFERENCE AGENDA

Tuesday 29 November

- 13:00 - 15:00 Registration
- 15:00 – 17:00 **Opening Speeches**
Petr Rafaj, Chairman, ÚOHS, Czech Republic
Roman Onderka, Mayor of the City of Brno, Czech Republic
- William E. Kovacic**, Professor of Law, George Washington University, Washington D.C., USA
Kamil Jankovský, Minister for Regional Development, Czech Republic
Miřhal Hašek, Governor of the South Moravian Region, Czech Republic
Bedřich Danda, Deputy Minister, Ministry of Industry and Trade, Czech Republic
David Raus, Judge, Regional Court of Brno, Czech Republic
Josef Bejček, Professor at Faculty of Law, Masaryk University, Brno, Czech Republic
- 17:00 Glass of wine

Wednesday 30 November

- 9:00 – 10:30 moderator panelists **WHAT'S NEW IN COMPETITION LAW**
Michal Petr, Vice-chairman, ÚOHS, Czech Republic
Milan Brouček, Chief Economist, ÚOHS, Czech Republic
Tony Reeves, Clifford Chance, Brussels, Belgium
- 10:30 – 11:00 Coffee break
- 11:00 – 12:30 moderator panelists **MORE ECONOMIC APPROACH TO RESTRICTED AGREEMENTS**
Milan Brouček, Chief Economist, ÚOHS, Czech Republic
Svend Albaek, DG Competition, European Commission, Brussels, Belgium
Daniel Donath, Charles River Associates (CRA), Brussels, Belgium
Paula Ramada, Division Director, London Economics, London, Great Britain
Paul Tregear, Deputy Director of Economics, Office of Fair Trading (OFT), London, Great Britain
- 12:30 – 14:00 Lunch
- 14:00 – 15:30 moderator panelists **PRIVATE ENFORCEMENT**
Jacques Steenberghe, Director General, Belgian Competition Authority
David Anderson, Partner, Berwin Leighton Paisner LLP, Brussels, Belgium
Jan Balarin, Centre of Comparative Law, Faculty of Law, Charles University, Prague, Czech Republic
Filip Kubík, Policy and Strategy: Private Enforcement, DG Competition, European Commission, Brussels, Belgium
József Sárai, Head of the International Section, Hungarian Competition Authority
- 15:30 – 16:00 Coffee break
- 16:00 – 17:30 moderator panelists **BID RIGGING – CARTELS IN PUBLIC PROCUREMENT**
Theodor Thanner, Director General, Federal Competition Authority, Austria
David McFadden, Legal Advisor, Irish Competition Authority
Katharina Krauss, Head of Unit for Combating Cartels, German Competition Authority
Marc Reysen, O'Melveny & Myers LLP, Brussels, Belgium
Marta Skrobisz, Head of Unit in the Department of International Relations and Communication, Polish Competition Authority
Hanna Witt, Deputy Head, Competition Law Department, Swedish Competition Authority
- 19:30 Conference Dinner (Wannieck Gallery)

Thursday 1 December

9:00 – 10:30	moderator panelists	<p>PUBLIC PROCUREMENT ACT AND ITS FUTURE AMENDMENTS</p> <p>Pavel Herman, Public Procurement Advisor to the Chairman, ÚOHS, Czech Republic Eva Kubišová, Vice-chair, ÚOHS, Czech Republic Jan Sixta, Deputy Minister, Ministry for Regional Development, Czech Republic Pavel Štorkán, Chairman of the Exchange Chamber, Czech Moravian Commodity Exchange Kladno, Czech Republic</p>
10:30 – 11:00		Coffee break
11:00 – 12:30	moderator panelists	<p>DEVELOPMENT AND DIRECTION OF PUBLIC PROCUREMENT AT COMMUNITY LEVEL</p> <p>Eva Kubišová, Vice-chair, ÚOHS, Czech Republic Jaroslav Kračún, Public Procurement Legislation Expert of the DG for Internal Market and Services, European Commission, Brussels, Belgium David Petrlik, Assistant to Judge, European Court of Justice, Luxembourg</p>
12:30 – 13:30		Lunch
13:30 – 15:00	moderator panelists	<p>SIGNIFICANT MARKET POWER – FUTURE OUTLOOK IN RELATION TO COMPETITION LAW</p> <p>Hynek Brom, First Vice-chairman, ÚOHS, Czech Republic Radan Kubr, Attorneys at Law, PRK Partners s. r. o., Prague, Czech Republic Luděk Svoboda, Director, Department of Significant Market Power, ÚOHS, Czech Republic Miroslav Toman, President, Federation of the Food and Drink Industries of the Czech Republic</p>
15:00 – 15:30		Coffee break
15:30 – 17:00	moderator panelists	<p>STATE AID – CURRENT TRENDS AND VIEWS</p> <p>Hynek Brom, First Vice-chairman, ÚOHS, Czech Republic Milan Bumbálek, Director, State Aid Department, ÚOHS, Czech Republic Ondřej Dostal, Permanent Representation of the Czech Republic to the EU, Brussels, Belgium Kristina Haverkamp, Head of Unit European State Aid Control Policy, Federal Ministry for Economics and Technology, Germany Wouter Pieké, Head of Unit DG COMP C.4 - State Aid, DG Competition, European Commission, Brussels, Belgium</p>
17:00		CLOSING REMARKS



Svobody Square (Marie Schmerková)

OPENING CEREMONY OF THE ST. MARTIN CONFERENCE 2011

INTRODUCTION OF SPEAKERS



Petr Rafaj
*Chairman, ÚOHS
Czech Republic*

Mr. Rafaj graduated from the Faculty of Mining and Geology, VŠB – Technical University of Ostrava. After several years in private sector he became the Deputy Mayor of Frýdek-Místek city. From 2002 to 2009 he was a Member of the Chamber of Deputies in the Parliament of the Czech Republic. In the Parliament Mr. Rafaj worked, among others, in the Budget Committee and also introduced the Act dealing with the abuse of significant market power. Since 9 July 2009 Mr. Rafaj has been the Chairman of the Office for the Protection of Competition.



Kamil Jankovský
*Minister for Regional Development
Czech Republic*

Mr. Jankovský graduated in Economics from the Faculty of Civil Engineering at Czech Technical University in Prague. Prior to his appointment as a Minister for Regional Development in 2010 he worked as a Director, Partner and Chairman of the Board of Directors of the company Phar-service s. r. o. During his political career, he joined the ODA party in 1994, where he worked in an expert commission in the area of health care and in the business section. Since 2002 he has been a member of the European Democrats. In the 2002-2006 period he was a representative of the Prague 10 city council and a member of its state executive committee. Since 2009 he has become a member of the Věci veřejné (Public Affairs) party.



Bedřich Danda
*Deputy Minister
Ministry of Industry and Trade
Czech Republic*

Mr. Danda studied the College of Industry and then he completed postgraduate studies focused on radioisotope liquidation and a pedagogical course specialised on apprentice training school management. Mr. Danda began his career in road transport, he worked as technical expert in the Biological Institute of the Czechoslovak Academy of Science (CSAS), he continued as dosimeter-technician and later as supervising expert of the isotope department in the Institute of Experimental Botany CSAS. Mr. Danda started his business activity in 1990 as owner of car repairing and car transport companies. Mr. Danda is leading representative of citizens associations, namely the Prague Club of Historical Vehicles, the Motor-Carriers' Association of Bohemia and Moravia and the Association of Entrepreneurs and Traders of the Czech Republic.



Michal Hašek
*Governor of the South
Moravian Region
Czech Republic*

Michal Hašek graduated in Law at Masaryk University in Brno. He started his political career in Czech Social Democratic Party (ČSSD) by being elected Deputy Mayor and later on Mayor of Drásov, a village in the Tišnov region where he comes from. From 2002 he was a deputy in the Chamber of Deputies of the Parliament of the Czech Republic and chairman of the ČSSD Deputies' Club. He also held the functions of Vice-chairman of the agricultural committee, the security committee and also Vice-chairman of the permanent media committee or the church property issues committee. Since 2008 Michal Hašek has been a Governor of the South Moravian Region, he is also Chairman of the Association of Regions of the Czech Republic, a deputy in the Chamber of Deputies of the Parliament of the Czech Republic and a Statutory Vice-chairman of the ČSSD.



