OFFICE FOR THE PROTECTION OF COMPETITION

Since 1991, the Czech antimonopoly office has been watching over the compliance with rules of fair competition. The office is not headquartered in Prague amongst the key governmental agencies, but in Brno, as if to proclaim its operational independence. In the period of 1992 to 1996, the Office functioned as the Ministry for Competition. The change was rationalized by the on-going economic transformation, and above all, by the ministry's role in the privatization process. The activities of the Office for the Protection of Competition (hereinafter referred to as "the Office") affect, directly or indirectly, every citizen of the Czech Republic. The Office creates conditions for competition to flourish, oversees public procurement and monitors the allocation of state aid. As a central body of the state administration, the Office is entirely independent in its decision-making process. The Office is headed by a Chairman, nominated by the Government and appointed by the President of the Republic. The term of office for the Chairman is six years, and nobody may serve more than two terms. The Chairman may not be a member of any political party or political movement.

WHEN COMPETITION WORKS, THE CITIZENS PROFIT

Competition between companies is the fundamental mechanism of market economy. It fosters innovation, reduces manufacturing costs, and improves performance of the entire economy. Only the firms stimulated by competition can offer products and services that are competitive in terms of quality and price. This is especially important to the consumer, because intense competition allows him to choose from a larger selection of goods at lower prices. It is a simple, but very effective guarantee that the quality and price of products and services are at their optimal levels. Effective market competition is the main driving force behind overall competitiveness and economic growth. It is particularly effective when the market is formed by independent companies exposed to competitive pressures. To ensure that the suppliers are capable of exerting these pressures, the law identifies certain prohibited practices that are capable of restricting competition. These practices are then targeted by the antimonopoly office, with the primary objective of eliminating their adverse effect on competition.

CARTEL AGREEMENTS

The best known examples of prohibited agreements are those concerning direct price fixing. In these cases, the citizen is denied the possibility of buying at competitive prices. There is usually an increase in prices that would be lower in a normally functioning competitive environment. Agreements to divide the market are no less significant. The companies do not compete naturally, the market does not evolve but remains stagnant. New entrants find it very difficult to establish themselves in the market. The parties entering a cartel agreement do so in order to limit the competition, divide the market, and dominate it. This is done in hopes of securing a steady profit, without the risk of seeing a newcomer in the market whose activities and offer of superior services would jeopardize their position. However, given the fact that such agreements typically restrict incentives for innovation or reduction of costs, they tend to become a straight jacket for the further growth and development of individual cartel members. It is precisely for these situations that the antimonopoly authorities came up with what is called a leniency program. A firm has the option of informing the Office that a cartel agreement exists, and if the information is hitherto unknown, there is a good chance of escaping the penalty in the ensuing administrative procedure. The first company to take full advantage of this program in the Czech Republic was one of the energy drink manufacturers, when faced with a penalty of up to twenty million Czech crowns for an illegal exclusive sales agreement. Nowadays, the leniency application is only possible in horizontal agreements cases.

The agreements about market shares or price fixing are of course not the only prohibited agreements. Cartel agreements are very sophisticated and the cases of the Office employees obtaining the actual document bearing the participants' signatures are extremely rare. Also prohibited is for example acting in collusion or entering into an information exchange agreement. Open market requires the competitors to act independently of each other and refrain from coordinating their actions. This law was broken in the past, for example, by retail chains, engineering companies or agricultural producers. All of these competitors were substantially fined for their illegal behaviour. To be transparent and foreseeable as much as possible in its decision-making practice, the Office issued Guidelines on the method of setting fines. Competitors, who break the antitrust rules, can use these guidelines to figure out the amount of fine that could be imposed on them.

