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OFFICE FOR THE PROTECTION OF COMPETITION

Annual Report 2009

Contents

Introduction by the Chairman

I have become the chairman of the Office for the Protection of Competition in the second half of the year 2009, on July 9, when I was appointed to the post by President Václav Klaus. I have led the Office, the importance of which I am fully aware of, practically since the moment the Czech Presidency of the Council of the EU came to an end. In connection with the Presidency the Office organized important conferences with international participation. The most significant was the State Aid Day in April and the Competition Day approximately one month later. The smooth course of the Presidency and of all the accomanying events crowned the successful role of my predecessor Martin Pecina as the head of the Office, which was under his leadership built up into a state-of-the-art and dynamic institution.

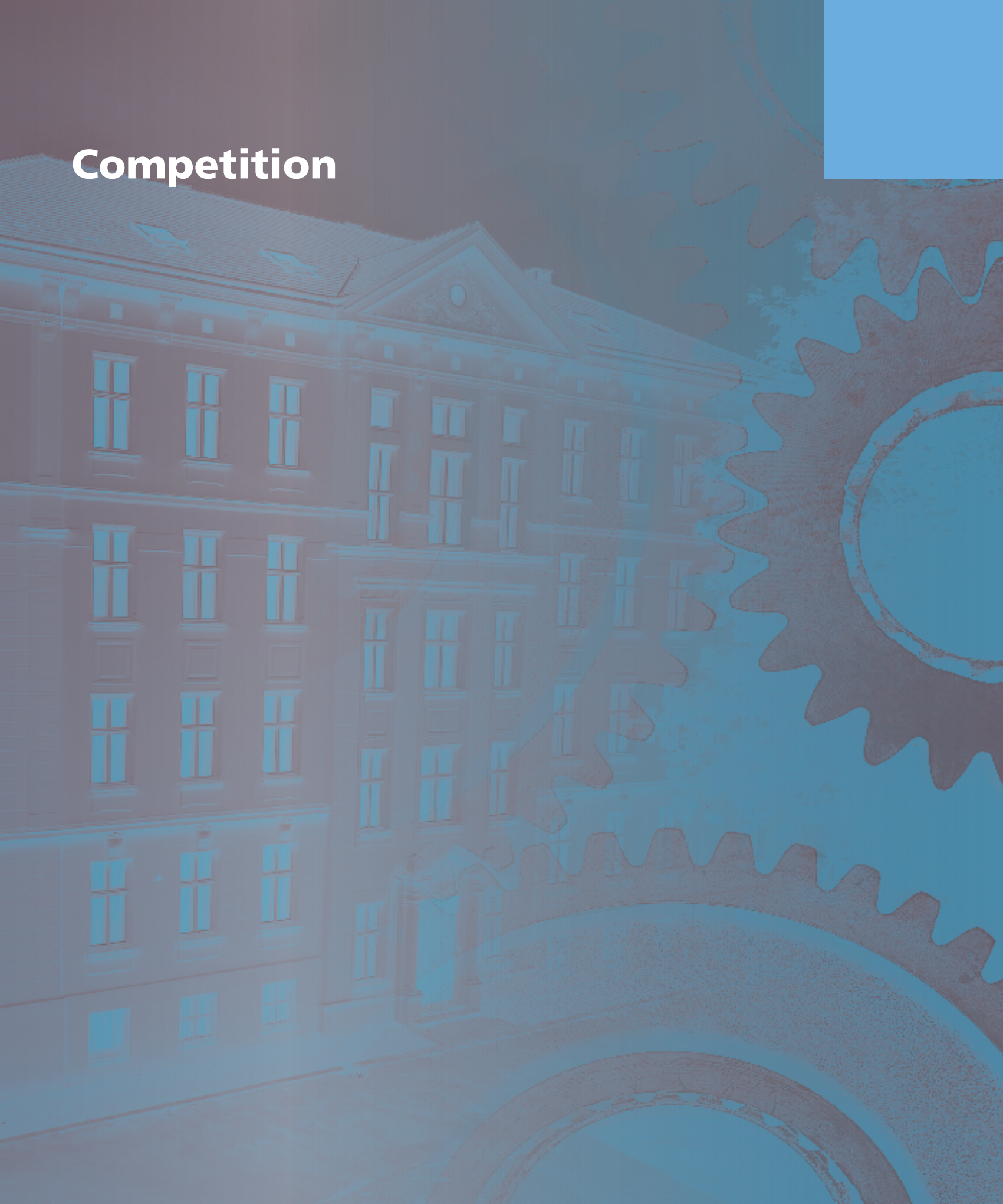
The aim of the Office for the Protection of Competition is to ensure fair and equal conditions for all undertakings. Such market environment is beneficial for development of the Czech economy, as well as for consumers. Control over public procurement is among the basic competencies of the Office. It is not necessary to stress that the purpose of this control is to use public means, i.e. resources coming primarily from tax payers, economically. Out of this reason it is desirable to create transparent conditions for public procurement tenderers to ensure that financial means from public resources are expended as efficiently as possible.

I would like to highlight that in the course of my activities at the Office for the Protection of Competition I would like to to put the main emphasis on prevention. Nevertheless, we will further and rigorously continue with repression if we detect serious violation of law. This holds true for the area of public procurement, as well as for competition and the Act on the abuse of significant market power. At the beginning of the year 2010 the control over observance of this Act fell within the competence of the Office. In connection with the economic crisis still in progress state aid is an important topic for the Office. Although the Office does not have the power to take decisions in this area, it may be achieved via consulting particularly that the Czech entrepreneurs will not be disadvantaged in comparison to foreign competitors.

This Annual Report shows that the Office for the Protection of Competition contributed substantially to further enhancement of a fair environment for fair entrepreneurs in the year 2009. I believe that the year 2010 will be similarly successful.

Petr Rafaj
Chairman, Office for the Protection of Competition

Competition



Competition

Competition issues are a fundamental priority in the activities of the competition authority. The Office has been dealing with concentrations of undertakings, cartel agreements and abuse of dominant position since its creation in 1991. The objective of its activities is the protection of competition as a phenomenon. It does so primarily by way of decision-making activities or competition advocacy. In regard to these matters, the Office received a total of 325 submissions within the past year. The position of the Office continues to become more and more complicated, as the methods of anticompetitive behaviour are becoming more sophisticated. In the process of detection of anticompetitive practices, primarily in regard to prohibited (cartel) agreements, the Office therefore makes continually greater use of all of the tools that it has available. Those include, among others, unannounced on-the-spot investigations, so-called dawn raids, or the leniency programme, which allows for the remission of a fine for undertakings that fully cooperate with the Office and provide evidence leading to the detection of a cartel agreement.

As of 1 January 2009, the number of staff of the cartel department has been increased, which corresponds with the belief of the Office that cartels constitute the greatest evil for the economy. The former three sector departments, which primarily focused on abuse of dominant position, vertical agreements and competition advocacy, were transformed into two, and then at the end of 2009, into one. The Chief Economist Department was also revitalized, and is responsible for formulating and implementing economic and econometric analyses and procedures in the application of competition law. The staff increase and material reinforcement of this department is a reflection of the sincere determination of the Office to implement, in accordance with the procedures of the European Commission and certain other competition authorities, a more economic approach in its activities, and to do so in antitrust matters as well as in matters relating to mergers.

Legislation

As of 1 September 2009, Act No. 155/2009 Coll., amending Act No. 143/2001 Coll., on the protection of competition, took effect. The amendment contains partial changes in the scope of effect of the Act, as well as in regard to prohibited agreements, supervision in regard to concentrations, proceedings before the Office, and further, the amendment also pertains to the investigative powers of the Office and penalties. Significant aspects primarily include changes in matters pertaining to concentrations of undertakings. Newly, the Act now allows for so-called simplified procedure on the approval of concentrations and mergers in cases where there is no suspicion of a possible distortion of the market. It will now be possible to decide on such cases, which pertain primarily to companies with a low market share, or changes in control from joint control to exclusive control, within 20 calendar days. In accordance with EU competition law, the amendment also allows for the penalization of the legal successors of undertakings that have violated the act on the protection of competition. Fines imposed upon associations of undertakings (chambers, etc.) will now be derived from the amount of the turnover of all of the members of the association, with the maximum amount being 10 percent of such sum.