Roman Onderka
*Mayor of City of Brno
 Czech Republic*

Graduate from the Faculty of Business and Management at Brno University of Technology and at the Karel Engliš College in Brno in the area of economics and commercial law. Currently, he is the Mayor of the Statutory City of Brno, Vice-chairman of the Brno Municipal Committee of the Czech Social Democratic Party, member of the Government Council for Sustainable Development and deputy member of the Governance Committee to the Congress of Local and Regional Municipalities in Strasbourg.



William E. Kovacic
*Professor of Law
 George Washington University
 Washington D.C., USA*

William Evan Kovacic served as a Commissioner of the Federal Trade Commission from 2006 to 2011. He was the FTC's General Counsel from 2001 through the end of 2004. Mr. Kovacic earlier worked at the Commission from 1979 to 1983, first with the Bureau of Competition's Planning Office and later as an attorney advisor to former Commissioner George W. Douglas. Prior to his appointment as Commissioner, Mr. Kovacic has taught antitrust law at George Washington University Law School and George Mason University. In January 2009, Mr. Kovacic was appointed a Vice-chairman for outreach of the International Competition Network. Since 1992, Mr. Kovacic has served as an adviser on antitrust and consumer protection issues to the governments of Armenia, Benin, Egypt, El Salvador, Georgia, Guyana, Indonesia, Kazakhstan, Mongolia, Morocco, Nepal, Panama, Russia, Ukraine, Vietnam, and Zimbabwe.



David Raus
*Judge
 Regional Court of Brno
 Czech Republic*

Graduate from the Faculty of Law at Masaryk University in Brno where he currently teaches commercial law and is a member of subject commission for commercial law. He worked as an articulated clerk from 1997 to 1999. From 1999 to 2003 he worked at the Office for the Protection of Competition as a Director of the legal department and Chairman of advisory body of the Office's Chairman in antitrust matters. Later on he became an assistant of Supreme Administrative Court judge. Since 2006, he has been working as a judge of Regional Court in Brno, focusing on protection of competition, public procurement and regulation in energy sector.



Josef Bejček
*Professor at Faculty of Law
 Masaryk University, Brno
 Czech Republic*

Former Dean of the Faculty of Law of Masaryk University in Brno (1995-2001). He currently chairs the Commercial Law Department of the same faculty. He has been called upon as an expert witness in various important international arbitrations. He has been a member of the Appellate committee of the Czech Office for the Protection of Competition since the very beginning of its existence and he has also taken part in the work of many technical teams that contributed to the drafting of certain new legislation (the Civil Code, the Act on the Protection of Competitions, and the Public Procurement Act). He works as an arbitrator of the Arbitration Court attached to the Czech Chamber of Commerce and the Czech Agrarian Chamber. He has lectured around the world, including Vienna, Budapest, Munich, Berlin, Poznan, Regensburg, Salzburg, New York, Atlanta, Washington and many others. Currently he is a president of an editorial board of specialized journal for competition law "Antitrust".

WHAT'S NEW IN COMPETITION LAW

CZECH COMPETITION POLICY 2011

I. Decision Making Practice of the Office

Number of new decisions in merits in this period was not particularly high. This circumstance is influenced, however, by the fact that the number of employees of the Competition Section had significantly decreased (currently it is only 32 persons) and therefore it was necessary to consistently focus on the highest priorities.

As for the investigation of cartel, investigation of price cartel agreement of *detergents* and *television tubes* was finally closed, as well as the first purely Czech *bid rigging* case concerning *property management of city of Litoměřice*; the Office is currently conducting other two *ex-officio* proceedings on bid rigging. The Office also decided on price agreement of association of undertakings *Czech Association of Waste Management*. Two older cases were also concluded, decision on cartel of *poultry breeders* was issued and proceeding concerning *building societies* was terminated.

It is also important for the cartel enforcement that the Office received its first leniency application concerning purely Czech case (i.e. not only as a supplement to Commission application, as it was in past), and wide application of settlement procedure (see below) – this was applied in cases of *detergents and Association of Waste Management*.

As for the abuse of dominant position cases, the Office has finished its first case on predatory pricing *STUDENT AGENCY* and initiated an investigation on margin squeeze. On the other hand, the efforts on prioritization abolished the necessity to review some older cases, where it was decided to reopen the proceeding; the Office needs to decide again on possible abuse of dominant position in cases *ArcelorMittal* and *Czech Coal*.

And finally regarding the concentration of undertakings, the number of proceedings has stabilized at approximately 50 per year, many cases were solved under simplified procedure. Five concentrations were decided in the second phase; of which *Agrofert/Loredana*, *Agrofert/Euro Bakeries* and *ČEZ/Energotrans* are still under assessment. As for the concluded cases the concentration of *UPC/Sloane Park* was cleared without conditions. Creation of the *Czech Aeroholding* was subjected to imposition of behavioural and structural commitments and represents of the Office's more economic approach to assessed concentrations.

II. Legislation

By the end of October 2011 a proposal of the amendment to the Competition Act was introduced to the Parliament. The amendment should deal with issues of leniency and settlement procedure; both should be set in the Act and interconnected with other legal regulations. Leniency documents issues should be solved explicitly, being excluded from the file before the statement of objection is issued and subsequently protected against possibility to be reproduced, as well as solution of non-punishment of natural persons working in companies, which met the leniency application criteria from the view of the criminal law. After the approval, the Act would be amended with new notice on leniency and settlement procedure.

With regards to the prioritization, draft of *notice on alternative solution of certain competition issues* was completed and disclosed for public discussion. Attempting to eliminate the competition problems before initiation of proceedings and application of commitments. Elimination of a conduct distorting competition before the administrative proceeding is initiated should be in the future possibly applied in much wider scope of less serious infringements, including vertical agreements on prices. The commitments procedure should enable to boost the potential to significantly change the behaviour of undertakings.

III. Judicial Review

As regards the judicial review, the year 2011 did not represent any significant breakthroughs, unlike previous years. The Office is expecting court's opinion in a number of issues, which are not clarified by case law, or set at all. These are mainly procedural issues, as limited access to file, the principle of non self-incrimination related to existing documents or implementation of certain evidence, but also court approach to institutes as leniency and more economic approach.

The Office succeeded at the Regional court in a number of key cases, namely *cartel of bakeries* and *České dráhy* (Czech Railways) should be mentioned. For the future the court conclusion in case of *Telefónica O2* will be also important, stating that too extensive investigation prior to initiation of the administrative proceeding may constitute unlawful intervention.

IV. Look into the Future

Horizontal cartels remain the Office's priority, particularly *bid rigging*. The Office will continue in opening ex officio proceedings and we expect rising number of national leniency cases. In abuse of dominant position cases the Office's aim remains to draft decisions based on solid economic analyses, despite its consistent application is very demanding on human resources. Extensive economic analyses will be needed in area of merger control, where we expect increase of substantial cases.

The amendment to the Act on the Protection of Competition should stabilize the legal environment that was a bit unstable in the past; having on mind that almost every year a substantial change in Act was introduced. Along with the amendment the Office is planning to publish number of interpreting notices focused mainly on procedural questions.

As for the courts, their decision-making can hardly be planned, but we expect decision in number of important cases, that could significantly influence the Office's activities in the next year.



Michal Petr
*Vice-chairman, Office for
 the Protection of Competition*

INTRODUCTION OF SPEAKERS



Michal Petr
*Vice-chairman
Office for the Protection
of Competition*

Michal Petr graduated from the Faculty of Law, Palackého University, Olomouc and Masaryk University, Brno. He has served on the Office for the Protection of Competition since 2003. He has been acting as a Director of the Legal Department for many years, afterwards, as a Director of the Section of Economics, Legislation and International Affairs and as a Chair of Appellate Committee for Competition. In 2010 he was appointed to the post of Vice-chairman, who leads the Section of Competition. He educates competition and European law at Masaryk University and at Palackého University. He is the author of the large number of Czech and foreign publications in the field of competition and due process.