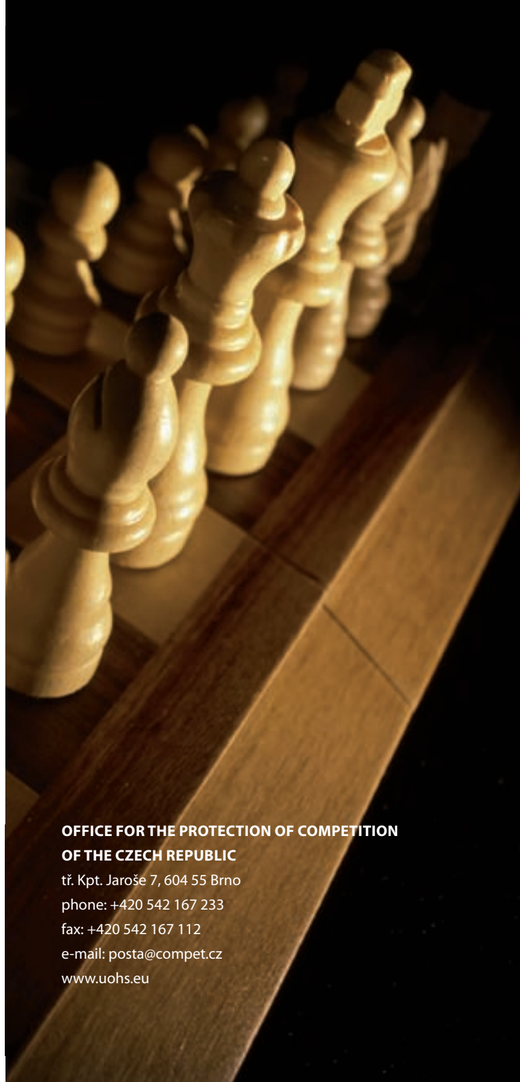
ABUSE OF DOMINANT POSITION

The Czech Republic, just like any other country, has markets with the so-called natural monopolies. These are primarily network systems. It is obviously not profitable to have two parallel networks supplying homes with gas, heat, or electricity. The companies with a dominant or even monopoly position on the market are in such a strong position that allows them to act substantially independently of the competitors, as well as the customers and suppliers. The market situation is usually monitored and corrected as necessary by the appropriate sector regulator, in conjunction with the antimonopoly office. The Office mission is to safeguard competition as a phenomenon. The Act on the Protection of Competition is stricter on the competitors in a dominant position than on those in a marginal position. They are not permitted to behave in a manner that would be perfectly acceptable in a small firm. If it were the other way around, the dominant player would most likely proceed to solidify its position and subsequently raise prices of its products, thus affecting both competition and consumer pricing in a negative way. A case in point is the natural gas market situation in the Czech Republic, where in practicality only one supplier of this strategic comodity exists. Consequently, the supplier's behaviour in the market, which only now begins to open up, has been the subject of keen scrutiny by the Office. It is certainly not the first time that the natural gas industry is being investigated. In 2000, the Office stated that one of the regional gas distributors had abused its dominant position when it improperly charged a gas meter installation fee. The company was fined, and eventually forced to correct the situation and return the wrongly collected money. It also apologized to its customers. Very common are infractions of the law on the part of dominant telecommunication operators, who may resort to unlawful means in order to maintain their dominant position in the liberalized market. An example is the distribution of service packages containing free minutes without the customer knowing when they have been used up, so that he tends to keep calling through the dominant operator, even though a competitor could handle these calls at a better price. Likewise prohibited are the so-called loyalty discounts, in which a dominant competitor gives a preferential treatment to one group of clients over another. In the final analysis, those holding the less advantageous contracts suffer a loss in consequence of the dominant's actions, as they have a greater monetary outlay for the same volume of service.

MERGERS

A critical evaluation of competitors' merger is the third pillar of protection of competition. Business mergers are commonplace on the economic scene. The larger players buy out the small ones in order to gain a more influential market position. Antimonopoly authorities therefore look at the largest mergers that stand out in various markets. If there is a prospect of a distortion of competition in the wake of a proposed merger, the participants are asked to give appropriate commitments. Only then is the merger approved. In isolated cases, the proposed merger may be prohibited.

The Office also dealt with cases, when the competitors, whose concentration had not been cleared, applied again for the concentration approval. If there were changes on the market in the mean-



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time, companies have the chance to succeed with their new proposal. The Office thus e.g. approved the concentration of two largest companies on the market with bakery products in the Czech Republic in the beginning of 2006, despite the fact that this concentration was previously prohibited. In the new administrative procedure it has been taken into account the fact that by the concentration created subject will not be, unlike its rivals, from the view of the access to raw materials self-sufficient, and it will have to get these materials by deliveries. The reason is that during the year 2005 one of the merging subjects sold the property share in the area of mill products. Even though the subject with the leading position has been created, the market shares of other bakery producers do not show a considerable distance. The purpose of the protection of competition in the area of mergers is not to thwart business plans but to intervene only when the proposed concentration is capable to distort the competition in the market.

PUBLIC PROCUREMENT

The purpose of public procurement supervision review is to use the public funds economically and in accordance with the competition rules. The Office has exercised its supervision of this area since 1995. The administration of public tenders is closely watched in the Czech Republic, as it is in other countries, because a large portion of public funds is expended that way and the public has an understandable interest in seeing this money spent effectively and economically. The Office's objective is to achieve, mainly through its decision-making activities, a free and open competition between the suppliers, along with a selection of the best proposal in a transparent manner devoid of any discrimination. The ultimate goal is the preservation of public funds. The parties should treat the individual tenders responsibly and suppress especially the cases that circumvent the public procurement law. That refers particularly to those situations where, by intent or by negligence, an agency may award a contract amounting to many millions of Czech crowns directly to a specific firm without taking advantage of competitive bidding in a competitive climate. It is the obligation of the contracting authority to provide the basic elements of competitive bidding, those being transparency of the selection process and equitable, non-discriminatory treatment of the individual bidders. If the Office detects a breach of the law, it may opt for what is called remedial measures, such as reinstating the unjustly excluded bidder to the process, or cancelling the entire tender. Should the contract be completed by the time the Office finds indications that the law had been broken, it cannot impose remedial measures, only penalties.