In the second half of 2009, the Parliament of the Czech Republic approved Act No. 395/2009 Coll., on significant market power in the sale of agricultural and food products and abuse thereof. The Office was authorized to conduct oversight in regard to compliance with the said act. The act came into effect as of 1 February 2010. Its purpose is to define the concept of significant market power and abuse thereof, for the purpose of the protection of competition in regard to the sale of agricultural and food products. The act also provides the relevant instruments that enable the assessment and prevention of the said anticompetitive behaviour. Significant market power is defined in the act as such a relationship between the purchaser and the supplier where, as a result of the situation on the market, the supplier becomes dependent on the purchaser in regard to the opportunity to supply its goods to consumers and where the purchaser can force the supplier to give the purchaser unilaterally advantageous terms of trade. The act applies to those purchasers of agricultural and food products whose turnover in the last financial year exceeded CZK 5 billion; for such purchasers, unless proven otherwise, it is assumed that they wield a significant market power. Abuse of significant market power to the detriment of the supplier is prohibited. Such behaviour must constitute systematic and repeated action, the purpose or result of which is a significant distortion of competition on the relevant market. A list of conducts that are considered prohibited is contained in the annexes to the act. A penalty in the amount of CZK 10 million or up to 10% of turnover can be imposed for a breach of the act. For the purpose of oversight in regard to compliance with the act, the Department of Control over Market Power has been established as part of the Office.

At the beginning of 2009, the Parliament of the Czech Republic approved a new criminal code, which, among other things, narrows criminal liability in the area of competition law. Unlike the previous broadly defined legal regulation, which basically precluded any real application, under the new regulation a criminal offence is only defined as horizontal cartel agreements, which are generally considered to be the most serious form of violation of competition rules. However, criminal liability for entering into a cartel, in accordance with the concept of Czech criminal law, applies only to natural persons.

The Office further continued to issue so-called soft law, i.e. methodical documents that increase the transparency and predictability of the actions of the Office. In the area of oversight over concentrations, the Office completed a 'jurisdictional' package, which it supplemented with a Notice on the concept of the concentration of undertakings and a Notice on the concept of undertakings concerned. In reaction to the economic crisis, in the spring of 2009 the Office issued a 'crisis package', which includes guidelines that are intended to enable the more flexible implementation of oversight over the concentration of undertakings. This category includes the Notice on the prohibition of implementation of concentrations prior to the approval and exemptions thereof and the Notice on the application of failing firm defence concept, which for the first time in the Czech Republic deals with the terms for the application of the so-called failing firm defence in a comprehensive manner. In reaction to the amendment to Act No. 155/2009 Coll., the Office explained in more detail the institution of simplified procedure in regard to approval of concentrations. This is a significant change, and one that should bring about cost savings and a simplification in administrative processes for a whole range of concentrations that do not typically constitute a threat to competition. The latest issued soft law is the Notice on agreements of minor importance which do not appreciably restrict competition, reacting to a change in the concept of the de minimis rule in the act on the protection of competition after its last amendment.

Alternative Resolution of Competition Issues

The Office favours alternative resolution of competition issues in cases where undertakings are interested in cooperating, and it is thus realistic that rectification will be achieved faster than by conducting lengthy administrative proceedings with a probable subsequent judicial review. In practice, two types of procedures may be distinguished. In less serious cases, administrative proceedings are not initiated and resolution is achieved by way of consultations in the course of the investigation of the submission. In some cases, the said procedure is the most appropriate way to resolve an unsatisfactory situation. Such a category also includes cases in which administrative proceedings have been initiated but have been terminated under the condition of the fulfillment of commitments proposed by the parties to the proceedings without a declaration of anticompetitive behaviour and without penalties being imposed. One of the tools that the Office also considers to be very flexible is the so-called settlement procedure, in which the parties, in exchange for an assurance of a reduction in the fine, cooperate with the Office in a qualified manner, acknowledge their liability for the anticompetitive conduct, and thereby contribute to procedural efficiency. In the course of 2009, the Office concluded a total of three cases (Albatros case, RWE case – advance payment on gas consumption, and administrative proceedings against Karlovarské minerální vody) by way of the settlement procedure. The same number of cases was resolved through competition advocacy outside of administrative proceedings.

Selected Cases

Gas Storage Tanks
In the course of the first half of 2009, the Office concluded its investigation on the market of natural gas storage in underground storage tanks. The investigation, which was under way from the end of 2007, pertained to a suspicion that companies belonging to the RWE group, through long-term reservations on storage capacities and not allowing access to such capacities, may have made access and functioning on the relevant natural gas supply market more difficult for their competitors. Access to storage capacities is an essential prerequisite for supplies of gas to households and other small customers. The result of the investigation and several months of intensive trilateral meetings, which were participated in by the Office, the companies under investigation, as well as the Energy Regulatory Authority, was a proposal of a remedial measure for the maintenance and protection of competition on the part of RWE group companies. Specifically, the RWE group undertook to gradually unblock and offer for use to third parties by 2013 storage capacity with a volume of 500 million m3, i.e. approximately 20 % of its capacities. At the same time, the effective period of the agreement on storage of gas, as entered into between RWE Transgas and RWE Gas Storage, was reduced by 12 years, which significantly reduced the period of intra-company reservations of natural gas capacity for RWE Transgas. Thereby, the conditions should be created for effective competition on the natural gas supply market.

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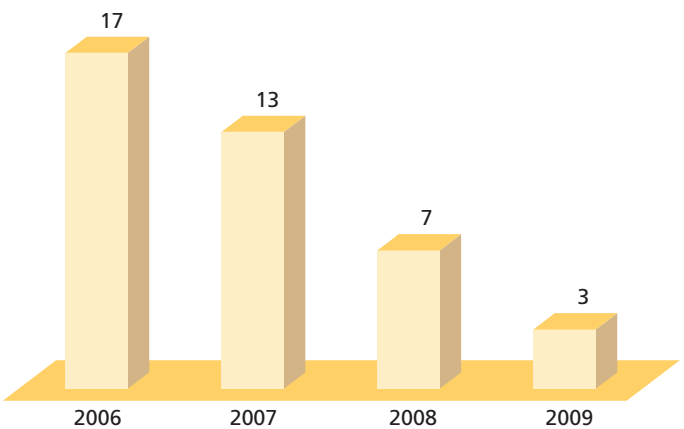
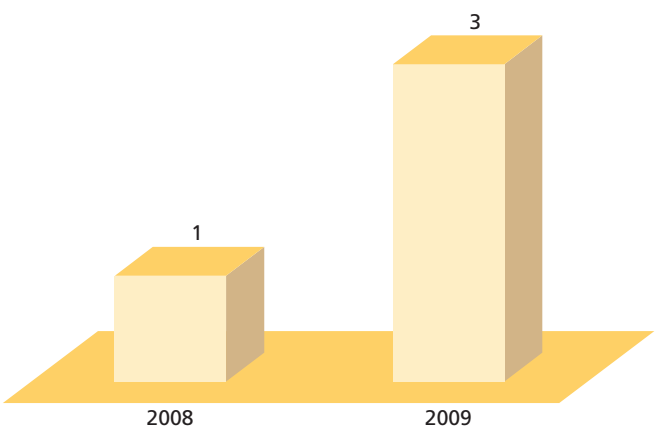
Zetor Case
The Office concluded the investigation of possible anticompetitive provisions contained in agreements on the sale of tractors and original spare parts entered into between companies from the Zetor group and their authorized distributors or service centers. The case was settled outside of administrative proceedings. The Office initiated the investigation in the first half of 2009 of its own initiative. In the course thereof, it identified certain provisions of distribution agreements that could have been in breach of the act on the protection of competition. The provisions in question were primarily those regarding: 1) prohibition of sale of competing goods for an indefinite period of time including a restriction on the use of non-original spare parts, 2) obligation of a minimum purchase volume, 3) restriction on sale outside of the specified territory, or 4) possible indirect price fixing for further sale. In July 2009, Zetor Trade, s.r.o., which together with ZETOR P.D.C., of the same group, entered into the said arrangements with authorized distributors or service centers, proposed for the disputed parts of the agreements to be deleted. The updated agreements without anticompetitive provisions were submitted to the Office.