Milan Brouček
*Chief Economist
Office for the Protection
of Competition*

Milan Brouček graduated from the Faculty of Economics and Military Management at the Military University of the Ground Forces in Vyškov (present University of Defence in Brno). In the period from 2000 to 2004 he also acted as an educator and an analyst. In 2004 he started working for the Office for the Protection of Competition as a Director of Economic Department. He has been acting as a Chief Economist with the Office for the Protection of Competition since 2009.



Tony Reeves
*Clifford Chance
Brussels, Belgium*

Tony Reeves is the Managing Partner of the Brussels office of Clifford Chance. He advises major corporations on EU and multi-jurisdictional competition law issues and specializes in merger notifications, abuse of market power, distribution and supply practices and compliance across a range of sectors. Tony Reeves has been based in the Brussels office since 1995 and is a member of the firm's Global Cartel and Merger Taskforces. He speaks regularly at conferences such as IBC, IBA, GCR, Fordham, Chatham House and industry events. Tony Reeves is recognized as a leading competition lawyer by Chambers, Legal 500, GCR, Who's Who Legal, European Legal Experts and The Legal Media Group's Guide to the World's Leading Competition and Antitrust Lawyers. He has also been a non-governmental advisor to the International Competition Network (ICN).

MORE ECONOMIC APPROACH TO RESTRICTED AGREEMENTS

MORE ECONOMIC APPROACH AND RESTRICTED AGREEMENTS¹

The trend of connecting legal and economic analysis together plays more important role in competition law across jurisdictions. In European competition policy was particularly seen significant development mostly in last decade. (More) economic approach in competition cases is now evident in all key areas including prohibited agreements. This can be illustrated, among others, on the development of so-called soft law of the European Commission (hereinafter "Commission"). Economic approach is representing a crucial framework for way of thinking and analyse in Commission's guidelines on definition of relevant market (1998), assessment of horizontal mergers (2004), non-horizontal mergers (2008), exclusionary abuses of dominant position (2009), vertical restraints (2010) and agreements on horizontal cooperation (2011). Also the Office for the Protection of Competition (hereinafter "the Office") reflected this development three years ago.

The basic principle of more economic approach is to prefer the evaluation of the impact of conduct (effect-based approach) prior to evaluation of the form of conduct (form-based approach). Its main advantage is particularly more effective differentiation between anticompetitive and pro-competitive conduct. For success of more economic approach it is necessary to include it effectively into legal framework, respect rules of due process and do not reduce predictability for undertakings. Undoubtedly it is the right way for competition law and policy in Europe and in the world. And even in cases of prohibited agreements, to which is dedicated one session of the conference.

Definition of relevant market is an issue across the competition law and is an essential part of almost every competition analysis. The role of economic analysis is indispensable when defining relevant market. The correct definition of relevant market is necessary part for correct assessment of (actual or likely) impact of the undertaking's conduct on market and consumers. Such areas undoubtedly include assessment of impact of horizontal agreements and vertical restrictions that are not hard core cartels, respectively hard core restrictions.

But even in hard core cartels and hard core restriction, there is a space for economic approach and economic analysis. For horizontal agreements can be economic analyses used for the detection of prohibited agreements in the market and to quantify harm caused to consumers (determination of non-cartel price). Economic approach can have positive impact on formulating of rules on hard core restriction in vertical

agreements. On the basis of recommendation of economic theory, the economists are reluctant to classify impacts of agreements whether it is price or non-price restriction or to define price restriction Resale Price Maintenance (RPM) as hard core restriction ipso jure. These recommendations are often accompanied by empirical studies.

With the application of more economic approach is linked the increasing emphasis on clear formulation of theory of harm by the Office, which is consequently verified. The theory of harm should express particular competition concern and be conform in number of economic theories and approachable empiric evidence (studies). Just this way of thinking represents important qualitative change from the previous formalistic approach.

In case of hard core cartels is theory of harm obvious (for example coordinated increase of prices or market sharing). In other types of agreements (for example information exchange) is situation more difficult, because these can have number of positive effects. The similar applies to vertical agreements that could have benefits to competition and consumers, and also in some cases of current hard core restrictions (for example RPM and sales and services promotion). Therefore is increasing the need for formulating credible theory of harm that can be confronted with any relevant positive benefits. The formal approach is unable to fulfil this need effectively and may lead to the creation of false arguments rejecting any possible positive benefits.

I believe that the session on more economic approach to prohibited agreements will be full of interesting presentations and many of mentioned topics will be discussed.



Milan Brouček
*Chief Economist, Office for
 the Protection of Competition*

¹ The contribution results from author's article prepared for yearbook of magazine Antitrust. See also M. Brouček: More economic approach and the Office for the Protection of Competition, Yearbook of Antitrust magazine, 2011.

INTRODUCTION OF SPEAKERS



Milan Brouček
*Chief Economist
Office for the Protection
of Competition*

Milan Brouček graduated from the Faculty of Economics and Military Management at the Military University of the Ground Forces in Vyškov (present University of Defence in Brno). In the period from 2000 to 2004 he also acted as an educator and an analyst. In 2004 he started working for the Office for the Protection of Competition as a Director of Economic Department. He has been acting as a Chief Economist with the Office for the Protection of Competition since 2009.



Daniel Donath
*Charles River Associates (CRA)
Brussels, Belgium*

Daniel Donath acts as a Consultant Senior for the company called Charles River Associates. He has been working at the Directorate General for the Competition, European Commission, where he has handled, among others, many merger cases and applied Article 101 for two years. Daniel Donath specializes himself in the application of empirical analyses and econometric techniques in the context of cases investigations of the competition distortion.



Paul Tregear
*Deputy Director of Economics
Office of Fair Trading (OFT)
London, Great Britain*

Paul Tregear studied the economics at the universities in London and Warwick. Since 1996 he has been acting in OFT, where he has participated in many studies and analyses needed for the evaluation of mergers, for the investigation in bank sector, pharmaceutical industry and many others. As an economic advisor of the OFT he has been leading the analyses for the vertical agreements cases in advertisements of outdoor equipment retailers and for the case of dominance abuse called Flybe from 2009 till 2010. Since 2010 he has been leading the Department of Economic Analyses and provides the support to the OFT investigation teams.



Svend Albæk
*DG Competition
European Commission
Brussels, Belgium*

Svend Albæk is a Senior Economist in the Chief Economist Team in the European Commission's Competition Directorate-General. He joined the Commission in 1998, working first for two years in the unit in the Industry Directorate-General dealing with industrial aspects of competition policy before moving to the Merger Task Force in the Competition DG in 2000. He was a main author of the Commission's horizontal merger guidelines. He then moved to the Antitrust Policy and Strategic Support Unit where he worked on the Commission's Article 82 Review until joining the CET in 2007. From 1992 to 1997 Svend Albæk was Associate Professor of economics at the University of Copenhagen, where he taught industrial economics.



Paula Ramada
*Division Director
London Economics
London, Great Britain*

Dr. Paula Ramada is a Partner in London Economics' London office and leads the firm's competition work. Paula has particular expertise in the area of cartel damages litigation and analysis of market power. During the last two years, Paula has worked on a number of different cartel damages assessment cases, supporting private clients in preparation for litigation or in negotiation of damages settlement. These projects utilised a wide range of economic techniques, ranging from construction of price and cost indices to econometric analysis of price determinants. At the UK Competition Commission where she was the lead economist in two merger investigations and in regulatory appeal to the Competition Commission under the rules of the gas market Uniform Network Code. Paula has also recently completed a wide ranging study for EC DG Trade and Industry on the screening and analysis of service sectors with weak competition. Paula was also the project manager of the study for EC DG Competition of recent changes to the automotive sector vertical restraints block exemption. Another significant project for DG Competition on which she participated was the econometric analysis of price effects in the GE/Instrumentarium merger. Prior to joining London Economics Paula was a Visiting Professor at London Business School and previously was an Assistant Professor of Economics at Northwestern University in the United States. Paula has a PhD in economics from the Massachusetts Institute of Technology.

