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1 INTRODUCTION BY JOSEF BEDNÁŘ, CHAIRMAN OF THE OFFICE



Activity of the Office for the Protection of Competition (hereinafter referred to as “the Office”) relates directly or indirectly to every citizen of the Czech Republic. The Office creates preconditions for support and protection of competition, supervises the public procurement and carries out the control in relation to provision of state aid.

*Activity of the Office in individual areas positively influences the economy, as it results in **savings and higher efficiency both on the microeconomic and the national economy level**. Important in this respect is not only the hitherto decision making practice, but also the so-called competition advocacy of the Office, i.e. the sum of all activities aimed at supporting the creation and development of competition environment. One of the main tasks of the Office consists in **elimination of artificial barriers to competition** from the part of unfairly competing companies. Actions of the Office against harmful anticompetitive behaviour of economic entities support development of small and medium entrepreneurship and positively influence employment. Creating space for more*

*competition also establishes conditions for jobs’ productivity growth, innovation and ultimately for **increased quality of final products and competitiveness of whole sectors of economy**.*

*The importance of the year 2004 consisted especially in the Czech Republic’s accession into the European Union. With respect to the fact that on 1 May 2004 **the competition and state aid law of the European Communities became directly applicable on the territory of the Czech Republic**, a need for implementation of the respective legal rules into the Czech legal system arose. Harmonisation of the Czech competition law, pursued by the Office already in the period before 1 May 2004, is at the same time of crucial importance also for the legal certainty of the legal rules’ addressees, as their behaviour is assessed pursuant to similar rules in the whole Internal market. In the area of antitrust the Office elaborated two extensive amendments to the Act on the Protection of Competition, one of which already came into force and the second of which was submitted to the Chamber of Deputies of the Czech Republic’s Parliament. Both the amendments have in common that they project into the Czech law the new principles of the Community law, which should on one hand enable maximum efficiency of supervising the observance of the competition laws and on the other hand ensure that the companies were not imposed an unnecessary burden by the competition authorities. In the **area of state aid** a new act came into effect on 1 May 2004. Since this date the decision making power in this area has been fully in the hands of the European Commission and the Office performs monitoring of the provided state aid. In the area of **public procurement** a new act was passed, which adopts the relevant directives of the European Communities and introduces completely new ways of contract awarding. An important change consists especially in abolishing the advantages for the domestic tenderers, which positively contributes to a more effective competition for the contracts. The Office played a significant part in elaborating the draft of this act.*

*In 2004 the Office detected several serious price cartels, which was reflected also by the amount of imposed fines. The highest sanction was imposed on the building savings companies in amount of CZK 484 million and is currently subject to appeal. By this decision the Office contributed to initiation of considerations on legislative changes in the given sector, which should improve the position of the building savings companies' clients. **The quality of the Office's decision making activity is shown by the fact that no legal action against its decisions was complied with in 2004.** For the first time, the Office also applied its so called Leniency programme, which enables more lenient treatment of companies which voluntarily announced a cartel and submitted evidence on its existence. This procedure contributes to speedier and more effective elimination of anticompetitive practices in a way that minimises impacts on consumers. The Office promotes the idea that the essential purpose of its activities is not imposing high fines, but especially quick and effective operation in favour of functional and fair market. Therefore, the Office endeavours to prevent possible distortions of competition for example already in the process of preparation of legislative rules and documents of non legislative nature. In 2004 the Office successfully withstood the effort to extend the Czech Post's monopoly also to the delivering of addressed advertisement mail (so called direct mail). In this way, a basic precondition for further progress of liberalisation on the post services market was met.*

*A tangible contribution of effective competition policy for citizens may be demonstrated also by the case of selling the company OKD. It was a case of state aid, where **the Office ensured that the incomes of the state budget increased** by almost 2 billion CZK. The Office assessed the purchase price of CZK 2.25 billion, offered by the company KARBON INVEST for the ownership interest of*

the State Property Fund in OKD as non-corresponding with the market conditions. As a result of this decision, the offer of KARBON INVEST was increased to CZK 4.1 billion.

***In the area of international relations** the year 2004 was significant especially due to the activities related to the accession of the Czech Republic into the European Union and joining the European structures operating in the area of protection of competition. The importance of cooperation and information sharing with foreign competition authorities was noticeably strengthened, especially in the framework of **the European Competition Network (hereinafter referred to as "the ECN") and the Network of the European Competition Authorities (hereinafter referred to as "the ECA")**.*

In 2004 the Office considerably strengthened its powers, as it started to apply, besides the national law, also the Community competition law. By the decrease in the number of merger proceedings, abolishing the so called negative clearance proceedings and proceedings on granting individual exemptions the Office gave itself the capacities for resolving the most serious cases of anticompetitive behaviour, as for example price cartel agreements.

The Office will thus continue to supervise the application of the modernised competition rules and act in favour of final consumers and fair companies by protecting effective competition.



2 LEGISLATIVE ACTIVITY

The legislative activity of the Office in 2004 was related especially to the accession of the Czech Republic into the European Union. With respect to the fact that since 1 May 2004 the competition and state aid law of the European Communities became directly applicable on the territory of the Czech Republic, a need for implementation of these legal rules into the Czech legal order arose. The legislative works had been commenced already in 2003, however, they were finished only in 2004 and in some cases they are still in progress.

In the area of antitrust two extensive amendments to the Act on the Protection of Competition were elaborated, one of which has already come into effect and the second of which was submitted to the Chamber of Deputies. In the area of state aid a new Act Setting Certain Relationships in the State Aid Area came into effect; a draft Act on Financial Transparency was prepared as well. In the area of public procurement the Office took part in drafting a new Act on public procurement adopting the directives of the European Communities.

AREA OF COMPETITION

THE FIRST AMENDMENT TO THE ACT

This amendment came into effect on 2 June 2004 as the Act No. 340/2004 Collection and reflects adoption of **the (EC) Council Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty**. It creates conditions for direct application of the Community competition law by the Office and cooperation with other members of so called ECN (*European Competition Network*, i.e. a network comprising competition authorities of the EU Member States and the European Commission) and also deepens the harmonisation of Czech and Community legislation.

The main change in the area of **agreements distorting competition** consists in abandoning the hitherto principle of so called **individual exemptions**. The companies are no longer

obliged to ask for approval of exemption from the prohibition of certain agreement, but, when the criteria set by law are met, such agreement is considered valid from the very beginning. At the same time the thresholds for the so called **de minimis rule**, excluding from the general prohibition agreements between companies, whose behaviour, with respect to their market share, does not constitute a serious threat for competition, were increased from 5% market share in case of horizontal agreements and 10% in case of vertical agreements to 10% and 15% accordingly.

The abuse of dominant position in form of refusing access to the so called **essential facilities** by a dominant company is newly related to the cases, when the transfer networks or infrastructure facilities are not only owned but also controlled in another way by the dominant company, for example in case of a lease. The concept of abuse of dominant position in this area was simultaneously expressly extended also to the issue of the intellectual property.

A significant change was brought by the amendment also in the area of concentrations between undertakings, especially in relation to the so called **notification criteria**, i.e. the definition of the threshold values of the concentrating undertakings' turnovers, exceeding of which makes the concentration subject to the approval of the Office. These criteria were modified in order to strengthen the so called *local nexus*, i.e. so that only concentrations which could have negative impacts on the Czech Republic's market were notified.

As a result of the implemented changes the number of notifications of less important concentrations significantly decreased, which enabled the Office to better use its resources for investigation of the most serious cases. The proceeding on approval of a concentration shall be newly initiated only after delivering a **complete application**. The application for approval of a concentration may be submitted at any time before and after conclusion of an agreement establishing a concentration. However, the companies are motivated to

submit their applications as soon as possible, as they are not allowed to implement the concentration before the decision of the Office on the approval of the concentration.

A new legal concept of a decision on **imposing measures proposed by the parties to the proceeding** was introduced, which enables closing the proceeding and elimination of the danger of distortion of competition without a need for issuing a decision declaring that a prohibited agreement was concluded or that an abuse of dominant position occurred. The Office newly acquired the power to carry out investigation also in the so called other than business premises, including e.g. the apartments of the leaders of the given companies. **Nevertheless, such investigation is conditioned by a prior consent of a court.**



On the basis of the Senate's proposal, the Act was amended so that the companies acquired a possibility to ask the Office for **a change** of its decisions in force that contain **conditions, commitments or restrictions**. However, the companies had to prove that the conditions on the relevant market had significantly changed as a result of the Czech Republic's accession into the European Union. In the set period of six months only two companies asked for a change in the decisions in force: RWE Energy

Aktiengesellschaft (privatisation in the gas industry) and ČEZ (privatisation of the energy sector). **The proposal of RWE was rejected.** In the case of ČEZ the Office stipulated a new condition, which better corresponds with the new situation on the market. The company is obliged, enable third independent entities access to its own capacity for production of electric power in overall volume of 400 MW in a form of an auction in years 2006 and 2007. However, it does not have to sell the majority in one of its regional distribution companies.

THE SECOND AMENDMENT TO THE ACT

Its purpose is to adapt the Czech legal order to the effects of the new Council Regulation No. 139/2004 on control of concentrations between undertakings. This regulation especially defines which concentrations shall be assessed by the European Commission. Furthermore, it stipulates the conditions for cooperation among the competition authorities of the EU Member States and the Commission. The Regulation defines conditions under which the Commission may refer certain concentration to the assessment of a national competition authority and vice versa. This second amendment was submitted to the Chamber of Deputies of the Czech Parliament in January 2005.

The draft includes a significant change in the economic criteria for assessment of the impact on competition. The concept, on the basis of which a concentration is approved or disapproved, has changed. The change consists in amending the hitherto test of dominance by a new system **combining the dominance test and the SLC test** (*Substantial Lessening of Competition*). The control of concentrations between undertakings will be in the future based on new economic principles that will enable prohibition of a concentration capable of causing negative impacts on competition, regardless whether they occurred as a result of creation or strengthening of a dominant position of the concentrating undertakings or other negative impacts of such concentration (especially by the so called *unilateral effects*).

The proposed legal regulation also prohibits any steps aimed at **implementation of a concentration** before the approval by the

Office. Should any undertakings breach this prohibition, they may be imposed a fine up to 10% of their turnover and also a duty to re-establish the original situation on the market, i.e. for example to sell the unlawfully acquired undertaking. The draft amendment is related, besides concentrations between undertakings, also to prohibited agreements. It proposes application of the Community **block exemptions** also to the actions, which do not affect trade between Member States. As regards the investigations, a new power of the Office's employees to seal the business premises, or cabinets, cases, business books and other business records for the period necessary for the realisation of investigation, shall be introduced.

THE AGRICULTURE AMENDMENT

On 7 September 2004 the Act No. 484/2004 Coll., amending among others also the Act on the Protection of Competition, came into force. It was not a proposal by the Government, but an initiative of a member of the Chamber of Deputies, which was not **supported by the Office**. The draft was submitted with the aim to strengthen the position of companies producing agricultural commodities and

trading them especially with the so called retail chains. This amendment defines in a new way the merits of **abuse of dominance**, includes the agreements by sale organisations and associations of the agricultural producers on the sale of unprocessed agricultural commodities into the so called **de minimis exemption** and stipulates that the Act on the Protection of Competition shall not cover the actions of undertakings in the area of production and trade with agricultural products, if they act in line with the law of the European Communities. **The practical impact of this amendment to the application of the competition law is factually zero**, however it distorted the system of the Act on the Protection of Competition and especially its full compatibility with the Community competition law. The given provisions should be abolished by the second amendment.

THE AREA OF PUBLIC PROCUREMENT

An essential change in the area of public procurement consisted in publication of the new Act on Public Procurement No. 40/2004 Coll., which, as of 1 May 2004, replaced the previous Act on Public Procurement



The seat of the Office for the Protection of Competition

No. 199/2004. For the purposes of implementing certain provisions of the Act, two implementing regulations (decrees) were adopted. The necessity of adopting a new act resulted especially from the need of ensuring **transposition of the relevant European directives** and also from the effort to legislatively establish the practical experience acquired in application of the previous act.