Prohibited Agreements on Export
In December 2009, the Office imposed a fine of CZK 5 million against Karlovarské minerální vody a.s. The said company, together with its subsidiary HBSW, entered into prohibited agreements on the prohibition of export. These agreements could have led to the distortion of competition on the carbonated non-alcoholic beverage market and on the non-carbonated non-alcoholic beverage market. Prohibited agreements were concluded with distributors of KMV and HBSW in the Czech Republic and abroad (primarily

Number of cases resolved through competition advocacy (outside of administrative proceedings)



Number of cases concluded in the settlement procedure

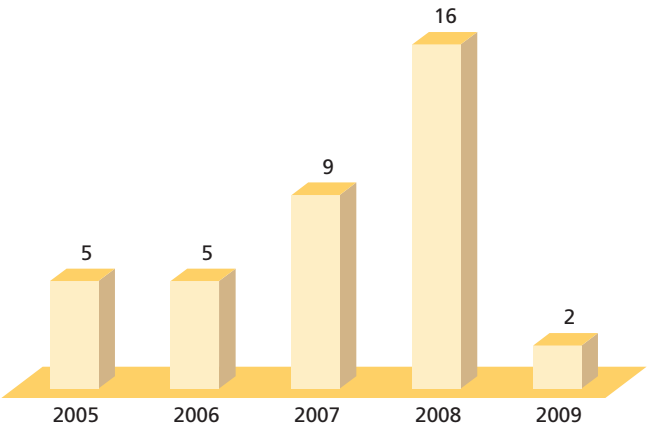


in Slovakia), from February 1999 until December 2008. The investigation by the Office established that such agreements were complied with on the part of purchasers. On the other hand, the party to the proceedings did not in any way conduct inspections of compliance with agreements on bans on export. KMV effectively cooperated with the Office in the course of the administrative proceedings and contributed to the detection and proving of anticompetitive conduct. In the course of the administrative proceedings, KMV stopped using agreements containing problematic provisions and proposed to its customers a contractual amendment approved by the Office. The case was resolved within the settlement procedure, thanks to which significant procedural economy was achieved on the part of the Office. Thanks to effective cooperation, KMV was given a resulting fine that was reduced by fifty percent.

Prohibited Agreements

The Office continues to place an emphasis primarily on pursuing cartels, for which it actively applies the so-called leniency programme. Since the effective date of the new leniency programme, the Office has received nine requests for leniency. In matters concerning agreements distorting competition, the Office conducted a total of nine administrative proceedings in the course of 2009. Twelve decisions on merits were issued; a breach of the law was determined in six cases, and six proceedings were terminated.

Number of initiated administrative proceedings – prohibited agreements



Selected Cases

Sokolovská uhelná

The Office imposed a fine of CZK 17.283 million against Sokolovská uhelná. In the period of time from 1997 to 2007, the party to the proceedings concluded and performed prohibited agreements on the prohibition of export, which had as their object the distortion of competition and which could have led to the distortion of competition on the pressed brown coal, brown energy coal and graded brown coal market in the Czech Republic. In its decision, the Office established a breach of the Czech competition act, as well as Art. 81 of the EC Treaty (currently Art. 101 of the TFEU). On the other hand, the execution and performance of agreements on the fixing of prices for further sale or obligations of exclusivity of supplies of brown coal and pressed coal were not established in the course of the administrative proceedings. Under Czech as well as European law, agreements on the prohibition of export are considered to constitute a serious distortion of competition. They are distorting by object, and thus in such a case it is not necessary to prove a negative impact on competition. Nevertheless, in the given case the Office reached the conclusion that a negative effect of the assessed agreements could be a restriction of competition within one brand. Through agreements on the prohibition of export, the supplier was able to divide the common market, and thereby contribute to the closure of the market in regard to intra-brand competition (within the same brand). The assessed agreements thus led to the reduction in the number of purchasers who were able to export the goods purchased from the party to the proceedings. On the basis of agreements on the prohibition of export, the distributors of the goods were limited in their choice of the end customer, which could have led to a reduction in the supply to consumers. An appeal has been lodged against the decision, it is thus not legitimate so far.

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Vertical Cartel in the Outdoor Sector
In two of its first instance decisions, the Office imposed a fine in the amount of CZK 2,316,000 on HUSKY CZ s.r.o. and CZK 425,000 on the entrepreneur Ing. Zdeněk Král (Pinguin brand) for entering into prohibited agreements on resale price maintenance on the outdoor equipment market. According to the evidence that the Office was able to obtain in an unannounced on-the-spot investigation, HUSKY CZ committed repeated breaches of competition rules in its business relationships with purchasers from among internet shops. The company based its pricing policy on oral agreements on obligatory compliance with so-called recommended prices, which it further specified in a price list sent out by e-mail. The relevant price lists contained a wholesale price not including VAT and a retail price that was always marked as recommended. Under the act on the protection of competition, recommended prices are not considered anticompetitive provided that the seller is not directly or indirectly restricted in setting resale prices and has the option of setting a final price that may even be less than the amount of the recommended sales price. Pricing policies that include instructions or penalties binding or motivating contractual parties to comply with the set (recommended) prices are prohibited under the law. Through the investigation, it was established that HUSKY CZ s.r.o. did actually monitor the performance of agreements on recommended resale prices on the part of its customers and also enforced compliance with the same under the threat of suspension of supplies of goods or other penalties. The other entity on whom a fine was imposed, Ing. Zdeněk Král, sent his customers an e-mail containing a written draft of an agreement on setting resale prices, which was accepted by them. Prohibited agreements were thus entered into and subsequently performed. An appeal has been lodged against the decision.

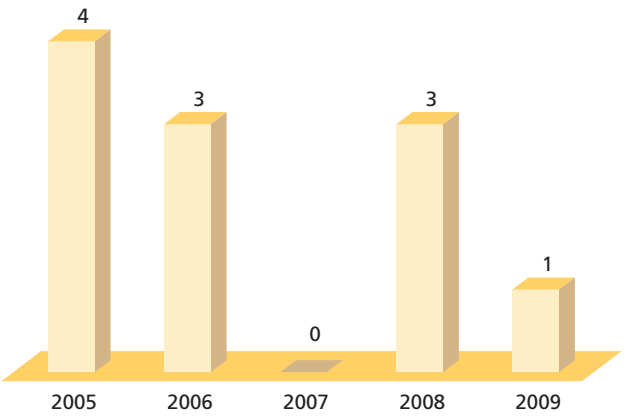
Abuse of Dominant Position

A total of three administrative proceedings concerning the abuse of dominance were concluded in 2009, with one of them being concluded in a so-called settlement procedure. A relatively complicated case conducted against Czech Coal Services was also concluded. In that case, the key issue was the definition of the relevant market.