PRIVATE ENFORCEMENT IN COMPETITION LAW

WHY NOT TO BE AFRAID OF COMPETITION PRIVATE ACTIONS IN THE CZECH REPUBLIC

Entrepreneurs in the Czech Republic are generally aware that against violation of competition rules could be seeking protection through the incentive to the Office for the Protection of Competition. Less known to the Czech business community is that the action to courts can be filled in cases of private enforcement, for example through actions for damages. The entities concerned can claim compensation for damage suffered, which was caused by anticompetitive behavior of undertakings, because such compensation cannot be claimed at the Office for the Protection of Competition and the Office is not – unlike the pricing authorities – obliged to stipulate the amount of damage. Even if we know from our experience, that the Czech courts are ready to decide on this issues (and are doing so for several years), anyhow in the Czech business environment was established a myth that the private enforcement does not exist in the Czech Republic or is difficult to enforce. But it is not true by any means. Although the quality of decision-making is different, as well as in other legal matters, despite it the Czech Courts are able to cope with claims arising from abusing of dominant positions, or cartel agreements, or violation of the Act on the Public procurement or unapproved state aid. In this context, the Courts benefits from the specialization that is demonstrated by the quality of decisions of the Competition Senate of Supreme Court in Prague.

Regarding the proceedings at the Office for the Protection of Competition itself, the interests of entities effected by the anticompetitive behavior stands apart, because the purpose of this proceeding is to protect competition itself. The Office for the Protection of Competition within the proceedings conducted is carrying out its public function that was entrusted by the law, and cannot – even if it wants – “to fix” private damages caused to other undertakings or consumers.

Those who suffered damage have to claim their rights by the action at general or arbitration courts. At these courts the undertakings or consumers can defend their rights affected by breaching of the competition law and seek for appropriate compensation. Undertakings breaching the competition rules can be *de facto* “secondarily punished” for their illegal conduct by civil courts, if they are ordered to pay a damage to entities concerned and to withdraw the illegally gained competitive advantage, which may have significant deterrent and preventive effect.

It is obvious that in case of application of private claims, so called *follow on* actions, i.e. in cases when a final decision of the Office for the Protection of Competition on breaching of competition rules was issued, and by it is the civil court bounded in question of administrative or breaching of legal duty, the persons suffered damages can easily prove their claims.

On the other hand, in case of so called *stand-alone* actions, complainant has to prove justice of his claim at court by himself, without relying on findings and conclusions of the Office for the Protection of Competition. According to my opinion, the Czech judge or arbiter can also cope with such case.

When making a claim in private enforcement for breaching of competition rules, it is possible to rely on national civil courts as well as on decision practice of EU courts. For example in decision C-453/99 the European Court of Justice stated that “*the full effectiveness of Article 85 of the Treaty and particularly its effect of prohibition laid down in paragraph 1 would be impeached, if not everyone could claim a compensation for damages caused by agreement or conduct that are eligible to restrict or infringe competition*”. Similarly decided European Court of Justice in case C-295/04 to C-298/04 Manfredi, when mentioned, it results from the principle of effectiveness that the national law must provide effective measures to remedy the damage suffered to person by breached of competition rules.

Despite the rising voices calling for changes in the private enforcement of competition law, I believe that the successful claims for breaching of competition rules in the Czech Republic does not required to change Czech legislation or adopt new regulation at EU level. On the contrary, I consider the current legal framework in the Commercial Code and Civil Procedure Act for such claims (especially compensation claims) sufficient.

It cannot be said, that there is no space for improvement in the Czech Republic. Of course that to both injured parties demanding compensation and courts as well could help generally accepted and recommended methodology for calculation of damages in competition (especially in cartel agreements). Inspiration can be found for example in manual from year 2009 prepared by for the European Commission - *Quantifying anti-trust damages, Towards non-binding guidance for courts*.

In this context also the Office for the Protection of competition could play its role as an advisory body (the same role has Czech National Bank in area of securities). It is however resisting in its involvement in court proceedings (e.g. in form of intervention on plaintiff side, relying on the decision of the Office for the Protection of Competition) so far.

Despite some insufficiencies, the overall level of competition protection can be assessed positively and it is good that the Czech competitors do not put up with breaching of competition rules by other undertakings.



Pavel Dejl

*Lawyer and Partner with
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INTRODUCTION OF SPEAKERS



Jacques Steenberghe

*Director General
Directorate-General
for Competition
Belgium*

Prof. Dr. Jacques Steenberghe is since 2007 Director General in the Belgian Competition Authority. He teaches competition law at the KU Leuven since 1979. Prior to joining the competition authority, he was partner in the Brussels office of Allen & Overy, and he has been legal secretary to the President of the Court of Justice under the presidency of Prof. J. Mertens de Wilmars. He is also Editor in Chief of the Dutch-Belgian European law review SEW, Chairman of the Board of the Stichting van het Koninklijk Conservatorium of Brussels (The Foundation of the Royal Academy for Music of Brussels), and honorary member of the Bar of Brussels (Nederlandse Orde van Advocaten bij de Balie te Brussel). He is a former member of the Brussels and Flemish Bar Councils. He lectured or gave conferences and served as a member of nomination committees or PhD examination committees in institutes and universities in Austria, Belgium, China, the Czech Republic, France, Germany, Hungary, Italy, Japan, Luxembourg, the Netherlands, Poland, Portugal, Spain, Turkey, the United Kingdom and the United States. He publishes regularly on EU and competition law. He obtained a PhD at the KU Leuven with prof. dr. W. van Gerven on legal remedies and ailing industries (1978). He holds a masters degree in law from the KU Leuven (1972), and bachelor degrees or equivalent certificates in law, philosophy and economics from the University of Antwerp (UFSIA)(1969).



Filip Kubík

*Policy and Strategy:
Private Enforcement
DG Competition
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Filip Kubík graduated from the Charles University in Prague and the University in Passau. He completed post graduate studies of European law at the university in Hamburg (LL. M. Eur.) and studied international relations at the university in Amsterdam as well. In the period from 2005 till 2008 he worked in the Antitrust Cases Department in the sector of telecommunications and IT. Before he left for Brussels, he had been acting as an advocate in Prague headquarters of legal office Kocián Šolc Balaščík, where he had focused on the competition law, telecommunication law, litigation and arbitrations. These days, he acts at the Directorate General for Competition as a member of the team responsible for the policy of competition private enforcement.



David Anderson

*Berwin Leighton Paisner LLP
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David Anderson is a Partner in BLP's EU and Competition Law team and heads the firm's Brussels office. He has practiced in London and Brussels in the international competition field for over 15 years. His practice focuses on EU and international antitrust aspects of mergers, acquisitions, joint ventures, cartels and abuses of dominant positions. He also advises on civil damages actions arising out of antitrust infringements, EU regulatory law and EU public affairs and communications strategies. He has advised the European Commission, the United Nations Conference on Trade and Development (UNCTAD).



Jan Balarin

*Centre of Comparative Law
Faculty of Law, Charles University
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Jan Balarin completed his Master's and doctoral studies at the Faculty of Law, Charles University, Prague. He acts as an advocate and as a co-worker of the Centre of Comparative Law at the Faculty of Law, Charles University in Prague. In his publishing activity he focuses on civil procedural law. He is actively engaged in procedural collective rights enforcement. In 2010 he completed internship focused on this topic at Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg. In 2011 he published monograph Collective Protection of Rights in Civil Proceedings.



József Sárai

*Head of the International Section
Hungarian Competition Authority*

József Sárai is an economist but studied legal sciences as well. He has been working at the GVH since its establishment on 1 January 1991 and he took over the management of the international relations of the GVH in May 1992. His main responsibilities cover cooperation both with international organizations and, on a formalized or informal bilateral basis, with other competition authorities. Mr. Sárai is the Hungarian coordinator in the International Competition Network, where he represents the GVH – as Co-Chair – in the Cartel Working Group. Being one of the Co-Chairs of the "Cooperation Issues and Due Process Working Group" of the ECN, he actively participates in the work of the European Competition Network.

BID RIGGING – CARTELS IN PUBLIC PROCUREMENT

AS FAR AS THERE EXISTS SOCIAL SUPPLY AND DEMAND FOR MANIPULATION OF BIDS AND FOR BIDS TO MANIPULATE

It is said that what belongs to everyone belongs to anybody. From my point of view this statement doesn't go together well with another: what is stolen from everyone thus wouldn't be stolen from anybody; indeed I presume that on the contrary: it is stolen from each of us. Then, what belongs to everyone belongs to each individual and not to anybody. None of us should stay careless while something is being stolen.