An important feature of the new act consists in **abolishment of more favourable treatment of domestic tenderers**. The previous legal regulation did not eliminate certain unclarities in interpretation of some concepts, which resulted in a lack of legal certainty in application of the Act and also in an excessive number of applications for a review. The whole tendering procedure was inappropriately extended in this way. At present, **a brand new Act on Public Procurement is under preparation in relation to adoption of new EC Directives** No. 2004/17 EC and 2004/18 EC, and the Office will on this occasion suggest that a simplified and transparent way of contract awarding was elaborated for the contracts below the thresholds.

THE AREA OF STATE AID

The issue of state aid was, until 30 April 2004, comprehensively regulated by the Act No. 52/2000 Coll., on State Aid. An essential change in the area of state aid, related to the accession of the Czech Republic into the European Union, consists in the fact that the EC state aid legislation became directly applicable and the power to make decisions on

the possibility to grant state aid was transferred directly to the European Commission. This was the reason for preparation and approval of a new Act, which, as of 1 May 2004, replaced the previous legal regulation and **created the framework ensuring fulfilment of the Czech Republic's obligations related to the accession into the EU and the needed cooperation of the Office with the Commission in performance of its powers**.

The Act No. 215/2004 Coll., Setting Certain Relationships in the State Aid Area especially stipulates that the Office will cooperate with the providers of state aid in relation to notification of the aid to the European Commission as well as during the proceeding before the Commission, will keep the register of state aids provided in the Czech Republic and will submit an annual report on the aids to the European Commission. The Act also stipulates a duty of providers and beneficiaries of the aid to submit necessary information to the Office and the Office's right to assess its completeness, correctness and truthfulness and possibly impose sanctions, as well as the duty of the beneficiaries and providers of state aid to provide the European Commission with their full cooperation in case when the Commission carries out an on-spot investigation at their premises, and defines the rules, pursuant to which unlawfully provided or misused aid shall be recovered. The new Act also stipulates that in individual proceedings before the European Commission it is the state aid provider that shall act on behalf of the state.

3 APPLICATION OF THE ACT IN THE AREA OF ANTITRUST AND MERGERS

The effort to enhance efficiency of proving and sanctioning the most serious distortions of competition was reflected in the change of the Office's organisational structure. Within the newly established Competition Department there are four sub – departments focused on separate economic sectors, while one of them concentrates on revealing and sanctioning cartel agreements. In 2004, 194 decisions were issued in the competition area, where the number of motions decreased considerably. This was caused especially by the **reduction in the number of administrative proceedings in the area of concentrations**. The Office also does not conduct the negative clearance proceedings and the individual exemption proceedings any more. **The Office used more frequently the possibility to conduct so – called unannounced on-spot investigations** (where an administrative proceeding is opened just before the inspection), which enable more probable collecting evidence about alleged anticompetitive behaviour. In 2004 the Office revealed **more price cartels. Fines amounting to almost CZK 1,226 billion in total were imposed**. In comparison with the year 2003 there was approximately a triple increase.

For the first time the so called Leniency programme was applied, which enables more lenient treatment of undertakings that voluntarily announced a cartel and submitted evidence about its existence. The programme was used by company PINELLI. The Office dealt with a number of cases of **distortion of competition** in the area of food production. **The Constitutional Court dismissed an action** lodged by company Karlovarské minerální vody against the Office's decision prohibiting the merger of Karlovarské minerální vody and company Poděbradka. In August of 2004 the Office opened its first administrative proceeding in case of a **violation of Article 82 of the EC Treaty**. Company ČESKÝ TELECOM is the party to this proceeding. The Office also commenced two administrative proceedings upon motions by **the Public Defender of Rights**.

After three years, the individual exemption from the prohibition of agreements distorting competition granted to the so called **pool of insurance companies** providing travel agency's bankruptcy insurance ceased to exist on 1 January 2004. The Office did not extend the exemption. During 2004, the number of travel agencies decreased by approximately 100, therefore the market in a way cleaned out some risk agencies. This affected positively also the decrease of the travel agencies clients' risks.

In 2004, the Office dealt again with the conduct of retail chains towards their suppliers. The Office was the first to provide a market analysis and to describe the issue and as early as 1999, it elaborated a draft amendment to the Act that introduced the notion of economic dependence. Pursuant to this amendment, possible anti - competitive practices of retail chains towards their suppliers could have been assessed in an efficient way. The Parliament of the Czech Republic did not pass this amendment and all initiatives of other institutions turned out to be inefficient. On the basis of the hitherto findings, a **specific regulation by a separate act** seems to be a possible efficient **solution** of the issue. Supervision over the observance of the Act should be entrusted to an institution equipped with instruments enabling a quick remedy of a wrongful situation (not an institution, whose decisions are subject to the judicial review).

In the area of concentration between undertakings the Office received **185 motions via the international ECN network**. **13** of them met the notification criteria set by the law. However, as none of the cases constituted a threat to the competition on the Czech Republic's territory, the Office filed no application for a referral of a case from the European Commission. In the area of antitrust, the Office received notifications of **749 cases** of conduct in breach of the articles 81 and 82 of the EC Treaty. An impact on the competition on the territory of the Czech Republic was identified **in three cases**. One of

these cases consisted in an investigation pursuant to the article 82 of the EC Treaty dealing with a possible abuse of dominant position by company ČESKÝ TELECOM, a.s.,

the remaining two cases are investigated by the European Commission (the SkyTeam Alliance, international roaming in the telecommunication sector).

The number of motions and administrative proceedings including appeals against first – instance decisions and the number of petitions filed with the High Court or the Regional Court against decisions of the Chairman of the Office in the years 2000 – 2004.

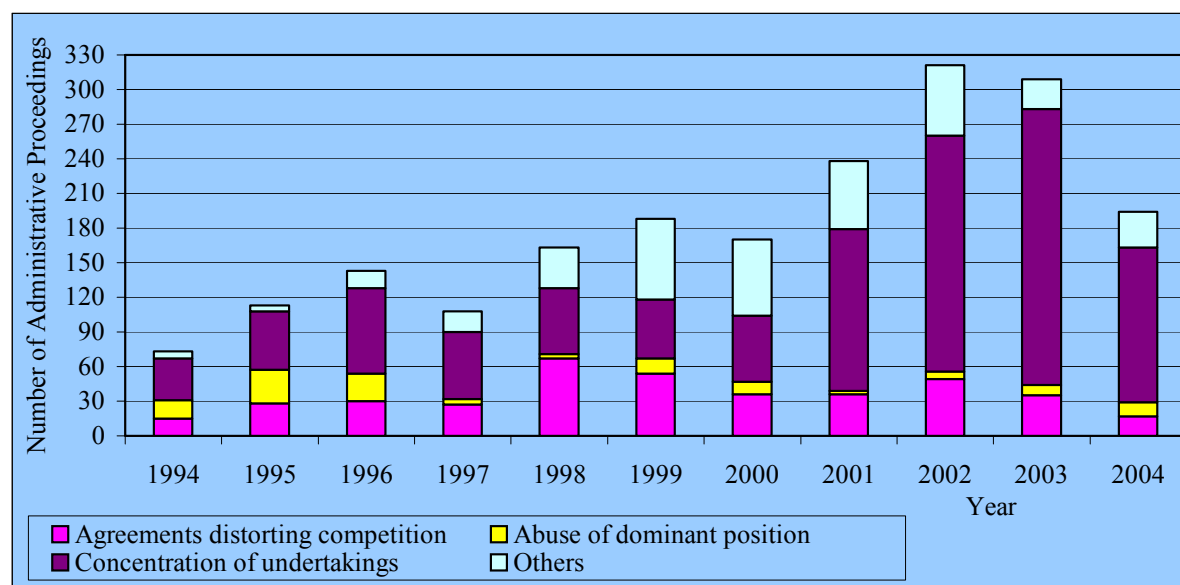
Motions	2000	2001	2002	2003	2004
Total (antitrust, concentrations)	607	464	492	821	672

Administrative proceedings	2000	2001	2002	2003	2004
Agreements distorting competition	36	36	49	35	17
Abuse of dominant position	11	9	7	9	12
Concentrations	57	140	204	239	134
Other (termination, suspension and procedural fines)	66	59	61	26	31
Administrative proceedings in total	170	244	321	309	194
Number of appeals	16	11	46	32	36

Number of actions to the High Court or the Regional Court	2	3	7	8	9
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Total amount of fines imposed in 2004 (based on decisions issued in 2004)	1,236,090,000 CZK
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Administrative proceedings of the Office in 1994 – 2004



3.1 RESTRICTIVE AGREEMENTS

In 2004, investigations of **538** motions and complaints in total were commenced. **17 administrative proceedings** were opened, 7 of which were sanction proceedings, 8 of which were negative clearance proceedings and the remaining 2 were proceedings concerning individual exemption from the prohibition of agreements distorting competition. **30 decisions were issued**, 13 of which were sanction decisions, 12 of which were negative clearance decisions and 5 of which concerned individual exemptions. In several cases the proceeding was conducted with a higher number of parties to it. Fines of almost **1,065 billion CZK** in total were imposed in the area of agreements distorting competition.

SELECTED CASES

Building savings companies

Six building savings companies, i.e. all the undertakings on the given market in the Czech Republic, were mutually exchanging, on the basis of an agreement, since 1997, sensitive information – among others information on the number of concluded building saving contracts, on the amount of the saved money, on the granted credits and on their market shares, in monthly periods and retrospectively. The agreement subsequently in 1999 created preconditions for a mutually **concerted prohibited practices in setting the fees** for administration of building savings accounts and in case of five parties to the proceeding also in establishment of different charges for administration of building savings accounts for new and older building savings contracts, or introduction of so called fee for interest advantage enjoyed by the older agreements. For the above-mentioned conduct, by which the parties to the proceeding mutually excluded the risk of uncertainty on the future behaviour of their competitors on the market and achieved a significant increase of the fees for administration of building saving accounts, or set a new fee for the interest advantage, the Office imposed fines in overall amount of **CZK 484 million**. All the parties to the proceeding were in the framework of the

remedial measures imposed also a duty to set the level of fees for administration of building saving accounts to the level prior to the proved anti – competitive conduct and the duty to remove the different charges for the administration of building saving account related to new and older building saving contracts, respectively to remove so called charges for interest advantaged treatment of older contracts. **An appeal against the Office's first – instance decision was lodged.**

Agreements of sugar producers

The administrative proceeding **against the company EASTERN SUGAR ČESKÁ REPUBLIKA, a. s., the company Moravskoslezské cukrovary, a.s. and the company Cukrovary TTD a.s.** was aimed at ascertaining whether the parties to the proceeding entered into an agreement on fixing the prices of sugar or whether they applied concerted practices in fixing the prices of sugar. It was proved that the parties to the proceeding had been mutually exchanging confidential information on the production of sugar, supplies, sales, exports and imports of sugar, market shares and other information, in monthly periods via the Bohemian – Moravian sugar refinery association. The sugar producers in question **applied concerted practices in fixing the prices of sugar from 1 May 2004 until 30 June 2004 at least**. The sugar producers also entered into a **prohibited, null and void agreement on the exchange of information** and since 1998 were performing this agreement by which they were intentionally breaching the Act from 1998 until November of 2004 (one of the parties to the proceeding was committing such an infringement only until August of 2004). The sugar producers in question **were also performing the agreement on sharing the sugar market** from September of 2002, at least, until August of 2003. By the described conduct the sugar producers distorted competition on the market for industrial sugar for further processing and competition on the market of sugar for immediate consumption. The companies in question were imposed a fine amounting to **118.7 million CZK in total**. **An appeal against the Office's first – instance decision was lodged.**

Application of the Leniency programme

The Office closed the first case of an application for use of its so called Leniency programme. On the basis of this programme the undertaking that is the first to disclose relevant information on a prohibited cartel agreement to the Office, about which the Office had no evidence so far, and confesses to being a party to the prohibited agreement and at the same time, puts an end to its anti – competitive conduct, may take advantage of imposing a lower fine or even the Office’s refraining from imposing a fine. In the case in question, the Office decided not to impose a fine upon the applying company PINELLI that



had been a party to a proved cartel agreement in the area of energy drinks. The company PINELLI, that had concluded a prohibited agreement on exclusive sale with the distributor, voluntarily provided the Office with information about this cartel agreement, submitted evidence about its existence, and applied to the Office for remission of the fine on the basis of the Leniency programme. As the Office was provided with this information completely on a voluntary basis and at the time when it was not aware of the agreement’s existence, the Office refrained from imposing the fine. The possible fine could have amounted to almost 20 million CZK, taking into consideration the turnover of the company in question. PINELLI breached the Act by entering into an agreement on exclusive sale that from September of 2002 to April of 2004 might have resulted in distorting competition on the market for energy drinks sold in small – consumer packing. The performance of the Agreement on exclusive sale would have made the other distributors’ access to the products of the company PINELLI impossible. It has to be

pointed out that this company has a share over 40% on the market for energy drinks sold in small – consumer packing in the Czech Republic.