Selected Cases

Incorrectly Charged Advance Payments
In another settlement decision, the Office imposed a fine of CZK 10 million against RWE Transgas, a.s. The reason was abuse of dominant position, which, according to the Office, RWE had committed towards some of its customers, small-scale consumers of natural gas and households. In September 2008, on the basis of an error in a calculation formula, RWE set disproportionately high advance payments. The advances were thus incorrectly set for a total of 129,131 customers from among small-scale consumers and households. The inaccuracy in setting the amount of the advance amounted to approximately 10% as compared with the usual situation. Such advances were paid by a part of the affected customers beginning in November 2008. As a result of the inactivity of RWE, in which RWE, without objectively justifiable reasons, failed to make, in the opinion of the Office, an adequate effort necessary to remedy such a faulty situation, as it did not proceed to globally reduce such disproportionately high advances for those customers who did not request a change thereof themselves, and thus such customers were for a certain period of time limited in their opportunity to dispose of such extra funds that were unnecessarily paid in such a way. Such behaviour had an impact on a total of 78,746 customers, who had not by 8 June 2009 themselves requested a reduction in the amount of the incorrectly charged advances. The affected parties were clients of regional gas companies belonging to the RWE group, specifically Východočeská plynárenská, Severomoravská plynárenská, Severočeská plynárenská, Středočeská plynárenská and Západočeská plynárenská. RWE Transgas fully cooperated with the Office from the very start of the proceedings. In the course of the proceedings, it accepted the conclusions of the Office and acknowledged the legal qualification of the behaviour. Further, as part of the settlement procedure, RWE Transgas undertook to compensate, significantly over the usual extent, the damage incurred as a result of the mistake described above by those of the affected customers who would have an overpayment at the end of the accounting period. As part of the final accounting for the supply of natural gas in September 2009, an extra 8 percent valuation of the paid amount (i.e. the difference between the correctly and incorrectly assessed amount of the advances) was credited to the account of such customers. The Office confirmed that the said commitment was fulfilled by the said party to the proceedings. The total amount of such compensation to the affected customers reached up to over CZK 5.5 million.

Number of initiated administrative proceedings in 2009 – abuse of dominant position



Brown Coal Market

In December 2009, the Office terminated administrative proceedings that were being conducted with Czech Coal Services a.s. The Office examined whether the said company violated the act on the protection of competition, specifically whether it abused its dominant position by applying different prices in agreements on the sale of brown coal and by refusing supplies to United Energy, a.s. The Office reached the conclusion that Czech Coal Services a.s. did not have the dominant position on the relevant brown energy coal market within the period of time being assessed. The first precondition of the definition of abuse was thus not fulfilled. Therefore, the Office did not deal with the issue of the abuse of dominant position as such in the relevant administrative proceedings.

In the course of 2009, administrative proceedings concerning possible abuse of the dominant position of ČEZ were also teminated. The Office suspected that the said company abused its dominant position by applying different terms in an agreement on the sale of energy coal that it entered into with Lignit Hodonín, s.r.o. for the period of 2005–2010. The Office primarily objected to the manner of setting the price of brown coal, whereby Lignit as the only one of the suppliers of brown coal did not have such a price formula arranged that would include the effect of an interannual change in the price of energy. However, in the course of the administrative proceedings, ČEZ commenced negotiations with Lignit Hodonín regarding a change in the agreement and subsequently modified the terms thereof. The primary change pertained to the manner of setting the price of lignite; the newly proposed price formula took into consideration, effective as of 1 January 2009, the effect of an interannual change in the price of electricity. The price formula is thus identical to the one that is contained in analogous agreements between ČEZ and other brown coal companies. Concurrently along with the newly agreed manner of price calculation, the other provisions containing a reduction in the price for supplies of lignite were also removed. Other contractual terms were unified as well. For the above reasons, the Office reached the decision that the termination of the administrative proceedings can be qualified with the condition of the fulfillment of the said remedial measures proposed by the party to the proceedings.

Mergers

An area in which the economic crisis manifested itself tangibly is oversight of the concentration of undertakings. In 2009 there was a substantial drop in the number of notified concentrations, by approximately one fourth. Other competition authorities are also facing the same trend. The reason is that during times of crisis there is usually a decrease in acquisitions. However, only a very small number of the transactions assessed by the Office pertained to undertakings in economic difficulties. In the past year, the Office conducted two proceedings in the second phase, of which one concentration was approved on the basis of structural remedies (Agrofert/Agropol). The other, upon a thorough investigation, was found to be compatible from a competition law perspective, and thus approved without any accompanying measures (BXR Logistics/Čechofracht). Significant decisions from a precedent point of view include the Hutnická zaměstnanecká pojišťovna/Zdravotní pojišťovna Agel decision, in which it was stated that health insurance companies, in providing public health insurance, do not carry out economic activity, and thus are not undertakings within the meaning of competition law (the concentration in question was not subject to approval due to non-fulfillment of notification criteria). In the Libute/IPO decision, the Office based its assessment on the dispositional character of the proceedings regarding the approval of a oncentration, in

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accordance with which the Office is authorized to issue decisions on a concentration only in such a form in which it has been notified, and without regard to any speculations concerning the actual configuration of the transaction that are difficult to verify and that are refuted by the parties to the proceedings. The other side of such an approach is the obligation of the parties to provide the Office with accurate and complete data and the option of future annulling the decision as a result of a breach of such obligation.

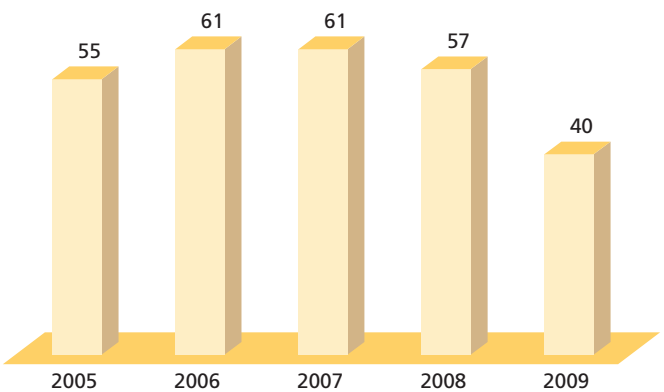
In matters pertaining to concentrations of undertakings, a total of 40 proceedings were initiated and 42 decisions on the merits were issued. A total of 35 mergers were dealt with in classic administrative proceedings (28 approved, 1 with remedies, 6 mergers not subject to approval by the Office) and another six in simplified procedure. In one case, a decision on the non-approval of an exemption from the ban on the implementation of concentration prior to formal decision was issued.

Selected Cases

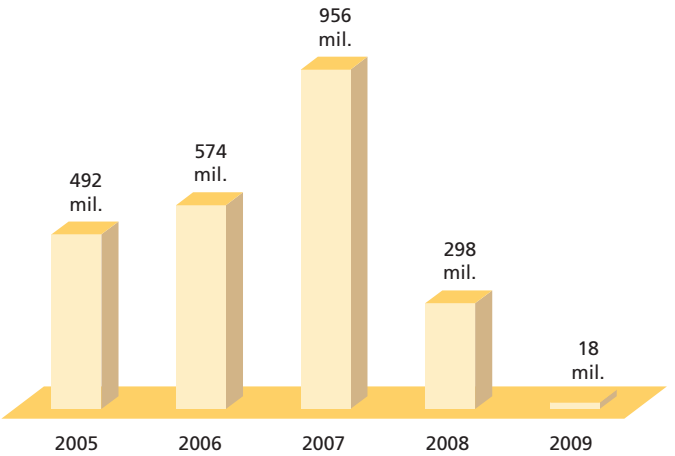
Merger Approved with Remedies
In March 2009, the Office approved the concentration of undertakings AGROFERT HOLDING, a.s. and Agropol Group, a.s. However, the Office qualified its consent with the condition of the fulfillment of several structural remedies in favour of preserving effective competition, which the party to the proceedings accepted prior to the issuance of the decision. In a detailed analysis of the individual markets that were to be affected by the concentration, the Office identified possible concerns of the distortion of competition on a total of nine relevant markets of retail fertilizer sales, retail feed mix sales, purchase of grains and purchase of oil plants in six regions of the Czech Republic. The AGROFERT group would also be strengthened on other markets as well; however, as was established in an extensive investigation, significant competitive pressure will be preserved on those markets, and business partners of the undertakings being concentrated would have the opportunity, even after the merger, to choose an alternative supplier or customer. In the interest of preserving effective competition on the markets most affected by the concentration, AGROFERT undertook to sell off selected parts of the business of some companies of the AGROFERT and Agropol groups as well as a minority equity share that it owned in one of their competitors. The buyer had to be an undertaking that had all of the prerequisites to create additional competitive pressure on the entity created by the concentration. Furthermore, AGROFERT was not allowed to burden the object of the transfer with non-standard liabilities until the time of the sale, and in the period after the sale it had to apply standard terms in regard to them within mutual business relations. According to an analysis carried out by the Office, the said obligations were sufficient to eliminate concerns of distortion of competition on the affected markets.