Another proverb states that if there are occasional thieves, there are lack-of-occasions law-abiding people as well. This statement is much fairer and less flimsy than the first bogus wisdom.

Lot of decent people remain like that because not because of their nature, but because their surrounding environ doesn't allow them to behave improperly. The society is healthy if the wider environ is interiorized into the conscience of the people!

Corruption of contracting authorities together with bid rigging on the side of tenderers is deadly combination, of which toxicity is uneasy to find equal, perhaps corruption of competition authority or in justice might be worse. If there are thieves of public funds on both sides, i.e. tenderers and contracting authorities, a plot of interests hardly to be revealed is created, which steals maybe tens of per cent from public funds.

We all well know what bid rigging is, describing on and on its forms, exposures and typology given by the doctrine, competition authorities, OECD and others. We all know manuals and methodologies on symptoms of manipulation of bids and tools how to combat them.

Similarly to criminology handbooks, which can serve as a learning material for criminals, handbooks on identification of bid rigging can be well used as a handbook for manipulators, warning methodically and didactically what to be careful of and how to avoid suspicion. According to these manuals even public servants can specifically "cultivate" their co-manipulators with public tenders in a way to avoid suspicion on both of them.

Manipulation of bids is similar to corruption. Everybody knows that it exists and that it is not exceptional, if even not widespread. Some would say that society itself stands on

corruption, or at least some parts of social life or some industry areas. Indeed, not one of us conducts it and everyone condemns it (politically correctly) verbally outwards. However, many people and companies take advantage of it and calculate it as a common socio-economical incentive.

In this area latency is great, I suppose that among greatly latent hard-core cartels it is the very manipulation with bids the most hidden case. General Cliché of a tip of iceberg (which allegedly reveals some ten per cent of its total mass) would be too optimistic in this case. Cases of detected and punished bid rigging can be count using one hand both at the European level and national competition authorities' level. Explanation, that it is a simple fact that bid rigging is a rare phenomenon, is not really offered and hardly anybody would (including those attempting to give such explanation) believe it.

Coalition of interests of all parties involved is incredibly tight, burden of proof (among others due to possibility to explain the behaviour of involved parties by circumstances other than manipulation of bids) is extremely difficult, on the contrary possibility to detect is extremely low. Aspect ratio between possibility to be revealed and level of predicted advantageous gains for parties to the manipulation is eminently favourable and in combination (I am afraid not unexceptional) of bid rigging and corruption on the side of contracting authorities, directly "a dream criminal consociation" is concerned.

I do not believe in preventive and deterrent effect of theatrical exemplarity of sanction in single case, which was revealed. Criminal associates can well calculate probability of disclosure and sanction and can make economically cold risk decision (other values' aspects do not make any difference, morale in this situation is a swear word or a subject of a mockery).

The decisive factor will be only consistent and constant work and change in the mood of frustrated but mainly resigned public, stress on destruction of interests' coalitions among tenderers and among tenderers and contracting authorities, on internal public and private mechanisms to narrow down the space for corruption and bid rigging development.

Wider application of leniency programmes (indemnity for cartel announcers) nowadays soles the shoes a bit to the arrogant self-confidence of gangs of thieves from our taxes. There are nothing else but common criminals, regardless their

fancy superior functions, luxurious limousines, spectacular offices, representative headquarters and white collars or even diner-jacket. Indeed, they can sometimes feel like Fortuna's orphans, being deprived from common legal "bonanza", which cannot be reached in their industries (typically in public constructions sector), while in other industries competitors get on much better (some of the Czech NCA's administrative files can reveal that margins of some commodities can be multiplied hundredfold).

An argument that their alleged theft of manipulation in public procurement is a mere child's play compared to the entirely "legal theft" of privileged goods distributors, limps a bit. Consumer simply doesn't have to buy the overcharged luxurious goods and usually there is a functionally equal cheaper substitute and it consumer's own decision whether to buy or not. Contracting authority usually needs the tender (if not, in worse case, created to fit-in to associate "godfathers") and competition, which would otherwise decrease the price, is excluded by the bid rigging. Moreover, the investment incentive is often controlled by a public servant, who doesn't hold his own purse and with some skills he can draw off some small "back-pass" – should the entrusted money be guarded less carefully (for the sake of unfair tenderer and his own) than in case it would be his own.

The law is a method of a social regulation according to deviations, which can handle the most serious antisocial phenomena in some per cents of cases. If the "incorrectness" is widespread (which is the case of bid rigging as we all suppose), the law itself fails to take care of it and it cannot be expected to, that would be recidivism of law romanticism. In these situations the criminals play with law sort of "soft version" of Russian roulette with an indispensable difference in rules, although there is only one bullet in the revolver, there is not only one revolver in play, there are thousands.

Not only state and external threat of criminalization and economic sanctions have its unquestionable importance, it is also a cultivation of internal code of conduct and its enforcement in interpersonal relations. Various ethical codes and compliance programmes can, despite frequent sneers, have sharper and more effective teeth than "paper tigers" of criminal sanctions.

Everyone who disagrees with such practices must take in permanent and never-ending efforts to create and maintain of social intolerance and unacceptability of manipulation with public tenders, with all means and methods at his disposal and in a scope of powers that he keeps be it minimal or not.

Let us hope that we are more numerous, with raising influence, greater that of those on the other side. I am afraid that this is the only way to reach the point where manipulation with tenders become mere excess in a range of which law can effectively correct it.



Josef Bejček
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INTRODUCTION OF SPEAKERS



Theodor Thanner
Director General
Austrian Competition Authority

After finishing his postgradual studies at the University of Salzburg, Theodor Thanner served in State Government of Salzburg. Afterwards he was a Head of Legal Section of State Government, worked at the Federal Chancellery and acted as an advisor to Federal Minister of Defense. Dr. Thanner is an editor of magazine Austrian Journal for Competition Law, member of Public Procurement Office, member of Board for Data Protection Affairs, member of the Supreme Court for Patent and Trademark Law. He is an author of numerous publications concerning constitutional, antitrust, electoral and administrative law and a lecturer at the University of Vienna.



Marc Reysen
Partner
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Dr. Marc Reysen is a partner in O'Melveny's Brussels office and a member of the EU Antitrust and Competition Practice. Prior to joining O'Melveny in April 2011, Marc was a partner at Howrey LLP in Brussels. Marc's practice focuses on representing clients in complex merger control proceedings before the European Commission and the German Bundeskartellamt as well as in providing strategic advice in relation to merger control procedures in other countries. Marc has provided strategic advice in cases under Article 101 EC, particularly regarding R&D cooperation, complex licensing arrangements and production joint ventures. He has also defended clients against allegations of abusive behaviour, advised in relation to structuring distribution systems, and has recently represented clients in a number of cartel investigations. His experience spans a range of industries, in particular fast moving consumer goods, pharmaceutical products, financial services and industrial products. In the financial services sector, Marc has worked on major merger control matters, providing behavioral advice, compliance training and guidance in relation to the European Commission's sectoral enquiry. Marc is recognized by a number of publications, including Who's Who Legal, European Legal Experts, and Juve Handbuch Wirtschaftskanzleien, which calls Marc "experienced and competent", in its 2010/2011 edition. He is active in the International Bar Association (IBA) and currently serves as Officer and Working Group Coordinator of its Antitrust Committee and Co-Chair of its working group on Developments in Chinese Competition Law. Marc has considerable experience in Asia and most recently was Co-chair of a panel on the enforcement of abuse of dominance rules in Asia at the joint IBA and Korean Bar Association Competition Law Conference in Seoul, South Korea.



David McFadden
Legal Advisor
Director of the Monopolies Division,
Irish Competition Authority

Dr. David McFadden was appointed Member of the Competition Authority in July 2011 and is Director of the Monopolies Division. David is a solicitor and has been legal advisor to the Irish Competition Authority since July 2000. Having qualified and practiced as a solicitor in private practice, he joined the Criminal Division of the Chief State Solicitor's Office in 1997 where he worked for two years prosecuting cases on behalf of the Director of Public Prosecutions. He then spent a further year working as a Revenue Solicitor specialising in revenue enforcement. After joining the Competition Authority from Revenue in July 2000 David led the Heating Oil investigation which is the first criminal cartel prosecuted successfully before a judge and jury in Ireland or Europe. David is the author of the Irish Cartel Immunity Programme and co-authored the European Competition Authorities (ECA) Leniency Principles. David holds a Ph.D. in law from Trinity College Dublin. His Thesis was entitled, 'Damages Actions in Competition Law in Ireland: Why and How?' He also holds a 1st Class Masters Degree in law (LL.M.) from Trinity and a Masters Degree in European History from University College Dublin. David has written a number of articles on competition law and enforcement.