Agreement on price fixing in the area of the ADSL modems sale

In August 2003 the Office received a motion by the company Czech On Line, a.s., stating that in relation to its public tender concerning purchase of ADSL modems it became suspicious that the company **ČESKÝ TELECOM, a.s. (hereinafter referred to as „ČTc“)** in the course of its own public tender entered into agreements including suppliers’ obligation not to sell ADSL modems to other interested parties at a price lower than the price for which they had sold the modems to ČTc. During the preliminary proceeding the Office found out that the respective Framework agreements between ČTc and suppliers of ADSL actually included provisions which might have resulted in a distortion of competition. Therefore the Office opened an administrative proceeding against ČTc. In its opinion the possible infringement consisted in ČTc’s entering into ADSL modems supply agreements that included a provision putting an obligation upon the other party to the agreement not to sell the products in question to any other company in the Czech Republic at a price lower than a price set for ČTc. The Office imposed a fine amounting to 15 million CZK for the **conclusion of prohibited agreements on price fixing** which might have resulted in a distortion of competition on the market for supply of modems and accessories designed for the connection to the Internet through the ADSL technology. The Chairman of the Office reduced the fine to 10 million CZK in an appellate proceeding due to the fact that **the party to the proceeding had removed prohibited provisions included in the agreements, had not enforced their performance and, at the same time, had admitted their anti - competitive nature before the decision was issued.**

The Czech Chamber of Pharmacists

The Czech Chamber of Pharmacists breached the Act by approving, within its Licencing Code, the Chamber’s power to express its consent to the location of a

pharmacy, including a possible isolated department for dispensation of pharmaceuticals, and its consent to the material, technical and personal equipment of a pharmacy for the extent of provided medical care. The conduct in question consists in a prohibited and null and void decision by an association of undertakings that resulted in a distortion of competition on the market for pharmaceutical services. **The Office imposed a fine amounting to 500,000 CZK** upon the Chamber and, at the same time, a remedial measure consisting in changing the Licencing Code and informing the Chamber's members about the change. **An appeal was lodged against the decision.**

Sale of periodical press

Company **Mediaprint & Kapa Pressegrasso, spol. s r.o.** breached the Act by putting an obligation, in the Agreements on supply, purchase and following sale of press, upon the retail press sellers not to enter into a contractual supply relationship with other competitors and not to purchase the supplier's goods from a third person. It also placed them under an obligation not to purchase periodical press and non - periodical publications, that the supplier was offering, from other competitors and it also placed the retail press sellers under an obligation not to purchase periodical press and non - periodical publications from other competitors without the supplier's consent. The above - mentioned agreements might have resulted in a distortion of competition on the market for distribution of printed titles for a free sale. The Office prohibited the performance of the agreements, **imposed a fine amounting to 1.5 million CZK upon the company Mediaprint & Kapa Pressegrasso, spol. s r.o.** and, at the same time, a remedial measure consisting in informing in a written way all the retail press sellers about the prohibition of the agreements pursuant to the statement of the Office's decision. **An appeal was lodged against the decision.**

3.2 ABUSE OF DOMINANT POSITION

In 2004 the Office commenced 12 administrative proceedings, 11 of which were sanction proceedings and 1 was a negative clearance proceeding on a party's

proposal. The Office **issued 15 decisions** in the area of abuse of dominant position, 12 of which were sanction decisions, remaining 3 were negative clearance decisions on a party's proposal. The investigations dealt mainly with **cases of abuse of dominance in network sectors, i. e. for example in telecommunications and heating production sector.** The most serious case concerned a parallel publication of a wholesale and retail service offer for ADSL from company ČESKÝ TELECOM.

In 2004 sanctions amounting in total to **160.5 million CZK** were imposed for abuse of dominant position.

SELECTED CASES

Exercising different conditions

In March 2004 the Office received a complaint by a professional association of companies offering lease services, with regard to a conduct by the company **ŠKODA AUTO a.s.**



which had been refusing to grant a discount for purchase of larger quantities of personal motor vehicles of the „ŠKODA” brand to the companies that offered so called operational lease (under which the ownership of the subject of the lease is not transferred to the lessee after the closing of the lease). In the course of the administrative proceeding it was proved that **the ŠKODA AUTO company had negotiated different conditions of the wholesale purchase of personal motor vehicles of the „ŠKODA” brand in agreements with individual parties to the contract (wholesale purchasers).** It was also proved that **the ŠKODA AUTO company had been refusing to grant the same conditions**

resulting from wholesale - supply agreements even to the lease companies which were, by means of such a conduct by the company ŠKODA AUTO, disadvantaged in comparison with other business partners of the party to the administrative proceedings, notably because of the lack of possibility to conclude wholesale - supply agreements with the company in question and enjoy advantages arising from such agreements, that is, in particular, discounts granted to other wholesaler. ŠKODA AUTO company abused, by means of the above - mentioned conduct, its dominant position and that's why the Office imposed **a fine amounting to 55 million CZK** upon the company, ordered it to refrain from such a conduct in future and imposed a remedial measure consisting in adjustment of the contents of the Agreements on supply of personal motor vehicles to wholesalers that had been effective so far. **The company ŠKODA AUTO lodged an appeal against the first instance decision.**

Publishing the change of the offer of ADSL services

Company ČESKÝ TELECOM, a.s. (hereinafter referred to as "ČTc") made public a new structure of its services provided on the market for mediation of access to the Internet services and for transmission of data by using the broad - band xDSL technologies (ADSL) at a press conference held on 26th November 2003. These services were intended to substitute the services provided through the company's section „Internet On Line“ from 1 January 2004 and on the same day (i.e. on 26 November 2003) the company also made public the change of its wholesale offer on the basis of which the end - customers are provided with ADSL services by other operators. By making both the offers public on the same day ČTc failed to provide the other operators with a time period sufficient for assessing the wholesale offer in such a way that these operators could enter into negotiation with ČTc about the new form of ADSL services and enter into an agreement with ČTc that would have made provision of these services possible. By means of such a conduct, ČTc prevented the other alternative operators from offering ADSL services to the end - customers on comparable conditions. It has to be pointed out that alternative

operators are not able to provide ADSL services without the access to the infrastructure possessed by ČTc. Due to this fact ČTc gained a considerable competitive advantage and caused damage to other competitors. Besides that it also caused damage to the end – customers who had a limited possibility of choice of the ADSL services provider during the period in question. The Office imposed **a fine amounting to 90 million CZK** upon ČTc for the infringement of the Act. ČTc has lodged an appeal and the decision has not yet entered into force.

SAZKA - scraping lots

During 2003 the Office received several complaints by contractual partners of the company SAZKA, a.s., that were pointing out



to an abuse of a dominant position in the sale of scraping lots. In the course of a preliminary proceeding the Office found that the contractual terms and conditions in the relationship between SAZKA and its procurers included provisions that could have distorted competition. In the course of the administrative proceeding it was proved that SAZKA exercised towards its procurers **inappropriate contractual terms and conditions that consisted particularly in a duty to activate another package of scraping lots regardless of whether all the scraping lots of the previous package had been sold out** in the situation when the maturity of a package of

scraping lots, set by SAZKA, had expired. **The procurers were also not given a possibility to return the unsold scraping lots of the activated packages** for which the procurer had paid a price to SAZKA after the expiry of the maturity of the package (the agreements allowed returning a scraping lot only in case of termination of the validity of an immediate or a money lottery or termination of a procurement activity of the procurer, but only with regard to those scraping lots that had not been paid for). A failure to fulfil the above – mentioned terms and conditions could have resulted in SAZKA's withdrawal from the agreement. The company SAZKA was imposed upon **a fine amounting to 12 million CZK** for breaching the Act. An appeal has been lodged against the decision.

The first proceeding on the infringement of the European Community law

In August of 2004 the Office opened its **first administrative proceedings on an infringement of the Article 82 of the EC Treaty**. The reason for the proceeding were the unregulated price plans of company ČESKÝ TELECOM, a.s. (hereinafter referred to as "ČTc") designed for its end – customers from among households, small undertakings and customers using the ISDN (Integrated Services of Digital Network) comprising a monthly lump for a lease of a telephone station an inseparable part of which are call credits or free minutes for „free“ calling (calls up to the level of such a credit are perceived by the customers as a performance provided “free of charge”, for they are not charged separately to them). The object of the assessment was constituted also by a service called „Internet Express“, in addition to which a customer obtained a „Universal type“ price plan together with a lower price for a minute of call charge, or a uniform price of 9.90 CZK (excluding VAT) for the first hour of calling was charged to the customers (such a possibility was not available to the customers using other price plans). The administrative proceeding was aimed at assessing whether ČTc, by this bundling of services, did not impede the development of competition and did not create a barrier to entry of new operators into the market, to the development of current alternative operators and whether this resulted in a limitation of the consumers' possibility to

obtain services of the highest possible quality at a competitive price. **In April 2005 the first-instance decision was issued in this case. It is the first decision ever issued on an infringement of the European Community Competition law in the new EU Member States.**

3.3 CONCENTRATION OF UNDERTAKINGS

The number of concentrations between undertakings significantly decreased in 2004. The Office issued 164 decisions on the merits. The Office approved one concentration with conditions or restrictions and prohibited a concentration in one case.

The amendment to the Act allowed companies to ask, in relation to the accession into the EU, for a re-assessment of conditions imposed by the Office in its previous decisions. **Two companies used this possibility.** The majority of the concentrations assessed by the Office in 2004 took place in **the pharmaceutical industry and services sectors**. High number of concentrations in the food and tobacco industry remains. As regards services it was especially the case of companies dealing with services in the area of real estates. A high number of concentrations was also registered in the sector of chemistry, engineering and network industries, which corresponds with the situation in 2003.

SELECTED CASES

Prohibited merger of bakeries

The companies to merge in this case were Bakeries International Luxembourg S.A. and DELTA PEKÁRNÝ a.s., which operate in the Czech Republic also by means of a network of their subsidiaries. The parties to the proceeding are the two **most important players on the market** of fresh standard baked goods and bread in the Czech Republic. The Office stated in its decision that implementation of the merger would have led to a substantial lessening of competition environment, in particular on the market of fresh standard baked goods and bread. The entity created by the merger would have operated as a single producer on the entire territory of the Czech

Republic and would have been able to cover the established demand for bakery products almost anywhere and would have had better negotiation position against other competitors on the market. This would have allowed it to transfer its market power to all regions and thus **eliminate competition**. The entity created by the merger would have had a wide portfolio of products and control over an important part of raw materials base. Economic and financial power would have allowed such entity to act in a considerable extent independently on its competitors and consumers with a high probability of negative impact on consumers.