Concentration in the Logistics Sector
The Office approved a transaction as a result of which BXR Logistics B.V. acquired the undertaking Čechofracht a.s. In the course of the preliminary part of the investigation, the Office held a concern, on the basis of several complaints, that the concentration could lead to a significant distortion of competition, and therefore it assessed it more thoroughly in the so-called second phase of the administrative proce-

Number of initiated administrative proceedings – mergers



Total amount of fines imposed by the Office in the 1st instance decisions (in CZK)



Parties to the proceedings paid a total of CZK 3.810 million in administrative fees for notification of concentrations of undertakings.

Average duration of administrative proceedings in regard to competition issues in days (not including concentrations of undertakings)

	2001	2002	2003	2004	2005	2006	2007	2008	2009
First instance	88	52	90	83	120	272	360	405	120*
Second instance	261	228	260	335	325	185	152	299	166**

*one concluded administrative proceeding / ** two concluded administrative proceedings

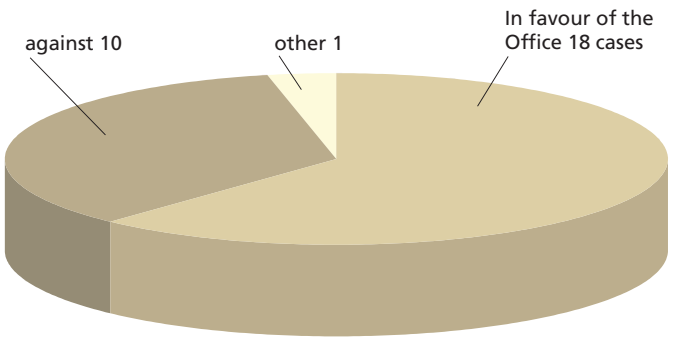
edings. In the Czech Republic, the activities of the undertakings concerned overlap primarily in regard to the provision of comprehensive logistical services. The Office also focused its attention on, among other things, the segment of transport and forwarding of brown coal, in which the entity created through the concentration would have an important position and in regard to which complaints were also received. However, a number of competing companies also operate in this area and the customers of such services are companies in the electricity production sector, steel industry and chemical industry, which have a strong negotiating position and can react to a possible change in prices by turning to an alternative carrier. On the basis of a detailed analysis of the relevant markets and the possible effects of the concentration, the Office reached the conclusion that the BXR Logistics/Čechofracht concentration would not have the effect of a significant distortion of competition, and therefore it approved the concentration without remedies.

Appeals and Judicial Review

In 2008, 17 appeals were filed in regard to competition issues. The Chairman of the Office issued a decision in a total of 22 cases; only one half of those pertained to decisions on the merits, of which in five cases the previous first instance conclusions were confirmed, and three decisions were changed. One of the key cases was the fine imposed on the company České dráhy for abuse of dominant position. Out of the non-merit cases, five concerned the matter of interest on fines (fuel cartels and GIS), three concerned the renewal of proceedings, one deferment of payment of a fine, and two the access to file.

Parties to the proceedings very often lodge actions against the decisions of the Office to the courts. According to information available in January 2010, eight actions were filed with the Regional Court in Brno in 2009. The Regional Court in Brno and the Supreme Administrative Court issued decisions in a total of 29 cases, with 18 of those being in favour of the Office. Significant judgments include, among others, the confirmation of a cartel of wholesale distributors of pharmaceuticals. A fine of almost CZK one billion for a cartel of engineering companies is valid once again, as is a penalty of CZK 313 million against six fuel distributors. In those two cases, the Supreme Administrative Court annulled the preceding judgments of the Regional Court in Brno. Certain issues pertaining to the cartel of engineering companies will currently be dealt with by the Court of Justice of the EU, which the Regional Court in Brno referred to with preliminary questions and suspended the said proceedings until the resolution thereof.

Review of decisions of the Office by the courts for 2009



according to data available as of 31 October 2010

Selected Cases

Fine imposed on České dráhy

With his second instance decision, the Chairman of the Office imposed the highest penalty so far for abuse of dominant position, in the amount of CZK 254 million, against České dráhy, a.s. The behaviour of the said company on the railway freight transport market of substrates transported in large volumes constituted a breach of both Czech as well as EU competition law. In the period from 1 January 2004 to 30 November 2007, České dráhy applied, without objectively justifiable reasons, differentiated prices towards their customers for railway freight transport services for transports with comparable calculation parameters affecting the amount of the costs for such services as well as a different amount of the margin. In this way, the party to the proceedings disadvantaged some of its customers, for whom prices were dictated, or the margin was significantly higher than for other customers with analogous or comparable performance, and also made the opportunity for other railway freight carriers to function on the market more difficult. České dráhy granted more advantageous terms primarily to those of its customers to whom transport was offered by competing companies. At the same time, competitors of České dráhy did not have an opportunity to react adequately to such a pricing policy. Furthermore, in 2006 and part of 2007, České dráhy prevented SPEDIT-TRANS, a.s. and ŠPED-TRANS Levice, a.s., without objectively justifiable reasons, from entering into agreements on a customer tariff, and thereby from receiving a discount off of the public price list, and also set the obligation to put down 100 % advances for the railway freight transport services being provided to them. On 5 January 2006, České dráhy terminated Agreements on Central Accounting of Freight Charges concluded with the above mentioned undertakings, and it thus disadvantaged them as compared to their competitors. České dráhy took such steps in response to the highly competitive behaviour of both companies. As a final result, these companies were prevented from further activity on the market or such activity on their part was made considerably more difficult. České dráhy submitted a request to the Office for a deferment of the payment of a fine, and the Office accommodated the party to the proceedings in that regard.

Wholesale Distributors of Pharmaceuticals before the Court

The Regional Court in Brno confirmed the fine of CZK 113.064 million imposed on the principal domestic distributors of pharmaceuticals. Alliance Healthcare s.r.o. (CZK 23.859 million), GEHE Pharma Praha spol. s r.o. (CZK 16.831 million), PHARMOS a.s. (CZK 18.638 million) and PHOENIX Lékárenský velkoobchod a.s. (CZK 53.736 million) breached the act on the protection of competition through the fact that, in the period of time from 30 January 2006 to 14 February 2006, they mutually brokered a joint plan to terminate, as of 15 February 2006, supplies of the full assortment of pharmaceuticals to three prominent teaching hospitals – Thomayerova, Na Bulovce (both in Prague) and St. Anna hospital (in Brno) and to subsequently only provide them with supplies of so-called vital medications with reduced payment terms. They also implemented that joint plan in a coordinated manner from that day on.

Public Procurement and Concessions

Public Procurement and Concessions

The Office has been engaged in the review of the procedures of contracting authorities in awarding public contracts since 1995. Since that time, a sequence of three laws has been in effect, the current one being Act No. 137/2006 Coll., on public procurement. That act has been amended several times, which also occurred in 2009. In that regard, certain significant new rules have been effective as of 1 January 2010. The Office, as the overseeing body, can, in addition to appreciable fines, also impose a ban on the performance of a contract, and a so-called blacklist of bidders for public contracts has also begun to operate, maintained by the Ministry for Regional Development. The fundamental principles of awarding public contracts continue to apply, i.e. the principles of non-discrimination, transparency and equal access by all bidders.