Katharina Krauss
Director of the Special Unit for Combating Cartels
German Competition Authority

Dr. Katharina Krauss is a Head of the "Special Unit for Combating Cartels" (Legal Department) in the Bundeskartellamt which advises the Decision Divisions in fines proceedings and notably in the preparation, conduct and result analysis of search operations and in the application of the German leniency notice. She has more than 10 years of practical experience as a case handler and case manager in cartel and merger cases of the Bundeskartellamt. Before, she worked for the Max-Planck-Institute for Foreign and International Criminal Law, Freiburg. She has written and lectured on criminal procedural law, cartel enforcement and antitrust law.



Marta Skrobisz

*Head of Unit in the International Relations and Communication Department
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She has been working in the Office of Competition and Consumer Protection since 2007. She is the Head of Unit in the International Relations and Communication Department, where she is responsible for the Office's international affairs in the scope of competition and consumer protection as well as advocacy initiatives. Previously, she was gaining experience in commercial and civil law in law firms and courts. At present she is a legal advisor trainee at Warsaw Chamber of Legal Advisors, which is a practical and theoretical preparation to Bar exam.



Hanna Witt

*Deputy Head
Competition Law Department
Swedish Competition Authority*

Hanna Witt, Deputy Head of Cartel Department, Swedish Competition Authority. She is an economist from the University of Uppsala, Sweden. She has also studied economics at the University of Göttingen and the Universidad Complutense in Madrid. Upon leaving University, she worked at the Swedish National Audit Office until 2002 when she joined the Swedish Competition Authority. In February 2011 she became Deputy Head of Department.

DEVELOPMENT AND DIRECTION OF PUBLIC PROCUREMENT AT COMMUNITY AND NATIONAL LEVEL

AMENDMENT TO THE ACT ON PUBLIC PROCUREMENT: NOT A MERE FACE-LIFT

It is difficult to write about directions and developments in the area of public procurement in times, when at national level legislative authorities discuss intensively “transparency” amendment to the Act on Public Procurement (hereinafter referred to as “the Act”), as a matter of fact it is like forecast the weather to extent that in six months there will be summer and similarly that current amendment is certainly not the last one. Question remains, how many amendments we can expect and how intensive the procedure will be. The solution of future direction of legal regulation of public procurement (also with regard to the developments in the Czech society) would definitely be not adoption of proposal of one of the members of the Parliament, who proposed to abolish the Act completely and at the same time to order contracting authorities to dispose the public funds as it was their own money. Honestly, who ever hasn’t been struck by this idea?

But back to current development and recent amendment, which is one of the topics of the conference submissions in area of public procurement. The most important changes that should be implemented can be divided into several areas:

- Changes in definitions of current terminology – e.g. decrease of thresholds for small-scale public tenders by one half (for tenders in construction industry the entrance in force will be postponed).
- Introduction of new institutes – i.e. important public tender, persons with special eligibility.
- Changes in area of qualification – e.g. abolition of whole area of economical and financial qualification criteria, abolition the possibility to require ISO certificates during the qualification, abolition of limitation of tenderers etc.
- Changes made in order to increase proficiency of contracting authorities – e.g. introduction of list of evaluators, persons with special eligibility and their role within awarding procedure etc.
- Changes implemented in order to protect suppliers – e.g. imposition of ban on contracting authorities to set qualification criteria which would lead to significant distortion

of competition and which could have been replaced by corresponding contract condition; significant extension of data duly stated in protocol of qualification assessment; and eventually imposition of restriction on assessment of payment conditions or contract conditions that create duties of supplier etc.

- Imposition of new duties on contracting authorities in order to increase the transparency of procedure by publishing more and new information and data. Compulsory preliminary announcement of below-thresholds and above-thresholds public tenders one month in advance before initiation of awarding procedure can be one of the examples. Publication of the reasoning of the awarding procedure together with an important novelty – publishing of all contracts (including amendments) exceeding CZK 500 thousand and disclosure of actual price paid for the tender (except of small-scale public tenders and some particular tenders excluded from the regime of the Public Procurement Act.
- Changes in area of digitalization – e.g. introduction of obligatory electronic auction for particular tenders for supplies and strengthening importance of contracting authority’s profile.

Among many proposed amendments which were discussed, there is one worth mentioning (inspired by the Slovak practice) which proposes that the contract concluded with selected tenderer shall only enter into force when the document is published in the Register of Contracts. Moreover it should be mentioned that another proposal imposes obligation for selected supplier to “get naked” as for the ownership structure. This proposal goes together with current obligation of each supplier (be it in a form of joint stock company) to submit list of shareholders holding share above 10 per cent which is extended by a new duty of selected supplier to disclose not only its own ownership structure but also ownership structure of important subcontractors. The proposal expects this obligation to remain in force during the whole duration of performance of public tender and introduces sanctions of payment revocation or obligation to refund the price of public tender. As mentioned above, it is clear that the changes are not a mere face-lift but significant intervention in current legal

enactment. Common denominator of most of the changes is effort to increase transparency and secure public funds savings in public procurement. From this point of view the efforts should be complimented. Question remains, and only future application practice will provide an answer, whether suitable tools were chosen in order to reach mentioned goals. Whether or not the changes will introduce more than politically motivated introduction of new duties of contracting authorities and severe sanctions for their breach. As far as here the amendment might be labeled as mainly political rather than practical, rather contracting than supplying and amendment mandatory rather than motivational.

I am a life optimist and I strongly believe that we will be able to find public procurement awarding procedure scheme in future, that will motivate contracting authorities and representatives to award efficiently with subsequent acceptance of their responsibility for eventual infringement of prescribed rules. Moreover, it should be a scheme enabling persons who are involved in public procurement to use flexibly methodological support from the guarantees of the enactment and scheme that will secure effective and swift protection of competitors' rights. I am not sure whether or not the proposed amendment steps towards this scheme. It is nonetheless good we have this amendment. It proves that public procurement are developed permanently at least.



Tomáš Machurek

*Chairman of the executive Committee
of the Public Procurement Association
Partner and Executive of MT Legal LLP*

INTRODUCTION OF SPEAKERS



Pavel Herman
*Public Procurement Advisor
to the Chairman
ÚOHS
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Pavel Herman graduated from the Faculty of Law of the Masaryk University in Brno. Since 1999 he has been working for the Office for the Protection of Competition. At first, he acted as an official for the Department of the Surveillance over Public Procurement, then as Head of Building Tenders Department and the director of Public Procurement Section. These days, he acts as a Chairman's advisor, which includes not only legal activities, but also solving the conception questions in the field of public procurement in the Czech Republic. He devotes himself also to lecturing.



Eva Kubišová
*Vice-chair
ÚOHS
Czech Republic*

The Office's Vice-chair responsible for the Section of Public Procurement graduated from the Faculty of Law, Masaryk University. She joined the Office in 1995 and since that time she has been acting in various positions. She has been acting as the Secretary of Appellate Committee for the Competition, she has been engaged in the establishment of the Department of the Surveillance over Public Procurement and participated in the application of the new enactments of the Act on Public Procurement. Until recently, she has been participating in lecturing at the Faculty of Law in Brno and Olomouc, in the field of public procurement and the theory of law.



Jaroslav Kračún
*Public Procurement Legislation
Expert of the DG for Internal
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European Commission
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Jaroslav Kračún is a graduate of international business law at the Sorbonne University in Paris, and international business law and management at the ESSEC Business School in France. He worked as a lawyer. Since 2008 he has been acting at the Unit C3, which deals with Public procurement legislation at the Directorate General Internal Market and Services, European Commission. He is responsible for the Czech Republic, Slovakia and Slovenia.