The Office assessed particularly the possible price impacts on consumers, for the important position of merging subjects could have led to an increase of the bakery products' price level for consumers. Decrease in the number of important competitors could have also led to an easier implementation of anticompetitive practices and thereby a distortion of the market structure. The merging parties did not propose commitments that would have eliminated negative effects of the concentration, and therefore the Office **prohibited the merger**. **The Chairman of the Office confirmed prohibition of the merger by his second instance decision of 1 February 2005.**

Concentration on the bijouterie market

In 2004 the Office assessed a merger concerning the market of bijouterie, utility

glass, small glass gift products and other markets. Following the acceptance of the commitments proposed by the parties to the proceeding the Office approved the merger of companies Bijouterie Trading Company a.s., and Swarovski Bohemia spol. s.r.o. on one hand and ORNELA a.s. and Bižutérie Česká Mincovna, a.s. on the other hand. The merger of the entities will result, among others, in a considerable increase of their economic and financial power that will exceed the power of its competitors on the relevant markets, where small producers are often active. The Office stated that a substantial distortion of competition would have occurred and invited the parties to consider adoption of commitments and measures in favour of maintaining effective competition. The companies Bijouterie Trading Company and Swarovski Bohemia committed themselves to maintain open and fair demand for supplies for the bijouterie goods production from all business partners, including companies outside the group controlled by the parties to the proceeding, on standard business conditions, in particular observing delivery times, quality and prices. Furthermore the parties to the proceeding committed themselves to offer in the same period the related services on the same business conditions. Next commitment related to maintenance of open and fair demand for supplies for export of bijouterie goods produced by competing companies by means of company JABLONEX controlled by the newly created entity. The Office stated that the abovementioned commitments of companies Bijouterie Trading and Swarovski Bohemia were sufficient for removing concerns of substantial distortion of competition on the relevant markets and **approved the concentration with these conditions and commitments.**

Concentration of Metrostav/Subterra

The companies are active in all segments of the construction market. It is a horizontal merger related mostly to the market of surface construction and engineering construction. With respect to the orientation of both companies the Office specified also the submarket of underground engineering constructions. The entity created by the merger will acquire a large share of this submarket. Although a strong entity, active mostly on the

market of the Czech Republic, will be created, it will not have a dominant position. The merged company will be still subject to a real competition environment from the part of other large construction companies, many of which are parts of supranational groups active in the area of construction. These companies will remain a real alternative for consumers of construction work. The Office examined also the demand side of the market. The fact, that a large part of demand for engineering construction is created by public sector tenders, means that, in case of a sound course of tendering procedure, effective, efficient and fair competition among the tenderers is ensured. As a substantial distortion of competition will not occur, **the Office cleared the merger.**



Concentration of GORENJE/MORA

In the course of 2004 the merger between competitor **Gorenje gospodinjski aparati,**

d.d. (GORENJE) and company **MORA MORAVIA, a.s.,** was authorised. The acquisition was carried out by means of an agreement on purchase of shares, as a consequence of which Gorenje acquired shares constituting 100% share in the registered capital of the company Mora, and therefore also a possibility to directly control this company. Company Gorenje is active on a number of markets, particularly on the market of domestic appliance production, home equipment and heat engineering devices, MORA is active in the Czech Republic in the sector of production and servicing the boiling technology products. The activities of the companies overlapped on the market of boiling devices and vapour absorbers. The entity created by the merger will have an important position on this market. The positives of the transaction dwell in securing finances for modernization and increased efficiency of MORA's production that should result in benefit for consumers. **The Office stated that the acquisition did not give rise to competition concerns on the relevant market and approved the merger.**

Concentration of Aliatel/GTS CZECH

In January 2005 the Office cleared the merger of companies providing services and products in the telecommunications sector to business, public and home customers as well as other telecommunication operators. The assessed concentration has mostly horizontal nature. Even after implementation of the merger the dominant position of the company ČESKÝ TELECOM will be preserved along with potentially important competition among alternative operators. The given merger will strengthen possible effective competition between alternative operators and company ČESKÝ TELECOM, a.s.

Number of initiated administrative proceedings

	Year								
	1996	1997	1998	1999	2000	2001	2002	2003	2004
Mergers – Number of initiated administrative proceedings	74	58	57	51	57	140	217	239	134

In 2004, **174 decisions** were issued, **164** decisions were on **the merits of the case**. Out of this number, **119** mergers were **approved without conditions**, **1 with conditions or obligations**, 43 decisions were issued stating that a transaction was not subject to the Office's approval and **one merger was**

prohibited. One decision on exemption from a prohibition of a merger was issued within the monitored period. Two decisions related to granting status of a party to proceedings. One appeal was filed against a first-stage Office's decision on concentration of undertakings.

Conditions and prohibitions in decisions of the European Commission and the Office

	Prohibitions in the II. instance from the total number of all issued decisions (%)	Conditions in the II. instance from the total number of decisions issued in the II. instance (%)	Prohibitions in the II. instance from the total number of decisions issued in the II. instance (%)
European Commission - in average	0,7%	50,8%	15,6%
European Commission - 2004	0,4%	57,1%	14,3%
The Office - between 1 July 2001 – 31 December 2004	0,4%	56%	12%

3.4 APPEAL PROCEEDINGS

Appealed decisions in 2003	34
Of those decisions issued in 2003	33
Decisions appealed in 2004	36
Of those decisions issued in 2004	21

In 2004, **62 appeals** were lodged (against 36 first-stage decisions) which is 19 more in comparison with 2003. This increasing tendency in the number of lodged appeals contributed positively to enlargement of already established judicature of the Office. **The difficulty of the discussed cases** was reflected, among others, by a growing extent of given administrative proceedings. The complexity of submitted appeals also increased, which augments expert and time demandingness in discussion on appeals, and subsequently also the complexity of elaborating the second stage decisions. It is possible to say that cases of distortion of competition environment detected and investigated by the Office show more serious level of the competition law infringement year by year. These cases consist particularly in the most serious infringements of law as cartel agreements and price-fixing agreements.

SELECTED CASES

Cartel agreement of distributors of fuels

The Chairman of the Office decided on confirmation of the substance of the Office's decision stating that the parties to the proceeding, companies **Agip Praha, a.s., Aral ČR a.s., BENZINA a.s., ConocoPhillips Czech Republic s.r.o., OMV Česká republika, s.r.o., Shell Czech Republic a.s.**, violated the Act on the Protection of Competition by entering into **concerted practices aimed at fixing the sale price for the car petrol Natural 95** sold by their petrol stations in the period beginning on 28 May 2001 and ending on 30 November 2001. By the concerted behaviour the parties eliminated risks of competition and fulfilled their intention of increasing their profits by rising retail prices of petrol Natural 95 by approximately 1 CZK on the major part of relevant market, i.e. at 75-100% of their petrol stations within 15-36 hours, and mutually excluded the effect of competitive environment. **However, there was no factual reason for rise in Natural 95 sale price on the market.** The parties maintained the high level of the Natural 95 sale price until the end of November 2001 despite the continuing trend of a considerable decrease in purchase price. For the breach of law **finances amounting in total to 313 million CZK** were imposed.

Agreements of mobile operators

Companies Eurotel Praha, spol. s r.o. and Oskar Mobil a.s. and companies T-Mobile Czech Republic a.s. and Oskar Mobil a.s. breached the Act on the Protection of Competition by concluding and subsequent performance of prohibited agreements in their **Interconnection agreements. As a result of the anticompetitive provisions the other operators providing the transit services were prevented from entering the defined relevant market. Fines** were imposed for the breach of the Act, on **company Eurotel in amount of CZK 22,000,000, on company T-Mobile CZK 12,000,000 and on company Oskar Mobil in total amount of CZK 10,000,000.**

Fines for the company ČESKÝ TELECOM

ČESKÝ TELECOM, a.s., abused its dominant position on the market of provision of public phone services designed for business entities, via public fixed telecommunication networks, to the detriment of both other competitors and consumers. The company breached the act also by concluding with business entities **contracts on provision of price plans** in the wording of its General



conditions, which contained **obligations of the buyers of public phone services concerning the contractual phone charges**, including the Account of the phone charges, **the obligation of “exclusive offtake” or an obligation that**

the contract on provision of the price plan would not be cancelled by any of the contractual parties before certain fixed date. Company ČESKÝ TELECOM, a.s., also applied **individual conditions in the contracts** on provision of a price plan different from the General conditions, or applied programmes Winback/Retence. These obligations constitute so called **fidelity rebates**, which, by being provided by the company ČESKÝ TELECOM, as a dominant undertaking, created a barrier for development of competition on the relevant market and at the same time resulted in price discrimination of other customers that had not obliged themselves towards company ČESKÝ TELECOM. Company ČESKÝ TELECOM was imposed a **fine in amount of CZK 81,700,000** for the breach of the act.

Another breach of the act was committed by ČESKÝ TELECOM on the ADSL market. By **non-provision of the information necessary for interconnection of networks to the alternative operators**, the company prevented its competitors from entering the relevant market of mediation of access to the Internet services and transfer of data using broadband technologies xDSL (ADSL) via public fixed telecommunication networks. The abovementioned behaviour was committed by ČESKÝ TELECOM **despite the fact that it had been repeatedly asked by the alternative operators for provision of the information.** Company ČESKÝ TELECOM was imposed a **fine in amount of CZK 23,000,000** for the breach of the act.

LINDE TECHNOPLYN

The company breached the Act on the Protection of Competition by concluding prohibited **agreements on supplies of technical gases in bottles** with its customers, by which it abused its dominant position to the detriment of competitors and consumers, as it created a barrier for development of competition on the market of bottled technical gases supplies. The abovementioned agreements contained **an obligation that the customer would take its overall consumption of technical gases mentioned in the agreement exclusively from LINDE.** They also breached the act by the fact that by their means LINDE applied **individual**

conditions different from the internally defined rules resulting from the price list of technical gases, with the aim of acquiring or maintaining customers to the detriment of competitors in the way that it adapted the conditions for conclusion of agreements to individual requirements of particular customers. **The company was imposed a fine in amount of CZK 12 million.**

Karlovarské minerální vody

The abovementioned company as the majority shareholder of company Poděbradka, **executed its voting rights connected to the shareholding and influenced the behaviour of the controlled undertaking before the legal effect of the Office's decision on approval of concentration between undertakings.** The concentration of companies Karlovarské minerální vody and Poděbradka was not approved by the Office. The subsequent action filed by Karlovarské minerální vody was **rejected** by the Supreme Administrative Court and subsequently also by the Constitutional Court. Company Karlovarské minerální vody was imposed a **fine in amount of CZK 10,000,000** along with the duty to transfer the shares of Poděbradka to such an acquirer, which is independent on KMV as regards its ownership, funds and personal relations.

A ban on re-import

Company ČEZ, a.s., breached the Act on the Protection of Competition by **concluding agreements on ban of re-import of electric power to the Czech Republic** in seven contracts on supply of electric power. These contracts could have resulted in distortion of competition on the market of electric energy supplies to the electric energy traders and distribution companies. The arrangement on the ban of re-import to the Czech Republic means that a certain product that has been already exported to a certain territory, cannot be re-exported back to the Czech Republic, which constitutes restriction or even exclusion of access of other companies to the market. Respecting the ban on re-import causes suppression of competition, which, as a result, may lead to influencing the sale prices of certain goods to the prejudice of final consumers. The re-import contributes to

creation and development of competitive environment on the market. Company ČEZ was imposed a **fine in amount of CZK 7,500,000** for the breach of the act.

Oskar Mobil – direct price fixing

The abovementioned company breached the Act on the Protection of Competition by concluding **prohibited and void agreements on direct price fixing** distorting competition on the market of charging coupons for prepaid „Oskarta“ service in the distribution agreements on supply of charging coupons for prepaid „Oskarta“ service. The Chairman of the Office stated that the distortion of competition, consisting in conclusion of prohibited agreements on prices and their subsequent performance, restricted not only the free will of distributors but also the competition environment in favour of company Oskar Mobil. The distributors could not set their prices for sale of the charging coupons for pre-paid “Oskarta” service on their own discretion at the places where the charging coupons are sold to the final consumers. Company Oskar Mobil therefore did not have to face the price competition by other competitors, which would have resulted from different – i.e. lower- prices in sale to the final customers, by means of its own distribution channel. The final customers then, as a result of the anticompetitive behaviour of the party to the proceeding, had no opportunity to acquire the charging coupons for the price lower than the one set by company Oskar Mobil. Company Oskar Mobil was imposed a **fine in amount of CZK 6,500,000** for the breach of the act.