Administrative proceedings before the Office may be initiated on the basis of a written petition by a claimant. In order to prevent the filing of unfounded petitions, the claimant is obliged to pay a security deposit along with the filing of a petition, which is usually equal to one percent of the claimant's bidding price. If the Office determines that the contracting authority failed to abide by the procedure set out for the awarding of a public contract, and such behaviour significantly affected the choice of the most appropriate bid, and the contract has not yet been entered into, it imposes a remedial measure by annulling the tender for the public contract or just an individual action of the contracting authority, and returns the security deposit to the claimant. If a breach of the law that has significantly affected or could significantly affect the choice of the most appropriate bid has not been established, the Office terminates the administrative proceedings. In such a case, the security deposit becomes revenue for the state budget. The fulfillment of the role of the security deposit is one of the priorities of the Office. In the future, the Office intends to prevent purposeful petitions the only result of which is a delay in the contracting procedure. In some cases, bidders withdraw their petitions and assume that the Office will initiate administrative proceedings ex officio, which happens in particular in cases of evident breaches of the law. According to statistics, in 2009 a total of nearly CZK 60 million was paid as security deposits.

In the course of administrative proceedings, the Office determines breaches of the law in the procedures of contracting authorities that affected or could have significantly affected the choice of the most appropriate bid. In cases where the situation cannot be rectified, i.e. if a contract has already been entered into with the selected bidder, it proceeds to impose a fine that, in addition to a repressive function, also fulfills a preventive function. A fine for committing an administrative offence thus, in addition to sanctioning the contracting authority for its illegal action, is also intended to prevent the violation of the law, or rather to support behaviour that is in accordance with the law. In general, in its decision-making activities the Office focuses primarily on prevention. However, lately there has been a significant increase in penalties, which will be more appreciable in the future. A penalty is imposed upon the contracting authority as a legal entity. In setting the amount of fines, the basis for assessment is the price of the contract, and consideration is also given to the recurrence of behaviour, as well as aggravating or mitigating circumstances. In the course of 2009, penalties in the total amount of CZK 9,435,000 were imposed.

The current objectives of the Office in the area of public procurement include the proper application of the amendment to the act and the overall acceleration of review proceedings, which applies primarily to public contracts financed through European funds. A medium-term objective is to reduce the number of appeals, which often do not contain any significant new facts as compared to the first instance proceedings, and an increase in the success rate of decisions of the Office before the courts. In view of the number of cases being handled, it is also necessary to increase the number of staff of the Public Procurement Section. This section will also, in cooperation with the Competition Section, focus on detecting cartel agreements in public procurement, so-called bid rigging.

In matters pertaining to concessions, the Office has handled only a minimum number of cases so far. Under a concession contract, the concessionaire undertakes to provide services or to execute works and the contracting authority, in place of a payment as in a classic public contract, undertakes to allow the concessionaire to take revenue coming from the provision of services or from the use of the executed works (e.g. to collect fees from the users of a building or of a service being provided). Also typical for concession contracts is the fact that a substantial part of the risks associated with the taking of revenues coming from the provision of services or from the use of the executed works is borne by the concessionaire. The contracting authority is bound by the obligation to choose a concessionaire in a concession procedure if the anticipated revenue of the concessionaire equals CZK 20 million not including VAT or more.

Legislation

The period of 2009 brought about a number of significant legislative changes. On 9 September 2009, the Chamber of Deputies of the Czech Parliament passed the proposal of the deputy Miroslav Vlček for the issuance of an act amending Act No. 137/2006 Coll., on public procurement. That proposal is based on the results of legislative work taking place in the period of 2008 – 2009 under the auspices of the Ministry for Regional Development in cooperation with the Office. The main impulse for the commencement of such work was the need to transpose European Parliament and Council Directive 2007/66/EC dated 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts and concession contracts, into the Czech legal system. At the same time, focus was placed on the effort to improve the current state of legal regulation in order to increase its effectiveness.

Amendment No. 417/2009 dated 4 November 2009 and effective as of 1 January 2010 contains the following changes:

The text of the provisions of Art. 112(2) of the act was amended, containing an enumerative list of the competences of the Office in the area of oversight over public procurement. This change is significant in relation to the issue of the permissibility of review of small-scale public contracts, which continues to not be possible.

In the previous provisions of the law, it was only possible to file a petition for the review of the procedure of a contracting authority prior to a contract being entered into. The amendment introduced a new option of filing a petition also after a contract has been entered into, in the event of a petition for the imposition of a ban on the performance thereof. In the case of over-limit public contracts, these are transposition provisions, and the possibility also pertains to sub-limit public contracts. They differ from petitions under the previous legal regulation in the fact that they cannot be filed against every action on the part of the contracting authority, but rather only in cases where the petitioner is claiming that administrative offences have been committed which may result in the imposition of a ban on the performance of a contract. The filing of such a petition is not preceded by the filing of objections.

One of the most significant changes is the addition of the option for the Office to impose a ban on the performance of a contract as a remedial measure. In this case, it is a transposition of Directive 2007/66/EC. The ban on the performance of a contract will be imposed only on the basis of a petition and in cases as specified by the law as required by the Directive, if the contracting authority: a) awards a public contract without issuing a notification of the procurement procedure, despite being obligated to publish such a notification, or b) fails to comply with a ban on entering into the contract and, simultaneously, a further breach of the law is found in its actions, such breach significantly affecting or potentially affecting the choice of the most appropriate bid, or c) exceptionally fails to send a notification on the choice of the most appropriate bid in individual cases, but rather does so only on a quarterly basis, and, simultaneously, a further breach of the law is found in its actions, such breach significantly affecting or potentially affecting the choice of the most appropriate bid. The Office will not impose a ban on the performance of a contract if it finds that reasons worthy of special consideration, associated with the public interest, require the continuation of the performance of the contract. The costs associated with delays in the performance of the contract, with the commencement of a new procurement procedure, with a change in the entity performing the contract and costs associated with the legal obligations arising from the ban on the performance of the contract, cannot be considered as reasons requiring the continuation of the performance of a contract. A ban on the performance of a contract cannot be imposed upon a contracting authority that, despite not having published a notification on the commencement of a procurement procedure (e.g. if the contracting authority believes that it was not obligated to conduct a procurement procedure), has published a notification on the relevant form regarding the intention to enter into a contract. The proposal also deals with the issue of the invalidity of contracts entered into for the implementation of public works. Such contracts may, on the grounds of non-compliance with procedures according to the act on public procurement, be considered invalid (invalidity for other reasons is not affected thereby) only in cases in which the Office has imposed a ban on the performance of the contract.

A much-discussed new change is the introduction of a so-called blacklist of bidders. The amendment thus includes the introduction of an administrative offence consisting in the submission of information not corresponding to reality in order to prove qualifications, whether in the procurement procedure, or for the purposes of entries in lists of qualified or certified suppliers. A penalty is applied only in cases in which the supplier submits documents or information evidencing the fulfillment of a required qualification, despite actually not fulfilling such qualification, and, at the same time, the submission of false documents has an effect on the assessment of the qualification. The penalty for such an offence is, in addition to a fine, also the imposition of a ban on the performance of public contracts, for a period of three years. Persons against which a ban on performance is imposed will be registered in a special registry maintained by the Ministry for Regional De-

velopment of the Czech Republic. This registry is publicly accessible, including by means of the internet. That also relates to the introduction of a new qualification prerequisite, i.e. evidencing that the bidder is not registered in the said registry.