David Petrlík
*Assistant to Judge
European Court of Justice
Luxembourg*

Graduated at Faculty of Law of West-Bohemian University of Plzeň and finished his post gradual studies at Faculty of Law at Charles University, Prague. He is currently adviser to the cabinet of Judge Jiří Malenovský at Court of Justice of European Union in Luxembourg. He gives lectures and publishes extensively; he is an external lecturer at Charles University in Prague.

**Jan Sixta**

*Deputy Minister
Ministry for Regional Development*

After graduation from Charles University, Faculty of Law, he worked as a lawyer focused on public procurement at the Ministry for Regional Development and after that in Agency for Support of Business and Investment CzechInvest served as a Director of legal department dealing with important foreign investment projects. He has been Deputy Minister for regional development responsible for public investments and legislation. He was a member of a drafting team of Act No. 137/2006 on Public Procurement and he has been responsible for its amendments and changes. Jan Sixta represents the Czech Republic at international public procurement working groups within EU, WTO or UNCITRAL.

**Pavel Štorkán**

*Chairman of the Exchange Chamber
Czech Moravian Commodity
Exchange Kladno
Czech Republic*

Graduated from Material Engineering at University of Ostrava. He was engaged in initiation and opening of the Czech Moravian Commodity Exchange Kladno (ČMKBK). He has been a Chairman of its Exchange Chamber since 1995 and lately he became Chairman of the Exchange Committee of Energy Exchange of ČMKBK. Currently he has been a member of executive board of Institute of Union of Industry of the Czech Republic.

SIGNIFICANT MARKET POWER – FUTURE OUTLOOK IN RELATION TO COMPETITION LAW

BRIEF HISTORY OF ACT ON SIGNIFICANT MARKET POWER IN THE CZECH REPUBLIC

Significant market power is a concept that is appearing in the Czech competition law since 1 February 2010. The conception is closely linked with the Czech legislation described in the Act No. 395/2009 Coll. This concept takes into account relationship between supplier and consumer of food and agricultural products, where on one side is strong partner capable to force weaker side to act according to its will.

Respective regulation was established after long years of discussion whether public regulation is needed in the field of contractual relationships between suppliers and retailers. At the first sight it may seem that this regulation is redundant and extends the administrative burden on particular subjects. But this view is misleading. Given that the institutes of private law are not performed, in this case action on good manners in contractual relations and negotiations in good faith, the way to ensure protection of weaker party is possible by public law.

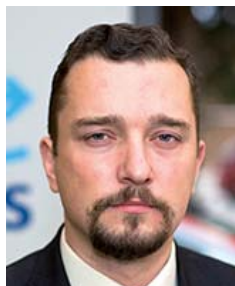
Current enactment is not considered as the most successful one, but at least it generally defines the rules under which the entities play game called trade with food and agricultural products. The Czech Republic is not the only country within the European Union dealing with similar issues by special regulation of competition relations, but there are eight other countries. The Office for the Protection of Competition was delegated by legislator as a regulator of these relations and supervisor over the observance of conditions stipulated in above mentioned Act.

Based on the findings of actual relations among customers and suppliers of food products it can be seen, that the given legislation had its partial effective contribution to cultivation and respect of both parties. Nevertheless, it is necessary to mention that the prepared amendment should enhanced legal certainty of public law addressees. It will be a topic of future and further public discussion on how to proceed in cases of abuse of economic position that has no characteristics of dominance, but enables the entity to behave like a dominant.



Hynek Brom
*First Vice-chairman
Office for the Protection
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INTRODUCTION OF SPEAKERS



Hynek Brom
First Vice-chairman
 ÚOHS
 Czech Republic

Graduated at Faculty of Law, West-Bohemian University in Plzeň where he has been lecturing at Department of Public Administration. In 2000-2002 he acted as a Head of governor's cabinet of Plzeň Region. After that he served as a Deputy Mayor and afterwards as a Mayor of city district Plzeň 4. He started his career with the Office for the Protection of Competition in November 2009 as a Head of State Aid and Administrative Section after one month he was appointed First Vice-chairman of the Office, heading Section of Public Regulation and Administration.



Radan Kubr
Partner
 PRK Partners s. r. o.
 Prague, Czech Republic

Partner and one of the founders of PRK Partners LLP. He deals mainly with competition law, state aid, public procurement, banking, commercial law, mergers and acquisitions. After graduation at Geneva University he worked with Poncet, Warluzel & Associés LLP. Obtained LL.M. in European Law in 1993 at College of Europe in Bruges. He worked with American legal company White & Case. Radan Kubr is admitted barrister in the Czech Republic and Switzerland.



Luděk Svoboda
Director
 Department of Significant
 Market Power
 ÚOHS
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Graduated in law from Masaryk University in Brno and dealt mainly with commercial law. He has served at the Office since 1994 as an officer and since 1996 as a Director of department. He has been dealing with competition law. After adoption of Act No. 395/2009 on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof, he was appointed Director of Department of Significant Market Power.



Miroslav Toman
President
 Federation of the Food and Drink
 Industries of the Czech Republic

Graduated from Agricultural University of Prague where he also obtained his dissertation. He worked in agricultural sector in different managing positions. From 1996 to 2001 he worked as a diplomat at representation offices of the Czech Republic in Bratislava and Washington. From 2002 to 2006 he acted as a Deputy Minister at Ministry of Agriculture responsible for relations with European Union, lately he was appointed First Deputy Minister – State Secretary. He has been the President of the Czech Federation of the Food and Drink Industries since September 2007. At the same time he has been a member of executive board of Czech Agrarian Chamber and of the Economic Chamber of the Czech Republic.

STATE AID – CURRENT TRENDS AND VIEWS

CURRENT TRENDS AND VIEWS IN AREA OF STATE AID

These days we are celebrating a 20th anniversary of the Office for the Protection of Competition (“the Office”). It is an institution that played key role in the area of state aid, mainly in the period before the accession of the Czech Republic to the European Union. On that occasion it should be stressed that the Office contributed significantly to the conclusion of the accession Chapter Competition, where issues of state aid in the Czech Republic were vigilantly observed by the European Commission. Without finalization of this chapter the Czech Republic would never accede the European Union.

The Office didn't lose its importance in the field of state aid after the accession, despite the fact that assessment of compatibility of state aids today is duty of the European Commission. I am glad that on this important occasion I can deliver several words on current trends in the area of state aid and future views in this field. Due to space limits I will refer to the most important issues, according to my point of view.

The Czech Republic went through dynamic development in the area of state aid. There were times when providers didn't know anything about the state aid. Today they are able to discuss the problem, apply the rules and the level of their knowledge of subject matter is increasing significantly. Structural funds have contributed to spread of knowledge and information among providers, for the provision of structural funds is governed by the same rules as in area of state aid. Further information has been one of the priorities lately, also for the Office. I am convinced that the state of play in the Czech Republic is similar to those in other member countries.

Many changes take place at the European level. We witness adoption of new regulations in area of services of general economic interest, area of state aid for films or other audiovisual works and others. For the reasons of ongoing debt crisis in the European Union an question emerged concerning the possibility of recapitalization of banks from public funds, which would also influence the area of state aid. We can expect adoption of special rules, as it was done by the Commission in the past.

In connection with state aid rules I have to mention few remarks. I see one of the main problems in their comprehensibility. The area of state aid is today in many cases covered by

secondary legislation which are not easy to be understood. Those times when the European Commission applied provisions of relevant Treaty are past. In principle today the state aid can be granted almost any time, it is only necessary to adjust it according to the particular enactment. Former noble aim to grant state aids only in exceptional cases was probably lost irreversibly. Efforts of the European Commission, embodied into motto “less but better targeted state aid” were abandoned during the financial or economic crisis. We can only hope that when the situation calms down the above-mentioned doctrine will be promoted again. I do not believe that granting of state aid should be completely common conduct. The companies have to prove they can act in the market without public funds.

Providers object the broad definition of state aid. It is, above all, hard to accept that undertakings can be nonprofit entities, controlled by public sector or focused on provision of cultural or social services. Similarly it is possible to identify areas where public funding is not very clearly defined according to the state aid rules. Sports financing is a typical example. Providers often lack certainty whether their desired grant to athletic union, sports club or civic association meets criteria of state aid definition or not. It should be mentioned that simple manual published at the European Commission's website doesn't bring much light to this issue. Unfortunately European rules do not distinguish unambiguously between serious and completely trivial cases of state aid.