4 PUBLIC PROCUREMENT

In 2004, essential legislative changes took place in the area of public procurement, both on the national level and on the level of the European Union. The Act No. 40/2004 Coll., on Public Procurement came into effect, replacing the Act No. 199/1994, Coll., in force for almost ten years, and in the framework of the EU new procurement directives were adopted.

LEGISLATIVE CHANGES

1. ACT ON PUBLIC PROCUREMENT NO. 199/1994 Coll.

Contracting authorities awarded the maximum possible number of public contracts under the Act No. 199/1994 Coll., before the date of effect of the Act No. 40/2004 Coll. (i.e. before 1 May 2004), because they already had practical experience with its application. This fact resulted in a **significant increase in the number of applications for initiation of administrative proceedings** in the summer months of 2004.

2. ACT ON PUBLIC PROCUREMENT NO. 40/2004 Coll.

This act, in force as of 1 May 2004, regulates the public procurement in awarding proceedings, which are completely **different from the previous legal regulation**. Newly the procedural issues of the contracting authorities' review are also modified. In 2004, the Office's Section for Supervision Over Public Procurement was elaborating its positions serving the contracting authorities and the tenderers as a methodological assistance in their proceedings under the new act No. 40/2004 Coll. **During the year, more than 800 written enquiries were answered**. The absolute majority of the enquiries related to the new act.

3. PREPARATION OF A NEW ACT PURSUANT TO THE NEW EUROPEAN DIRECTIVES

The procurement directives, adopted in the European Union in the beginning of the

nineties, were in 2004 replaced by new ones, to which the Member States shall adapt their legal order as of the 31 January 2006 at the latest. These legislative works have been already commenced in the Czech Republic. For the sake of the legal regulation's transparency a **new act** will be adopted, which will replace the whole Act No. 40/2004. The Office takes part in the preparation of the new act along with the Ministry for Regional Development. The basic principles and procedures contained in the Act No. 40/2004 will be preserved in the new regulation. The main changes in the new EU directives consist in the change of limits for public contracts exceeding the thresholds, establishment of a new way of contract awarding (so called "Competitive Dialogue"), extension of the possibility to use the framework agreements and electronic public procurement, clarification of the rules for exclusion of tenderers and assessment of bids. The sector directive abandons regulation of the telecommunication sector, on the contrary, the companies providing postal services were newly included among the contracting authorities.



DECISION-MAKING ACTIVITY OF THE OFFICE

The decision-making activity of the Office with its interpretation results became in 2004 a necessary element of the system of legal

regulation of the public procurement process and contributed to public funds' savings.

The Office, by **imposing a duty to redress the found breaches of law**, saves the financial means of the contracting authorities by preventing conclusion of contracts contradictory to the law and thus prevents possible disputes on performance of such agreements. In many cases, **cancelling the award of a contract** prevents implementation of public contracts awarded on the basis of insufficiently processed awarding documentation that does not define the object of the public contract, which brings a risk of additional requirements of the supplier for increase of the bid price. However, in case where the Office finds serious breaches of the Act only in the time, when the given contract for the performance of the public contract is concluded, it is no longer possible to remedy the wrongful situation resulting from the illegal action of the contracting authority. In such cases, the Office applies **imposition of fines**. In 2004 **the Office received 244 submissions and complaints** of entrepreneurs or citizens, or the bodies of state administration and local authorities, and initiated 7 controls under the Act on the State Control. On the basis of these controls and investigation of the abovementioned 244 submissions 92 administrative proceedings were commenced on the Office's initiative in 2004, in which **finances in overall amount of CZK 1,460,000** were imposed. The following **control actions** were initiated in 2004: The Statutory City of Liberec, Capital of Prague - the District Authority of Prague 1, ČEZ a. s. Praha, the Association of the Football Club AC Sparta Praha, the City of Uherské Hradiště and the Football Club FC Příbram.

ANALYSIS OF FAILURES OCCURRING IN THE PROCESS OF PUBLIC PROCUREMENT

1. INSUFFICIENCIES IN APPLICATION OF THE ACT NO. 199/1994 Coll.

It is possible to say that despite certain repeated faults of contracting authorities, the efforts to cultivate the legal awareness and thus reduce the number of errors in contract awarding as well as to increase the efficiency of the awarding process, have substantially

succeeded. This development is illustrated not only by more qualified approach of the contracting authorities already in announcing the tenders and their assessment, but also by more qualified petitions submitted by the tenderers for the purpose of reviewing the contracting authorities' procedure.

a) The most frequent errors of the contracting authorities in setting the conditions for public procurement:

- **Conditions of contract awarding are sometimes set** in a way that **favours tenderers from the region** where the seat of the contracting authority is situated,
- In public contracts involving construction work the contracting authorities commit errors of rather technical nature, when they do not ensure elaboration of sufficiently quality and complete project and as a result such **bid invitation documents are submitted** to tenderers in a public contract that do not **include the exact enumeration of demanded works and operations**,
- **A contract is deliberately divided** so that a contracting authority does not have to use a more difficult procedural method of contract awarding,

b) Most common errors made by contracting authorities in the evaluation of bids and the selection of the most suitable bid

In the bid evaluation process the contracting authorities do not abide by the basic principles of the public procurement process, namely transparency, non-discrimination of tenderers and a possibility for review of the decision of the contracting authority as regards the selection of the most suitable bid. In its reviewing and supervisory activities the Office often finds that **contracting authorities make errors at the very beginning of the public tendering process by choosing inappropriate criteria** that make it completely impossible for the **tenderers to identify what is more beneficial and thus preferable for the contracting authority**. **In cases where more evaluation criteria are used, it is in many instances impossible to review the process of**

evaluation of bids itself, as the report on the assessment and evaluation of bids, carried out by the contracting authorities does not contain any description of the evaluation method, which should be particularly thorough in case of those evaluation criteria which were impossible to measure objectively.

c) Further most common drawbacks in the process of assessment and evaluation of bids are the cases, where:

- The final evaluation is achieved by a mere definition of the assessment's average,
- The report on the assessment and evaluation of bids lacks explicit substantiation of the most suitable bid selection,
- Not all documents are archived

d) Tenderers' errors related to the submission of bids, objections or proposals for review of the contracting authority's decision on objections:

- **Documents** proving the fulfilment of qualifying criteria are submitted in **non-certified copies** or the age of the documents does not comply with the law,
- **Tenderers provide only unit prices** In their bids **instead of the total price for the execution of the public contract as a whole**,

2. INSUFFICIENCIES IN THE APPLICATION OF THE ACT No. 40/2004 Coll.

a) Errors by the contracting authorities in awarding public contracts

Errors on the part of contracting authorities occur in setting the individual criteria for evaluation of bids according to their economical profitability, while in several cases it was found that **a contracting authority had chosen a criterion, which had not expressed the economical profitability of the bid, but the qualification of the tenderer** (e.g. the references on the tenderer). **Other errors found:** The contracting authority did not use the relevant form set by the implementation

regulation for elaboration of documents required by the law (e.g. the reports on assessment and evaluation of bids). In awarding contracts under the new Act on public procurement **the contracting authorities** commit a serious breach of the law, namely the principle of non-discrimination, which is explicitly stipulated in the Act, especially by **setting their requirements for substantiation of meeting other qualification criteria in a way that does not correspond with the extent of the awarded public contract**. As an example may serve a public contract for an estimated price of CZK 6.5 million where the contracting authority set a requirement for the tenderer's turnover in amount of CZK 100 million, which is more than fifteen times the price of the contract. The abovementioned condition was discriminatory in its nature, as it did not allow the suppliers with a turnover adequate to the public contract to apply for it.

b) Insufficiencies made by tenderers in submitting an application for review of the contracting authority's acts

The complainants e.g. did not meet their duty to deposit a surety on the account of the reviewing authority when submitting their petition for a review of the contracting authority's acts. In such cases the proceeding concerning the contracting authority's review had to be stopped. The Office even experienced cases where the petition was submitted by the complainant already with the intention not to pay the required surety.

SELECTED CASES

The region of Olomouc – reconstruction of the road network

In case of three public contracts for repair and reconstruction of a selected road network the Office found an identical **breach of the law**. The conditions of the public tenders required from the tenderers submitting a joint bid **more demanding** substantiation of the preconditions for performance of a public contract than in case of tenderers constituted by a single entity. In this way, the contracting authority **breached the principle of equal approach** to all the tenderers. The contracting authority in its submitted appeals argued by a "special

character” of the public contracts, which it saw in the long term nature of their performance (10 years). In the contracting authority’s opinion the nature entitled it to setting such preconditions that factually restricted the participation in the tender to companies with “strong capital”.



Statutory City of Ústí nad Labem

The contracting authority concluded contracts on provision of activities in the area of information technologies for a non-specified period with company Metropolnet, of which it was the only founder and share holder. The contracting authority resulted from a false presumption and that was why it had not awarded the contracts pursuant to the law. It presumed that the Act on Public Procurement was not related to cases, where the performance of the contract is fully provided by a business entity, whose founder and the only party to it is a municipal authority and which was established for the purpose of provision of performance constituting the object of the given contract. The contracting authority did not observe the obligatory procedure for conclusion of the contracts by not awarding the public contracts in form of announcing public tenders, by which, along with the conclusion of the agreements themselves, seriously breached the law. With respect to the fact the performances according to the two abovementioned contracts had been realised and it was not possible to impose a duty to redress on the contracting authority, **the Office imposed a fine in amount of CZK 145,000. The contracting authority filed an appeal against the decision. The Chairman of the Office confirmed the decision and dismissed the appeal.**

Army Hospital Brno - reconstruction

The contracting authority formally invited a legal number of tenderers, which were five. Four of the invited tenderers submitted their bids, three of which were excluded by the contracting authority. Subsequently the contracting authority concluded an agreement on performance with the remaining tenderer – company **DEKORINT spol. s r. o.** The reviewing body found that two of the tenderers consisted of identical parties. Both legal persons therefore constituted a personal union, which is in fact a single entity, and that is why it was not possible to regard both the invited companies as autonomous and economically mutually independent entities, that could behave competitively on the market e.g. in a way that they would have submitted mutually competing bids for a public contract. The contracting authority thus, in breach of law by its procedure, did not ensure a free competition of all the potential tenderers, which should have been five in the given case. Furthermore the reviewing body found that even though the selected tenderer DEKORINT had not proved its qualification preconditions before the conclusion of the contract, the contracting authority did not exclude it from further participation in the tender. For the abovementioned serious breaches of law **the reviewing authority imposed a fine in amount of CZK 35,000.**

The Ministry of Interior – a Project of critical communication infrastructure

The contracting authority awarded the public contract in an open procedure pursuant to the Act No. 40/2004 Coll. on Public Procurement. The evaluation committee carried out a control of completeness of the bids, excluded one of them and proposed to the contracting authority to exclude one of the tenderers for not meeting the awarding criteria. Furthermore, the committee evaluated the remaining bids according to the single chosen criterion, i.e. the overall bid price and stated that it considered the bid with the lowest bid price as the most suitable. The contracting authority issued a decision on awarding a public contract, including also a substantiation of awarding the public contract and the order of the other tenderers. Tenderer ATS-TELECOM PRAHA submitted its objections against this decision.

The contracting authority did not comply with these objections. The tenderer ATS-TELECOM PRAHA sent the Office an application for a review of the acts of the contracting authority in which it stated that the winning tenderer had not met the qualification, furthermore that the winning tenderer had offered an extraordinary low bid price and that the contracting authority had not proceeded in line with the law. The contracting authority extended the submission in comparison with the objections by a third point, under which is stated that it had used the possibility to submit enquiries on the bid invitation documents and

that the contracting authority did not comply with its duty and did not express itself on these enquiries. On the basis of the abovementioned facts the complainant claimed a new decision on awarding a public contract. The Office did not find that the contracting authority had failed to comply with any of its duties in the evaluation of the bids. Non-replying to the enquiries that resulted from an administrative drawback had not any influence on the amount of the bid price of the complainant and thus it also had no influence on setting the order of the bids, forasmuch the only criterion for the bids' assessment was the bid price.