Other new changes include clearer rules regarding preliminary measures, and failure to comply with the procedure in handling objections constitutes a new offence. Fines imposed in public procurement area, equally as in the area of competition, penalties will now be enforced by the customs authority, not by the Office. The proposed legal regulation should, in accordance with the current interpretation of the relevant provision of the law, explicitly allow for an announcement of the bidding price upon the opening of envelopes. However, the reading of bidding prices will not be obligatory. As compared to the previous regulation, the contracting authority now has the option of requesting a supplementation or clarification of qualifications even in cases where the bidder fails to submit any documents for the given qualification prerequisite.

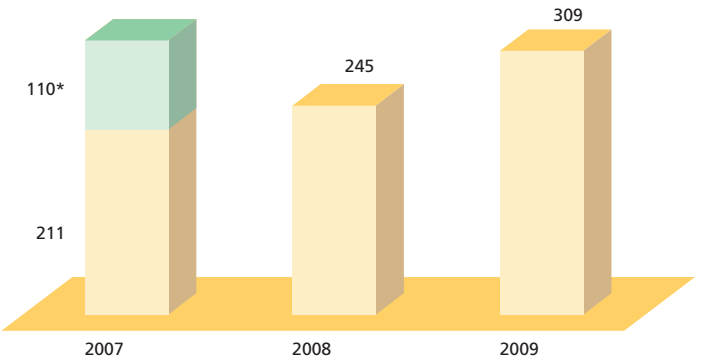
The said amendment has also led to certain changes pertaining to the concessions act. A new provision has been added to the text thereof, which, in a manner identical to the act on public procurement, obliges the contracting authority to act in accordance with the fundamental principles of the concessions procedure, i.e. the principle of transparency, equal treatment and a ban on discrimination. The principles must also be complied with in entering into concession contracts where the anticipated revenue of the concessionaire will not exceed CZK 20 million not including VAT. The concessions act will now include provisions regulating the review of the procedures applied by contracting authorities similarly to the act on public procurement, including all changes transposing the content of Directive 2007/66/ES. Similarly to the act on public procurement, a registry of entities with a ban on the performance of concession contracts has been introduced.

In the course of 2009, the Office participated in the drafting of a completely new text of the concessions act, which would fundamentally change the current legal regulation. However, more extensive legislative changes in this area are yet to be made.

Overview of administrative proceedings conducted

Total number of initiated administrative proceedings	**309**
Administrative proceedings initiated upon proposal	210
Administrative proceedings initiated ex officio	99
76 from incitements, 12 from terminated administrative proceedings, 11 from inspections	
The number of administrative proceedings in progress to the date 31 December 2009	76
Total number of first-instance decisions	**508**
Preliminary rulings + dismissed preliminary rulings	101+46
Issued decisions on the merits	**220**
Terminated administrative proceedings - no violation found	49
Remedial decisions + sanctions	171
Administrative proceedings terminated out of procedural reasons	141
Number of imposed fines	69
Amount of fines in force in 2009	3.997.000,-Kč
Amount of fines due in 2008 pursuant to Czech National Bank statement	2.547.000,- Kč
Amount of deposits paid in 2009	59.986.362,- Kč
Amount of deposits which lapsed to the state budget in 2009	3.884.289,- Kč

Number of initiated first instance proceedings



* 110 proceedings concerned public procurement of the company Lesy České republiky (Forests of the Czech Republic) for forest works and sale of timber.

Decision-Making and Supervisory Activities

In March 2009, an extensive inspection was commenced in regard to public contracts awarded in connection with the organization of the World Championships in Nordic Skiing, which took place in the city of Liberec. The inspection followed up on the previous findings of the Supreme Audit Office (NKÚ). A total of 8 staff members of the Office took part in the inspection in Liberec, where they conducted on-the-spot verification of contracts of the City of Liberec and the Technical University. In the case of the City of Liberec, the inspection staff expressed doubts in the inspection report regarding whether the contracts in question were awarded in accordance with the law. A fundamental finding was the intentional dividing up of the object of the public contract in such a way so that the contracting authority could award the individual divided parts in a less strict regime under the law. Examples are the realization of construction work in athletic facilities at Ještěd and Vesec, the purchase of snowmobiles, and the drafting of project documentation or the execution of investor technical supervision. The Office subsequently, in October 2009, initiated a total of 11 administrative proceedings against the City of Liberec as a contracting authority. A parallel inspection at the Technical University in Liberec as a contracting authority is still under way.

Shortcomings in the Application of the Act

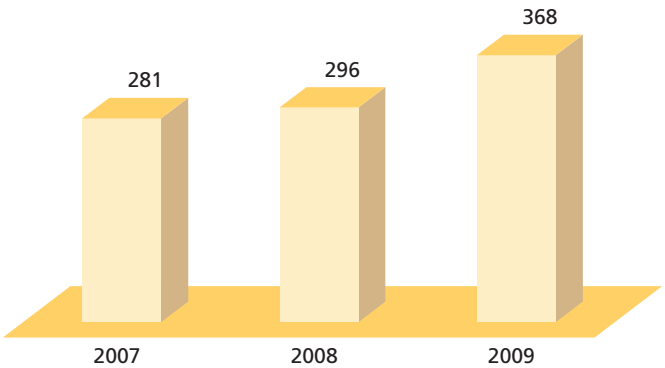
In regard to bidders, contracting authorities have an obligation to act in a non-discriminatory and transparent manner. The most serious breach of those rules is thus a situation in which the contracting authority fails to act in accordance with the said provisions at all and enters into a contract directly with a selected company. Another serious breach is also a situation in which a simplified procedure is applied and the competitive environment is restricted without cause. However, there are also other repeated instances of violations that give preferential treatment, for example, to certain manufacturers or suppliers. The act on public procurement is a relatively complicated legal instrument, so there are also cases arising as a result of the issue of whether a certain entity is obligated to act in accordance with it or not (e.g., health insurance companies).

Selected Cases

Auctions without Procurement Procedures

In 2009, the Office handled several cases in which contracting authorities entered into contracts with organizers of electronic auctions without a prior procurement procedure. In one such case, a fine of CZK 50 thousand was effectively imposed against the Ministry of the Interior of the Czech Republic. In violation of the act on public procurement, the Ministry entered into a contract with the company Clanroy Sales a.s. without having conducted a proper procurement procedure. The object of performance was the realization of an electronic auction and associated services for the purpose of the sale of real estate. Such a procedure could have significantly affected the choice of the most appropriate bid. In the case in question, the organizer of the auction was to receive its commission from the winning bidder. The commission was to be 5 % of the auctioned price. The contracting authority defended itself by stating that the commission was not deducted from the price of the auctioned real estate, but that it was rather paid above and beyond such amount by the winner of the auction, and that this was thus not a case of expenditure of public funds on the part of the contracting party. However, the contracting authority had the oppor-

Number of received complaints



tunity to include the costs associated with the transfer of the real estate in the purchase price paid by the purchaser and to subsequently pay the price of the services associated with the sale of the real estate to the chosen bidder. Instead, the contracting authority chose a different configuration of payment, i.e. it set out the obligation of the purchaser to pay the costs of the sale directly to the chosen bidder as a precondition of the sale. However, such a procedure cannot result in a situation in which the contracting authority was permitted to avoid the statutory procedure in ordering services. It is thus obvious that even in the case in question, it is a situation of the performance of a service required by the contracting authority for payment, which must be considered a public contract, despite the fact that, based upon the decision of the contracting authority, the payment is being made by a different entity. The Office also handled a similar case with a fine imposed against the city of Břeclav for the improper selection of real estate agencies for the sale of municipal apartments. In this case as well, a contract was awarded without the proper procurement procedure. The contracting authority also argued by stating that this is not a contract as defined by the act, as real estate agencies collect their commissions directly from purchasers and that it is not paid to them by the contracting authority. České dráhy and the allowance organization Zařízení služeb pro Ministerstvo vnitra were also similarly penalized.