Another problem can arise for the reasons of distance between providers and authority which assesses compatibility of state aid, i.e. the European Commission. I heard several times from the providers “God is above and Brussels is afar”. In other words they try to discredit the obligation to notify state aids before its granting. I think this motto remains joke and the providers realize well consequences of potential infringement of the state aid rules. Moreover, the European Commission has very efficient mechanisms in this area and is able through relevant authorities to secure the rules adherence.

It is unknown whether any or what kind of changes we can expect in the field of state aid. It is almost certain that with regard to the development of European internal market conditions the regulations will be modified. I also suppose that new rules governing other areas of economic reality will be adopted.

In the past the European Commission declared repeatedly its interest in focusing on more serious cases. Nonetheless according to the current rules it is obliged to assess compatibility of all state aids in the market of the European Union, unless for example block exemption hasn't been applied by the provider, pursuant to which the state aid in question is automatically deemed as compatible with the internal market. The administrative burden is great today and the Commissions workload will even increase in connection with accession of new member countries. It will be interesting to observe whether the Commission will apply extension of the block exemption or will consider decentralization of competences when particular state aids might be assessed by national authorities.

As for the decentralization that has been aforementioned I would like to conclude my submission with a few considerations on the subject.

In the past, one of the objections raised by the European Commission was that national authorities might have been under political pressure. As a former employee of the Office I like to remember the time before our accession to the EU, when the Office decided on compatibility of state aid with commitments that were derived from the European agreement. The Office actually substituted for the European Commission in a period that was not easy. In that time, many of the large Czech companies got in troubles, even a bankruptcy of a large Czech bank occurred. On the other hand foreign investments flew into the Czech Republic and many companies went into business here. All these events had something in common; in this context state aids should have been granted. In this period, the Office proved that it was able to stand any

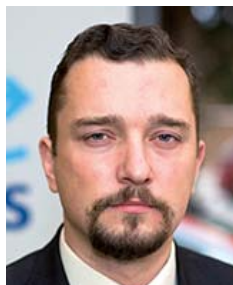
pressure and protect its independence. Moreover, if the providers knew that a penalty could be imposed from an authority operating at the national level, I am convinced that in their case the motivation to respect the rules would increase. Competences in less serious areas such as culture, sports or social services might be decentralized. Other areas would remain exclusively in scope of competences of the European Commission. Moreover it might be stipulated what is the amount level of state aid of which the European Commission will start its decision-making process. I presume that unnecessary administrative burden would be removed and only the most serious cases would be decided in Brussels. For these reasons the possibility of decentralization of state aid compatibility with internal market assessment is definitely worth mentioning. Even at the cost of adjustment of European rules.



Michael Kincl

*Assistant to Judge, Supreme Court of the Czech Republic
Courts Authorized Expert Focused on State Aid*

INTRODUCTION OF SPEAKERS



Hynek Brom
*First Vice-chairman
ÚOHS
Czech Republic*

Graduated at Faculty of Law, West-Bohemian University in Plzeň where he has been lecturing at Department of Public Administration. In 2000-2002 he acted as a Head of governor's cabinet of Plzeň Region. After that he served as a Deputy Mayor and afterwards as a Mayor of city district Plzeň 4. He started his career with the Office for the Protection of Competition in November 2009 as a Head of State Aid and Administrative Section after one month he was appointed First Vice-chairman of the Office, heading Section of Public Regulation and Administration.



Milan Bumbálek
*Director, State Aid Department
ÚOHS
Czech Republic*

Graduated at Faculty of Law and Faculty of Social Studies at Masaryk University in Brno. During his work for the Office, where he has been working (with a short break) since the end of 2002, he worked with the State aid department, Antitrust department and Cartels department. From 2008 to 2009 he acted as a coordinator of the Czech Presidency in the Council of the European Union in the area of antitrust. In 2010 he attended internship program at the European Commission, DG Competition. He has acted as a Director of State aid department since April 2011.



Ondřej Dostal
*Permanent Representation
of the Czech Republic
to the EU
Brussels, Belgium*

Graduated at Faculty of Law at Masaryk University in Brno. He has been dealing with the competition law since 2000 when he joined the Czech Office for the Protection of Competition. Starting 2004, as a Director of the International department he prepared and realized concept of international involvement of the Czech competition authority within competition bodies of EU, WTO, OECD, UNCTAD and International Competition Network (ICN). He acted as a member of the appellate committee for competition. Since 2007 he has served as a Secretary of the Permanent Representation of the Czech Republic to the EU in the areas of competition, state aid and public procurement. During the Czech presidency of the Council of the European Union he was a President of the EU Council Working group for competition.



Kristina Haverkamp
*Head of Unit European State
Aid Control Policy
Federal Ministry for Economics
and Technology
Germany*

Kristina L. Haverkamp studied law at the Universities of Munich, Geneva, Bonn and Athens (Georgia, USA). She started her career at the Bundeskartellamt in 1993, where she dealt with merger and anti-trust cases in the telecom and transportation sectors. In 2000, Ms. Haverkamp joined the Federal Ministry for Economics and Technology, from which she switched to the Federal Ministry of Finance in 2001. After four years at the Permanent Representation of the Federal Republic of Germany to the European Union in Brussels (2003 - 2007), Ms. Haverkamp returned to the Federal Ministry for Economics and Technology in Berlin, where she became a Head of the central coordination unit of the Federal government for state aid control policy questions in 2008.

**Wouter Pieké**

*Head of Unit DG COMP C.4
- State Aid, DG Competition
European Commission
Brussels, Belgium*

Wouter Pieké started his career at the Dutch Ministry of Economic Affairs. Since 1984 he has been working at the Directorate General for Competition, European Commission, in 1992 he held the function of the Head of the first task-force in DG Competition dealing with the financing, restructuring and privatisation of East-German companies (Treuhandanstalt). Since November 1995 he has been acting as a Head of the Anti-trust Unit dealing with basic industries, state aid for regional development, fiscal aid and of the newly created Unit where he has been responsible for dealing with aid to R&D, innovation and risk capital. These days, he holds the position of Head of the Unit dealing with aid in the information, communication and media market.

WELCOME TO BRNO



The City of Brno, the second largest city of the Czech Republic with more than 400 000 inhabitants, lies in the central part of Europe. Other important European cities are located within the range from 120 to 200 km from Brno: Prague, Vienna and Bratislava. The Brno International Airport offers regular air links.

Brno is the Moravian capital and a starting point for tourists who wish to explore the natural and cultural sights of the South Moravian Region. The Protected Landscape Area of the Moravian Karst is situated north of Brno and vineyards with stylish vine cellars stretch to the south. The city is surrounded by beautiful mixed forests which offer plenty of opportunities for hiking and cycling.

Brno boasts many architectonic monuments which are a testament to its rich history. The world renowned Tugendhat House is the pearl of modern architecture – designed by the German architect Ludwig Mies van der Rohe, inscribed on the UNESCO

World Heritage List (currently undergoing restoration). The unique Labyrinth under Zelný Trh and Mintmasters' house cellars are also worth seeing.

Today, Brno is the seat of both public and private universities, the highest judicial bodies and the centre of science, research and innovation. The city offers many cultural activities in theaters, museums, galleries, cinemas and clubs. The Exhibition Centre is of great economical and social importance to the city; it has an 80-year-long tradition and is a venue for a number of international trade fairs, exhibitions and congresses. Every year, the city hosts cultural events, festivals as well as important sporting events (for example the Motorcycle Road Racing World Championship - Grand Prix Brno).

www.brno.cz



Holiday Inn (archiv Holiday Inn)





Labyrint – podzemí pod Zelným trhem / Labyrinth under Zelný Trh Square (*Zdeněk Kolařík*)



Brněnské výstaviště / Brno Exhibition Centre (*archiv Veletřhy Brno / BVV Trade Fairs Brno*)



Zelný trh / Zelný Trh Square (*Vít Mádr*)



Vila Tugendhat - interiér / Villa Tugendhat - interior (*David Židlický*)