STATISTICAL DATA

The overall review of administrative proceedings conducted in the area of supervision over public procurement in the year 2004

Number of received submissions (applications+instigations)	636
Commenced administrative proceedings in total	340
Administrative proceedings commenced on the basis of applications	248
Administrative proceedings commenced <i>ex officio</i>	92
The decisions issued in total*	324
Issued decisions on the merits	165
Stopped administrative proceedings	57
Number of fines imposed	29
Amount of fines imposed by a first instance decision in thousands of CZK **	1 470
The amount of administrative fees due in the year 2004	3 245

* including the decisions issued in administrative proceedings commenced in 2003

** including the sanctions imposed by the decisions in the year 2003, which came into legal effect in 2004

APPEAL PROCEEDINGS

Number of appeals filed against first instance decisions:

Number of decision appealed in 2004.....	119
- of which decided and issued in 2004.....	71
Number of decision appealed in 2003.....	79
- of which decided	
and issued - in 2003	64
- in 2004	13

The reason for the significant increase in the number of appealed decisions of the Office shall be seen especially in the increased

activity of the contracting authorities aimed at awarding their contracts before the date of effect of the new act No. 40/2004 Coll., i.e. before the 1 May 2004.

Generally it may be stated that the **overall complexity of the conducted cases increased**, which was reflected also in the extensiveness of the submitted complaints and thus also in the time demands for their assessment and elaboration of a decision. Purpose-built **appeals, containing mostly no new facts, often occur** and objections that were responded in a comprehensive way already in the challenged first instance decision are repeated word by word. These procedures prolong the awarding proceeding and do not contribute to legal certainty of the parties to the

proceeding. More and more frequently the Office faces efforts of the parties to administrative proceedings to use all the available means, not only pursuant to the Administrative Procedure Code but also the Court Administrative Procedure Code. This effort is evident also due to the increase in the number of submitted administrative actions (14 cases in comparison with 2 cases in 2003), which are more often preceded also by a submission of applications for approval of renewal of a proceeding or applications for review of decisions in the framework of a non-appeal review proceeding (4 cases in comparison with one case in 2003). Also in the case of these applications the tendency not to present any new facts, but only repeatedly apply the objections and statements, that the Office had dealt with already in the first stage proceeding and appeal proceeding, was evident.

SELECTED CASES

The Municipality of Březová nad Svitavou

The Office found in its first stage decision on the procedure by a contracting authority - the municipality of Březová nad Svitavou - a serious breach of the Act's provisions in form of **awarding two contracts on construction supplies** of "the block of family houses in Březová nad Svitavou - Špitalská Pole, 12 units" and "block of family houses Březová nad Svitavou - Špitalská Pole, 14 units" **by invitations to more candidates to a public contract**, i.e. in a simplified form, when the legal preconditions had not been met. The overall amount of the pecuniary obligation exceeded CZK 20 million. The Office stated that the public contracts showed all the features of public contracts consisting in

performance of the same kind, forasmuch it was a case of one intended investment action, prepared and localised by the contracting authority on identical place and time and that was why the contracting authority should have awarded these contracts as a single contract in a form of a public tender. The contracting authority in the filed appeal objected that it had split the construction into several phases due to realisation reasons, while it had not been able to expect in advance the enormous interest of citizens in the construction, which caused that the phases were realised in such a short period. **The Chairman of the Office confirmed the appealed decision and rejected the submitted appeal. The contracting authority proceeded in breach of law by splitting the contract in a purpose-built way.**

The Ministry for Regional Development

The Office imposed on the Ministry for Regional Development a fine in amount of **CZK 50,000** and stated a serious breach in the procedure of the contracting authority committed by **not announcing a public tender** for the purpose of concluding a contract on "elaboration of monitoring system for the programs of the Czech Republic's structural funds", despite the fact that the amount of the future pecuniary obligation exceeded CZK 7.5 million. Instead, the contracting authority used the form of contract awarding pursuant to the Article 50, par. 1, letter b) of the Act without substantiating in a provable way that the entity, with which the contract had been concluded, had been the only possible candidate to the public contract able to provide the performance of this public contract.

5 STATE AID

State aid monitoring and assessment of state aid's compatibility with competition rules of the European Union are among the main pillars in the area of protection of competition. The Office has been involved in this field already since 2000. The powers of the Office changed in May 2004, when the decision-making power in this area was transferred to the European Commission and the Office became a central consultative and advisory authority.

ACTIVITIES IN THE AREA OF METHODOLOGY AND LEGISLATION

The Act No. 215/2004 Coll., on regulation of relations in the area of state aid and on the amendment to the Act on state aid for research and development, which replaced the Act No. 59/2000 Coll., on state aid as amended, was passed in the course of 2004. By the approval of this law an essential change was brought to the activities and the position of the Office from a decision-making authority to a central advisory and consultative authority. Furthermore, the Decree on Information Obligation of the State Aid Providers was prepared that should be issued in 2005. Draft rules on state aid are put forward by the European Commission to the Office as the central authority for the issue of state aid in the Czech Republic. The Office prepared for example its comments on the draft rules for state aid in the area of the general economic interest services, in co-operation with relevant Ministries the Office mediated the Czech parts' opinion on the review of Guidelines on national regional aid and on the Vademecum - Community rules on state aid for innovation or the proposal regarding so-called de minimis state aid. The Office also gives its opinion on technical proposals of the European Commission, e.g. on the amount of the reference rate, and gives notices to the recipients of the state aid in the Czech Republic that the new rules were adopted on the Community level.

ACTIVITIES IN THE AREA OF DECISION-MAKING

In 2004, 95 administrative proceedings were initiated and 135 administrative proceedings were concluded by the end of the year. The major part of the assessed proceedings related to **investment incentives**, technology centres and strategic services. Their share in the total amount of the administrative proceedings comprised 29 per cent. The activity of the Office shifted after the EU accession towards elaborating preliminary opinions, preparing notifications and discussing cases with the European Commission. In 2004, 13 new state aids were notified. In relation to the European Commission the Office elaborates statistical data and summaries on state aid and fulfilment of other commitments of the Czech Republic in the area of state aid.

ACTIVITIES IN THE AREA OF MONITORING

The most important activity in the area of monitoring in 2004 was realization of so-called interim procedure, within the framework of which the European Commission reviews the state aid decisions of the Office issued before 1 May 2004, that are still effective after the accession of the Czech Republic into the European Union. In cooperation with relevant state aid providers the Office ensured supply of the data required by European Commission in the course of the year. In connection with some difficult cases dealt with within this procedure, direct discussions of the Office's staff and European Commission's officials took place in the beginning of the year. Through these negotiations the cases of state aid in the area of banking were successfully closed in a short time. The Office also elaborated and sent to the European Commission the Annual Report on State Aid 2003. In comparison with the year 2002, the total amount spent on state aid in 2003 **decreased absolutely by more than CZK 30 billion** and in relation to GDP the volume of state aid decreased from **4.66% GDP in 2002 to 2.81%**.

The **reduction of state aid for restructuring and rescue** participated by the largest part in decreasing the total volume of state aid. This was followed by a progressive realization of drawing the state aid for bank sector granted in previous years. Furthermore, there was a decrease in state aid for environment, energy savings, regional aid and tourism. **The Office enforced reduction of the total level of granted state aid as an objective for the draft Conception of the Czech Republic's Orientation in the Framework of the EU for the period 2004 – 2013.** In the end of 2004 a summary of state aid granted, so called Scoreboard for the period 2000-2003, was elaborated. This summary is subsequently aggregated on the European Union level and serves for comparison of state aid granted in individual EU Member States.

In 2004, about 500 enquiries were answered, that helped to identify state aid and its subsequent notification to the European Commission. The answers on particular inquiries mentioned above were complemented with general seminars on selected areas of state aid on the level of ministries.

SELECTED CASES

Třinecké železářny

The Government proposed realization of a measure in the form of advantaged sale of bonds issued by **Třinecké železářny (TŽ)** and purchase of the ownership interest of 10.54% in the registered capital of the company ISPAT NOVÁ HUŤ, a.s. (INH), owned by TŽ. The Office assessed the proposed measure and approved the purchase price of the ownership interest as adequate to the value of INH shares, thus not constituting state aid. In the case of advantaged sell of bonds issued by TŽ the Office stated that the transaction had constituted state aid which could be authorised according to the EC rules on state aid only as state aid for environment, science and research, training and closing of redundant capacity. Subsequently, the Office limited the number of proposed measures only to such projects that factually complied with the terms of extra reduction of emissions, general and specific education and research and development projects.

Privatization of OKD company

The Czech Republic intended to sell its



ownership interest amounting to 45.88% of OKD company's fixed assets held by National Property Fund (NPF). For this purpose an exclusive agreement was concluded with **KARBON INVEST** company that was the narrow majority shareholder of OKD already. The share of NPF should have been sold on the basis of the Government's resolution for a purchasing price of CZK 2.25 billion. As the transaction was not carried out on the basis of transparent competitive tendering, the administrative proceeding on an exemption from state aid prohibition was commenced. Company Penta Finance also bade for the share with its binding bid of CZK 3.1 billion. On the basis of an expert opinion elaborated on request by NPF, with respect to the binding bid by Penta Finance and an expert opinion that this company had had worked out and considering the price of OKD's stocks on the public market the Office determined that the purchase price offered by Karbon Invest company did not correspond with the market price. Therefore the transaction was prohibited by the decision of 30 April 2004. Subsequently, the company KARBON INVEST increased the purchase price to CZK 4.1 billion. **This case assessed by the Office demonstrates aptly meeting one of the primary purposes of the state aid legal regulation's existence, in particular protection of competition by preventing undesirable preference of some of the market players and equally important function of state financial resources' protection.** As the final result, substantial financial funds amounting to the difference between former and realized purchasing price were acquired on the basis of the Office's decision.

Plzeňský Prazdroj

The Office was submitted an application for an exemption from prohibition of state aid in form of investment incentives for the company **Plzeňský Prazdroj, a.s.** The company submitted its investment intention to enlarge and modernize its production capacity. Plzeňský Prazdroj, a.s., has a dominant position on the Czech market of beer production and distribution (app. 48.2%). The second largest beer producer occupies 13% of the relevant market. Other breweries existing and newly emerging on the given market are

small or medium enterprises established mainly on the basis of Czech capital. Even further strengthening of the position of Plzeňský Prazdroj would have led to a distortion of the market environment within the Czech Republic. When assessing the regional benefits of the given investment, the Office also took into consideration the number of jobs created and the amount of investment costs. However, the Office concluded that the distortion of competition resulting from the grant of the investment incentive to Plzeňský Prazdroj, a.s., outweighed the advantages following from these investments for the Czech Republic. With respect to these facts the Office disapproved the exemption from the state aid prohibition consisting in investment incentives. **Plzeňský Prazdroj had brought a legal action against the Office's decision that was dismissed by the Regional Court in Brno.**

Toyota and Peugeot Citroen

The Office assessed a plan of companies Toyota Motor Corporation and Peugeot Citroen Automobile S.A. to acquire investment incentives for realization of an investment project for constructing new passenger car production plant in Kolín.

When assessing the regional benefit of this large investment action the Office took into consideration also the level of unemployment in the district of Kolín and the effect of the investment plan on the region. The amount of investment costs was high, while the investment foresaw creation of 1600 direct jobs and also indirect jobs. The investment should bring new high-tech technologies and production methods and high percentage of production export. The investment was aimed at constructing a new plant for passenger car production, therefore the recipient of state aid met the distinction marks of a company operating in the sensitive car industry. The Office came to the conclusion that the distortion of competition would be balanced by the advantages resulting for the Czech Republic from the given investment and **conditionally approved the grant of state aid** in the form of investment incentives, in particular an income tax abatement, material aid for job creation and material aid for training.