A separate category related to public procurement, as well as competition in general, are cartel agreements between the bidders. The bidders may, for example, agree which of them will submit the lowest bid and be assured of winning, only to switch places on the next tender. However, since both bids are overpriced to some extent, the purchaser ends up paying much more for the contract than if the winner had been picked in a fair contest from fully competitive bids.

STATE AID

The control over legal rules for the award of state aid seeks to minimize the unjustifiable advantages that some participants in the market or industry may have in competition at the expense of others. The goal of such control is to maintain, or restore, healthy market conditions and effective competition. Preferential treatment of selected companies is not conducive to long-term prosperity and economic growth, because firms that are not beneficiaries of state aid may get into insurmountable difficulties and will have to withdraw from the market. Therefore, as a general rule, state aid is not permitted, and may be granted only under extraordinary circumstances. The Office had been issuing rulings on the conformity of state aid awarded by the Czech Republic with the European Community law for a total of four years, until May 1, 2004. With the admission of this country to the European Union, that jurisdiction passed onto the European Commission. The Office continues to function as a monitoring, coordinating and consulting body that advises governmental agencies on the handling of individual cases. An example how the decision of an antimonopoly institution may generate money for the Government is the illegal state aid in the case of the OKD privatization. The Czech government decided to sell its share in this company to KARBON INVEST for 2.25 billion Czech crowns. However, in 2004, the Office blocked the transaction, which it viewed to be an illegal state aid. As it turned out, the market value of the share was actually higher by almost two billion Czech crowns.

PREVENTION AND THE OFFICE APPROACH

The Office emphasizes prevention over repression. Penalties, which may be as high as ten percent of the annual sales of a given company, are reserved for the most serious cases of breaking the competition law. The Office frequently issues warnings to prominent competitors against potentially anti-competitive actions. Some infractions may be resolved immediately in the investigative stage. Even with the remedial proceedings under way, the participants still have the option of accepting appropriate commitments to remedy their anti-competitive status. Only if the approach does not work there is a possibility of a large sanction. The Office's proceedings take place in two stages. The first ruling is rendered at the appropriate director's level. If the ruling is contested, the Office's Chairman issues a final verdict. His decision is based on a proposal from the appellate committee as his advisory body. The members of the appellate committee are mostly experts who are not the Office's employees. Firms may file a complaint against the Office's final decision at the following courts: Regional Court in Brno, Supreme Administrative Court and the Constitutional Court. Enterprises may also petition the courts for compensation of damages caused by an anti-competitive behavior of their competitor. This action is usually based on the final verdict from the antimonopoly office.

COMPETITION ADVOCACY

Competition advocacy encompasses all activities intended to create and develop a competitive environment, including public awareness of the benefits derived from such competition. A systematic application of competitive principles stimulates the development of various industries. The Office periodically analyzes the key markets, comments on the pending legislation, publicizes its positions, and issues decisions. The objective is to improve the situation in specific markets, eliminate barriers, and increase the overall ability to compete. In 2008, the Office published its Notice on alternative solution of certain competition issues. In this document is clearly stated, which cases can be solved by competition advocacy.

INTERNATIONAL COOPERATION

Since May 1, 2004, the law of the European Union has been directly applicable to the territory of the Czech Republic. The Office therefore works closely with the European Commission on the cases having a European dimension. There is an allocation system intended to ensure that a given case will be handled only by one office, i.e. the national competition authority or the European Commission. This reduces the risk of having multiple, and potentially differing, decisions in a single case. This so-called ONE STOP SHOP principle has been strengthened over the last few years in connection with the current reform of the European competition law. The European Competition Authorities (ECA) and European Competition Network (ECN) coordinate the cooperation between the national competition authorities and the European Commission. The cases impacting the European market are evaluated directly by the European Commission. These are mostly large mergers, where the Office has the right to submit comments dealing with the impact on the Czech market. On the other hand, the Czech antimonopoly office has also handled several cases involving infringements of the EU law. The Office collaborates with other institutions, too, inside and outside the European Union. For example, towards the end of 2005, it renewed its cooperation with the Federal Antimonopoly Service of the Russian Federation.

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OFFICE FOR THE PROTECTION OF COMPETITION OF THE CZECH REPUBLIC