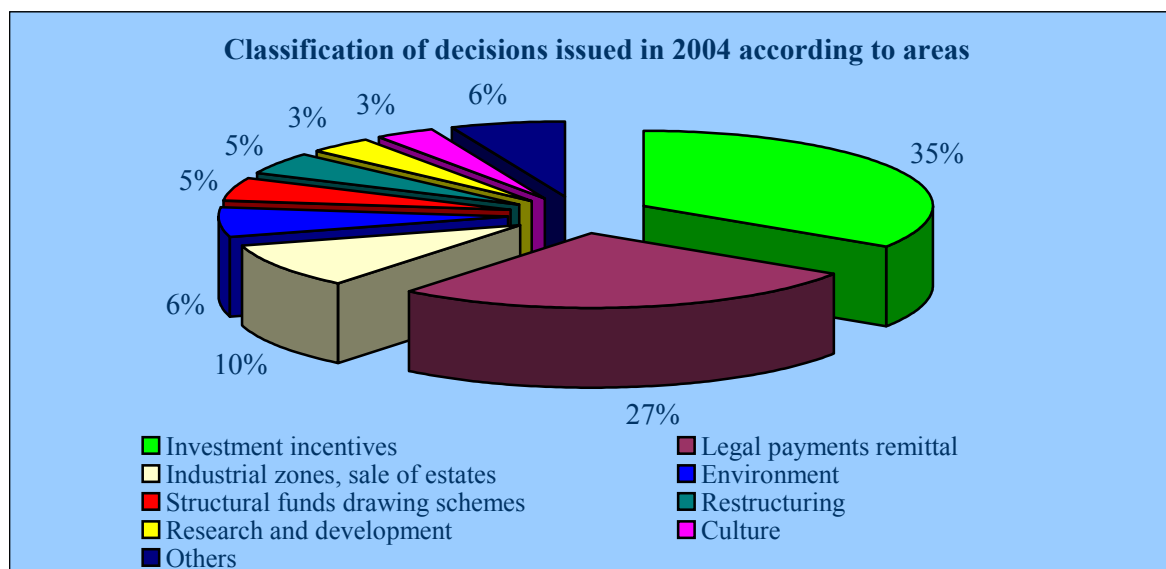
Number of issued decisions

	Year				
	2000	2001	2002	2003	2004*
Number of closed administrative proceedings	92	137	160	158	143

* as of 30 April 2004

Classification of decisions issued in 2004 according to the verdict

Verdict	Number
Approved with conditions	91
Approved	6
Termination of the proceedings	36
Disapproved	7
Partly approved with conditions/partly disapproved	2
Decision on obligation to modify the conditions of granting state aid	1
Total number of decisions issued in 2004	143



6 COMPETITION ADVOCACY

Competition advocacy is a sum of all activities aimed at **support of establishment and development of competition environment**, including the increase of general awareness of the public about the benefits resulting from the protection of competition. Consistent enforcement of competition principles contributes to development of a given industry.

The Office applied its competition advocacy for example on a procedure by the supplier of a medicament Pulmozyne (used for treatment of airways' ailments), company **Roche**, against the **pharmacies**. The company sent out a letter, in which it pointed out a decrease of reimbursement from the part of the General Health Insurance Company and stated that it was out of its possibilities to proceed further with decreasing of the medicament's price. Selected pharmacies were asked for a communication, whether they would be willing to continue ensuring supplies of Pulmozyne for reimbursement without any additional fee, or whether the Roche company should have addressed their competitors. Some of the pharmacies accepted the reduction of its trade surcharge, which may be assessed as a detriment caused to other competitors. The Office resolved the wrongful situation by its competition advocacy and invited Roche to remedy the situation. A pharmacy as an independent business entity has a right to determine its price policy on its own discretion and completely independently on the requirements of Roche. Furthermore, the Office, in the framework of its so called **passive legislation** applied its comments on the draft acts in case of which it was necessary to increase the effectiveness of the market environment and to enforce the development of a sound competition pressure. A significant effort was exerted by the Office in relation to the establishment of competition environment in the area of **postal services**. The endeavour of the Chamber of Deputies' members to extend the monopoly of the Czech Post also to the delivery of so called direct mail services (addressed advertisement deliveries) was considered as a restriction of the developing competition. The amendment to the act was subsequently returned by the Senate to the Chamber of Deputies which adopted the

Senate's position. **The Act on Postal Services was finally adopted in a wording that does not result in restriction of competition** and on the contrary contributes to the development of liberalisation on the postal services market. It is possible to expect that the postal services will be gradually exposed to the market principles. The EC directive in force imposes a duty on the European Commission to elaborate a study on the impacts of possible full liberalisation of postal services since the year 2009. A number of the EU Member States have already liberalised their postal services in much bigger extent than stipulated by the directive in force. In case of the direct mail services, all reservations were abandoned by eleven countries in total, including the Czech Republic. For example, Finland, Sweden and Estonia already do not have any area of the services reserved for a single operator.



In the course of 2004, the works on amending the Act on the conditions of operation on terrestrial communications were commenced, in the framework of which this act should comprise, among others, **a restriction** of the possibility to draw the fuels from the mobile gas stations. In this way, a discrimination of the competitors using these facilities could occur, along with restriction of their possibility to carry out business activities and restriction of the consumers' choice. The mobile fuel stations represent an alternative way of the fuels' supplies, which has a positive influence on the development of the competition

environment. That is why the Office supports the activity of the companies in the area of innovation and application of new ways of services' provision, including introduction of new distribution channels. As a result of this development, the competition climate is deepening and the services provided are acquiring more quality. The Office holds the position that it is desirable that further existence and use of this type of fuel stations **was not broadly excluded.**

COOPERATION WITH REGULATORS

The Act on the Protection of Competition defines the entities, whose behaviour in competition it regulates. The Act relates to all the entities that may be subsumed under the concept of "undertaking" and to all the sectors of economy without any exception, as well as to all public and private undertakings. The Office is the only administrative authority entitled to assess possible breaches of the Act on the Protection of Competition.

Regulation authorities, as the Czech Telecommunication Office (hereinafter "ČTÚ") or the Energy Regulation Office (hereinafter "ERÚ") implement ex ante measures leading to substitution of competition environment in the area, where effective competition does not exist or almost does not exist, while the Office for the Protection of Competition may, by its particular actions, prosecute ex post the behaviour of undertakings that exceeds the framework of a special regulation act. The combination of the ex ante regulation by a sector regulator along with the ex post protection of competition implemented by the Office is a useful tool for achieving effective support and protection of competition in the regulated industries, with the final aim of removing the regulation itself and enforcement of effective competition. For this reason the Office submitted its essential comments on the **draft Act on electronic communications**, concerning to the mutual relationship of the Office and ČTÚ. The Office succeeded in enforcing such rules for mutual cooperation that respect the independence of the Office and its exclusive competence to assess distortions of competition.

In 2004, the Office maintained its reservations towards the structure of the price plans directly regulated by a price decision of ČTÚ (1/2002). The reservations were related to **the price plans HOME MINI, HOME STANDARD and BUSINESS STANDARD** containing **bundling**, unacceptable from the competition point of view, **of call credits for calling to a regular monthly lump sum**, which the customers of ČESKÝ TELECOM have to pay for the use of a phone station. Due to this bundling, the customers are **bound to the services** of this company at least until using up the call credits and they are not motivated to use also the services of other telecommunication operators, forasmuch they obtain from ČESKÝ TELECOM a performance, which they perceive as "free of charge". **In April 2005 ČTÚ issued a new price decision which should remove the abovementioned barriers from the market.**



The Office cooperates also with the Energy Regulatory Office in the area of electric power production, gas and heat production, including consultations in conducting administrative proceedings. The Office cooperated with ERÚ on the creation of several decrees, in the course of which it enforced the competition principles. On the basis of a request by ERÚ for assessment of a particular company's action, the Office in 2004 initiated one **administrative proceeding**, in the course of which it assessed whether the heat supplier abused its dominant position on the market of heat supplies to individual consumers by its action. With respect to the fact that during the proceeding the Office did not find any indices suggesting that an abuse of dominant position had occurred, it stopped this administrative proceeding.

7 LEGAL ACTIONS FILED AGAINST THE DECISIONS OF THE OFFICE

Actions against decisions of the Office, filed before 1 January 2003, that had not been decided by the High Court in Olomouc until this date, were overtaken by the Supreme Administrative Court seated in Brno. Actions filed after 1 January 2003 fall within the material competence of the Regional Court in Brno.

ANTITRUST

Number of appealed decisions in 2003	11
Number of court judgements related to these actions	2
Number of appealed decisions in 2004	9
Number of court judgements related to these actions	0

Situation on 31 March 2005

However, in 2004, the courts **decided on actions against other decisions on appeal in force, against which the actions had been filed in the previous years.** Almost in all cases **the court confirmed the conclusions of the Office and rejected the filed actions, or refused them on the grounds of insufficient procedural conditions.**

The Constitutional Court in Brno decided on rejection of a constitutional complaint submitted by company **Karlovarské minerální vody, a.s.**, against a judgement of the Supreme Administrative Court in Brno of 13 April 2004 and the decision of the Chairman of the Office of 6 March 2002 **on non-approval of a concentration on the market of mineral waters.** The Constitutional Court in the assessed case also did not find any breach of the right to a fair trial and thus also any breach of the right to property and the right to entrepreneurship. The right to property and the right to entrepreneurship are not unlimited rights. The rights to property must not be in line with detriment of other entities or in contradiction to legally protected general interests, among which is the interest in functional market environment. The right to entrepreneurship may be, as regards certain

activities, restricted by law and a legal restriction of the extent of entrepreneurship thus may be considered in line with the Constitution. That was why **the constitutional complaint was rejected** as evidently unsubstantiated.

In 2004, the Supreme Administrative Court in Brno decided on rejection of an action filed by company **Moravské naftové doly, a.s.**, against the decision of the Chairman of the Office of 12 April 2002, which related to **non-granting of a position of a party to the proceeding** in the case of approval of concentration of companies RWE Gas AG / Transgas / 6 regional gas distributors. It results from the grounds of the judgement that it was not possible to affirm the view of the party to the proceeding, forasmuch the administrative authority in its decision on granting the position of a party to the proceeding resulted from a duly ascertained situation and it assessed the matter within the limits of its administrative discretion given to it by the Act on the Protection of Competition in the way that it did not grant the position of a party to the proceeding to the company Moravské naftové doly, a.s. Such a decision is fully in competence of the Office and that was the reason why **the court rejected the action in its full extent.** An action claiming cancellation of the Office's decision on merits, conditionally approving the privatisation of the Czech gas industry, was rejected **in the same way.**

The Supreme Administrative Court **rejected** an action by company **Chovservis** against the decision of the Office's Chairman of 3 October 2002, declaring that the company had concluded a prohibited agreement on the minimum price of breeding bulls' insemination doses with other parties to the proceeding and at the same time that the party had proceeded in concert on prices with the other parties to the proceeding. The parties to the prohibited agreement were motivated for their behaviour by their effort to exclude mutual competition and as a result they distorted competition on the relevant market.

The Supreme Administrative Court in Brno decided on **rejection** of an action submitted by company **Eurotel Praha** against the decision of the Office's Chairman of 9 May 2002 and imposed **fine in amount of CZK 48 million**. The plaintiff **abused its dominant position** on the market of mobile radiophone services in public mobile telecommunication networks by charging, with no objectively justifiable reasons, its customers for a minute of calling into the network operated by company **Český Mobil** (newly called Oskar Mobil) an amount higher than for a minute of calling into the network operated by company **RadioMobil** (newly called T-Mobile Czech Republic). In the given case, according to the Court's opinion, **there was no evidence in favour of a view that charging different prices was substantiated**. The Court stated that entry of the new competitor, i.e. company Oskar Mobil, was made more difficult and that was why the Office took legitimate steps in order to preserve optimum conditions on the market. The Court also considered laudable that the Office had proceeded reticently in performing its powers, without underestimating the role of market and aware of the fact that its primary task does not consist in creation, but protection of competition.

The Supreme Administrative Court in Brno, by means of its ruling, rejected an action on **competency**, filed by company **Eurotel Praha**, which claimed a decision that the exclusive competence for decision-making on rights and obligations resulting from an agreement on interconnection concluded by it and company **Český Mobil**, belongs to the Czech Telecommunication Office.

The court in its ruling stated that it resulted from the Act on Competencies that the central authorities of state administration shall be deemed to mean ministries and further certain other explicitly enumerated administrative authorities. Those other authorities, however, do not include the Czech Telecommunication Office. That was the reason why there was no possibility of establishing a dispute on competencies between ČTÚ and the Office.

PUBLIC PROCUREMENT

Number of appealed decisions in 2003	2
Number of court judgements related to these actions	1
Number of appealed decisions in 2004	14
Number of court judgements related to these actions	0

Situation on 31 March 2005

In 2004, the Supreme Administrative Court decided on **five** actions filed before 1 January 2003, while one of the actions was rejected and in four cases the appealed decisions were cancelled.

The Supreme Administrative Court, by means of its judgement, **cancelled** the decision of the Chairman of the Office of 6 February 2002, imposing a fine of CZK **300,000 on the Statutory City of Brno, the City District of Brno-střed** for multiple serious breaches of the law in overall seven cases of awarding public contracts. The breaches consisted especially in insufficient definition of the public contract's object of performance, furthermore, in several cases, the contracting authority failed to document the procedure and result of the bids' assessment by a written record, it did not distinguish the degree of importance of the individual criteria for assessment of the bids and in one case it used and exceptional way of awarding a public contract by invitation for submission of a bid to a single candidate without fulfilment of the legal preconditions for such procedure. **The Supreme Administrative Court fully identified itself with the legal conclusions of the Office concerning the found serious breaches of the law**, however, it cancelled the decision of the Chairman of the Office for procedural reasons, since this decision had failed to cope sufficiently with some of the evidence submitted by the contracting authority only within the course of the appeal proceeding. The procedural mistake, pointed out by the court, was subsequently remedied within a new decision on appeal, by which the Chairman of the Office repeatedly confirmed all the fact findings of the Office, as well as the imposed fine in its full amount.

8 INTERNATIONAL CO-OPERATION

EUROPEAN UNION

In relation to the accession to the European Union on 1 May 2004, the cooperation of the Office with the European Commission and the national competition authorities of the EU Member States intensified. The most important platform for this cooperation is the **European Competition Network (ECN)**. The essential questions related to functioning of the ECN and other topical issues of competition policy were discussed in October 2004 **in the presence of the Chairman of the Office at the meeting of the Directors General of the national competition authorities** of the EU and EFTA countries. The meeting dealt especially with the initiative of the European Commission for review of the Community policy in the area of abuse of dominance and the experience of the national competition authorities with the ECN functioning in the initial period of its existence.

Five ECN plenary meetings, aimed at practical issues of the cooperation among competition authorities within this network and draft new legislation related to the Council Regulation No. 1/2003, were held in the course of the year 2004. During these meetings, the Office presented its comments on the discussed papers, aimed at ensuring maximum effectiveness of the ECN functioning and application of the EC competition rules. Besides these meetings, the employees of the Office also participated on the activity of **the ECN subgroups for leniency and liberal professions**. The membership of the Czech Republic in the EU brings the possibility of the Czech representatives' participation in the **meetings of the European Commission's Advisory committees**. As regards the Office, it is especially a case of the Advisory committee on restrictive practices and dominant positions, Advisory committee on concentrations between undertakings, Advisory committee on state aid and Advisory committee on public procurement. In 2004, the activity of **the Working Group on Competition by the EU Council** continued. The Office is entrusted with monitoring the agenda of this Working Group and preparing

respective positions for the representatives of the Czech Republic.

In August 2004 the **twinning project for the area of competition**, composed of a part for the area of antitrust and a part for the area of state aid finished. In the framework of this project, financed from the PHARE funds, a pre-accession advisor for each area (an Italian expert for the area of antitrust and a German expert for the area of state aid) operated at the Office. The implementation of the twinning project in 2004 was aimed especially at strengthening the preparedness of the Office for sound application of the *acquis communautaire* rules in the area of competition after the accession of the Czech Republic into the EU.

In the end of the year the Office informally **informed the Irish competition authority** on a possible breach of the Article 81 of the EC Treaty by a **company seated in Ireland**. In relation to a prohibited agreement of candidates to a public contract (bid rigging), operating in most EU countries, a party to which applied for the benefits of the **leniency programme**, the Office communicated with the European Commission and the Slovak, Hungarian and Polish competition authority.

OECD, ECA, ICN, WTO

In 2004, the representatives of the Office also took part in the meetings of **the OECD Global Forum on Competition, the OECD Competition Committee and its Working Groups**. In February 2004 the delegation of the Office participated in the third meeting of the OECD Global Forum on Competition, connected with a meeting of the Competition Committee. This forum is a platform for exchange of experience from the area of competition law and policy among a wide spectrum of national delegations of both the OECD Member Countries, number of developing countries and countries in economic transition. The Office prepared for this meeting a contribution to the discussion on the experience with review of the competition law and policy in the OECD Member

Countries and relevance of this experience for the developing countries and furthermore a background paper for an in-depth review of Russian and Mexican economy. The meeting dealt also with the issue of challenges and obstacles faced by the competition authorities in support of economic development by means of protection of competition and the issue of contribution resulting for the economic development from prosecution of anticompetitive practices. **In the June meeting of the Competition Committee the Chairman of the Office presented the Annual Report on Competition Policy in the Czech Republic for the year 2003 and a contribution to the review of competition law and policy in Japan.** For the October meeting of the Competition Committee the Office elaborated contributions on the topics of private enforcement of competition law and predatory abuse of dominant position of undertakings. In relation to the voluntary contribution of the Czech Republic for the OECD activities in the area of the South East Europe the Office, in cooperation with the OECD and the Czech Republic's Ministry of the Foreign Affairs, prepared a **seminar on "Cartel Enforcement"**. This action took place with participation of representatives of the OECD, the European Commission and fifteen countries of the EU and the Southeast Europe in the premises of the Ministry of Foreign Affairs on 6 and 7 December 2004. **In the beginning of the seminar the Chairman of the Office presented an opening speech summarizing the experience of the Office with prosecution of cartel practices and recommendations of suitable instruments and activities for the participating countries with developing institutions for the protection of competition.** Furthermore, the representatives of the Office presented their experience with individual aspects of investigating prohibited agreements, using important cases from the Office's practice.

A plenary meeting of the European Competition Authorities' Network (ECA), which is a platform for the discussion of competition authorities in the European Economic Area, took place in May 2004. The Office prepared a contribution to the discussion on the issue of competition in the airline sector and its positions on the topic of cooperation among competition authorities

under the Council Regulation No. 1/2003 and exchange of employees among the European competition authorities.

In April 2004, the Third Annual Conference of **the International Competition Network (ICN)**, associating competition authorities of more than seventy countries, took place. Number of documents and initiatives, among others the draft four new recommended practices for control of concentrations between undertakings and creation of a new working group on cartels were presented in the conference. The Office prepared for this meeting contributions summarizing its experience with investigation techniques in the framework of the control of concentrations between undertakings and competition law enforcement in the regulated sectors.



Chairman Josef Bednár welcomed the American Ambassador in the Czech Republic, Mr. William J. Cabaniss (see the left part of the picture) in the seat of the Office in April 2004. Several weeks later the Office was visited also by the Ambassador of the Russian Federation in the Czech Republic, Mr. Alexej Leonidovič Fedotov.

In the framework of the Czech Republic's membership in the EU, the representatives of the Czech Republic participate in the meetings of the relevant EU bodies in relation to the preparation of the World Trade Organisation (WTO) Meetings. The main body responsible for negotiation of the Czech Republic in relation to the **WTO** is the Ministry of Industry and Trade. The Office in this relation provides its positions relating to the issues of competition law and policy.

CECI AND OTHER INTERNATIONAL ACTIVITIES

For the purpose of cooperation among competition authorities of the Czech Republic, Slovakia, Hungary, Poland and Slovenia in competition law enforcement, **the Central Europe Competition Initiative (CECI)** was established in 2003. The activities in the framework of this initiative in 2004 comprised **a seminar on investigation techniques in the cartel proceedings**, held in Krakow, where the Office presented its experience with investigation cartels in the area of retail chains.

An important form of international activities is the **informal communication with the foreign competition authorities in investigation of individual cases**. In 2004, these contacts took place especially with the competition authorities of the EU Member States. The Austrian Federal Competition Authority for example mediated provision of information on the property relationships in an Austrian company, to which the shares in the framework of the remedial measure imposed by the Office after non-approved implementation of a concentration of undertakings **in the area of mineral waters production** were transferred.

9 COMMUNICATION ACTIVITIES OF THE OFFICE

An important priority of the Office is the transparency of its decision - making practice. This area of the Office's activity is, together with communication with the public and journalists, provided by the **Press and Information Department (hereinafter referred to as "OTI")**. Its employees answer hundreds of enquiries, 200 of which were sent to the Office in 2004 pursuant to the Act No. 106/1999 Coll., **on free access to the information**, among others by means of the electronic registry posta@compet.cz.

The information released by OTI is aimed at a wide range of addressees. Press briefings with the Chairman of the Office are held to discuss important cases, where journalists are, at the same time, provided with press reports. These reports are then placed on the Internet (<http://www.compet.cz>), and the information on major cases is released also in English translation. The press reports are released, in particular, in relation to those cases that are closed by a final decision. Every year **the Annual report on the Office's activity for the public** is elaborated.

In 2004 an increased interest of media was noticeable. Cooperation with **expert law and economic magazines**, among others, was enhanced in the Czech Republic and abroad. An extensive interview with the Office's Chairman Josef Bednář was broadcast by the BBC radio station, a large dialogue was brought by the expert weekly Euro, the daily newspapers *Hospodářské noviny*, *MF Dnes* and others. Media and the public are often referred to the Office's **webpage** (<http://www.compet.cz>), which is **up-dated every day** and where the Chairman's expert contributions and lectures, among others, are made public. **The Information sheets**, which in 2004 were focused on following topics - the Leniency programme, the Office and the European Commission, agriculture, the Compliance programme, telecommunication, important events of 2004 - are particularly designed for the expert public and journalists.

The public becomes more and more interested in the Office's activity. This fact is

documented by the number of articles and references in the press, which has increased, in comparison with the last year, by about a quarter. At present, a weekly average amounts to more than 80 published articles. Every day OTI performs an **active monitoring of the news that appears in the media**. Even the information, on the grounds of which the Office often opens an investigation or an administrative proceedings, are searched for in this way. The Office has always made use of the knowledge arising from the EC authorities' decision-making practice, however, following the accession into the European Union, OTI has even intensified monitoring of the news on the activity of the European Commission and competition authorities of other Member States.

OTI has taken several steps aimed at increasing the share of received complaints whose content relates to the Office's powers. So called **Everyday's situations** from the area of the protection of competition and the public procurement have also been drawn. They have a form of guidelines that describe in detail a way of submitting an instigation to the Office that draws its attention to the violation of some of the acts falling within the Office's scope of powers. These guidelines are placed on the Office's webpages and on the Ministry of informatics's web portal of public administration (<http://portal.gov.cz>).

OTI contributed to keeping the public better informed also by taking an active part in preparing or co-organizing the presentations by the Chairman of the Office at various conferences and lectures. **The conference on cartels**, which was jointly organized by the Office, the Ministry of Foreign Affairs and OECD ranked among the most important ones during the past period. The Chairman of the Office opened with his expert speech also the Euroforum of the International engineering trade – fair in Brno or the Invexforum.

In 2004 the Office kept on promoting intensively **the Compliance programme** in which all the conceivable situations of the undertakings' conduct that might result in imposing a penalty by the Office are described

and explained. Adopting basic obligations on refraining from violation of the Act in internal documents of the undertakings contributes to

the cultivation of business environment and may prevent possible anticompetitive action.

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