Certain Business Companies Are Also Contracting Authorities

In August 2009, the Chairman of the Office, Petr Rafaj, confirmed the first instance decision of the Office according to which the company SARA MB, s.r.o. violated the act on public procurement when it failed to conduct a procurement procedure in choosing a supplier for an ice treatment machine for the winter stadium in Mladá Boleslav. The said company was penalized for its error with the sum of CZK 40 thousand. A procurement procedure had not been conducted despite the fact that the performance volume was in the amount of CZK 2.48 million not including VAT and it was thus proven to be a sub-limit public contract. The object of the dispute was primarily the issue of whether the said company is a contracting authority within the meaning of the law or not. The extract from the Commercial Register of the company in question shows that it operates athletic and sporting facilities and facilities serving for regeneration and reconditioning; furthermore, it was determined in the course of administrative proceedings that the purpose for establishing the contracting authority was also the improvement of the utilizability of the facilities of the winter stadium in Mladá Boleslav for the public. The company in question was thus established for the purpose of satisfying the needs of the public interest, and the other preconditions for the fulfillment of the definition of a public contracting authority were also met. The business company SARA MB, s.r.o. was thus obliged to act in accordance with the act on public procurement. Tělovýchovná jednota ŽĎAS in Žďár nad Sázavou and Komerční domy Rožnov, spol. s r. o. were also penalized for an unlawful procedure in selecting a supplier of an ice treatment machine. However, the said contracting authorities committed other administrative offences and did not dispute their position of a contracting authority.

Unauthorized Use of Negotiation Procedure without Publication

The Office imposed a fine of CZK 800 thousand on the Hradec Králové Region for serious offences in the acquisition of furniture for its new administrative headquarters. In 2004, the Region entered into a "lease (leasing) agreement" with IMMORENT ČR s.r.o. The purpose of the said agreement was the location for the Government of the region, Regional authority, Historical monument authority, detached offices of minis-

tries and other bodies of the Government. The volume of the public contract was equal to a value of over CZK one billion. Three years later, the object of performance was extended so as to include the supply of furniture for a price of approximately CZK 36 million not including VAT. This contract was once again awarded to IMMORENT in a negotiation procedure without publication, in violation of the act on public procurement. The negotiation procedure without publication is a type of procurement procedure in which the contracting authority calls upon one supplier or a limited number of suppliers to enter into negotiations. The application of this exceptional institution is allowed only upon the cumulative fulfillment of certain conditions specifically set out by law, so that this type of procurement procedure is not abused. However, in the case in question, not a single one of the conditions for the application of negotiation proceedings without publication had been fulfilled. For example, this was not a case of an extension of the existing scope of the supply, because furniture was not included at all in the object of the original contract. The contracting authority's requirements regarding the design, color and quality of the furniture cannot be considered requirements for the provision of goods of the same technical parameters as parts of the structure that had already been supplied. Neither did the circumstances of the building use permit proceedings constitute grounds for the contracting authority to apply a negotiation procedure without publication. Upon inquiry by the Office, the relevant Building authority did not confirm the necessity of the installation of furniture as one of the conditions for the issuance of a building use permit. The supply of furniture in general does not constitute performance that could only have been carried out by a single supplier. The contracting authority thus limited the sphere of bidders without justification, and should have conducted a separate procurement procedure.

Fine for Failure to Retain Documentation

In its first instance decision dated 10 December 2009, the Office imposed a fine of CZK 1 million against Lesy České republiky. The reason was serious errors in contracts from 2007 pertaining to computer technology. The contracting authority failed to retain documentation to a total of seven contracts, to the administration and monitoring of ICT structure and the provision of services consisting in the operation and maintenance of communications technologies. The total volume of the said public contracts was equal to approximately CZK 35 million not including VAT. Retaining documentation is the only possible way in which to verify whether the procedure of the contracting authority in the procurement procedure was carried out in accordance with the law. If the documentation is not carefully retained, the process of awarding a public contract cannot be properly examined, i.e. it is not possible to verify whether the procurement procedure was carried out in accordance with the law or not. The obligation to retain documentation is set out by the law for a period of five years. Besides the said error, the Office determined in at least one case of a contract for the supply of computer technology that the contracting authority, in violation of the law, divided up the object of performance in such a way that the anticipated value of the public contract was reduced. In the case of one of the contracts for the purchase of computer technology, a procurement procedure was thus not carried out and the contract was, in violation of the law, awarded as a small-scale contract (up to CZK 2 million).

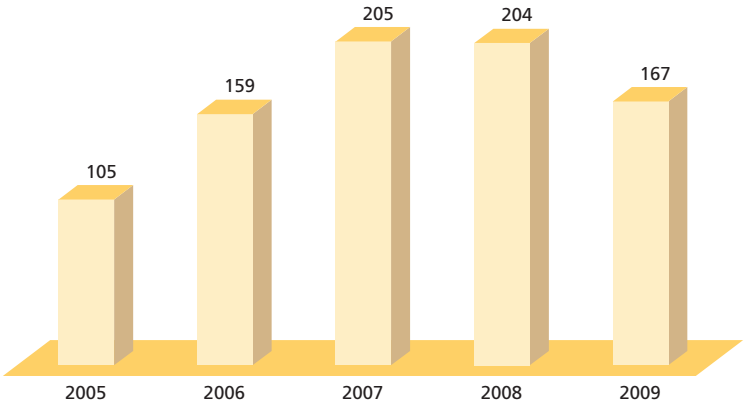
Contracting Authorities Must Avoid References to Certain Products or Services

Relatively serious offences in breach of the act on public procurement include situations in which contracting authorities choose such descriptions in tender documentation that they are typical for a certain product or service or for a certain entity. Contracting authorities must avoid such actions, as references to specific products in specifying the object of performance can lead to a significant restriction of the possibility of competition. The primary school and kindergarten (Základní škola a Mateřská škola) in Nová Říše committed such a serious error in awarding a "škola hrou" ("education through play") contract. In breach of the law, the contracting authority required, for example, the installation of a sound system for a classroom using a certain brand, and also, for example, a specific data projector or even nonskid PVC from a certain manufacturer. The manner in which the technical conditions were specified in the tender documentation led to both bidders delivering identical devices with the exception of interactive boards. The contracting authority thereby guaranteed an advantage for a certain manufacturer of the items, which was evidenced by the bids of both bidders. In view of the fact that in this case a works contract had already been entered into, the Office imposed a fine of CZK 30,000 against the contracting authority.

Contract for the Cleanup of Environmental Damage

The Office issued three first instance decisions pertaining to a multi-billion CZK tender of the Ministry of Finance for the cleanup of environmental damage. A total of three bidders filed petitions objecting to disqualification from the procurement procedure and asking for a review of the contracting authority's decisions. The Office terminated the administrative proceedings conducted on the basis of the petitions of Belgian companies DEC NV (DEME Environmental Contractors) and Dredging International NV and the consortium P-D Industriegesellschaft mbH + STAVOPROGRES BRNO, spol. s r. o. The Office issued the decision that the petition of the Belgian companies was not filed by an authorized entity, as the petitioner had not previously filed objections fulfilling all of the requirements in accordance with the law. And the consortium of P-D Industriegesellschaft + STAVOPROGRES BRNO made an error in non-delivering its petition to the contracting authority. For the said reasons, the Office was forced to terminate both proceedings. However, in its decisions the Office stated that the documentation of both the consortiums contained deficiencies that in themselves would have led to the administrative proceedings being teminated. On the other hand, the petition of a third bidder, the consortium of PPF Advisory (CR) a. s., Ecosoil Sud GmbH, AVE CZ s.r.o.,

Number of appeals submitted in individual years



Dekonta a.s. was justified and the contracting authority is, according to the current decision of the Office, obliged to annul the decision on disqualification of the said bidder from the procurement procedure, as it was in breach of the act on public procurement. In the proceedings, a preliminary measure was also issued in the form of the suspension of the procurement procedure. According to the contracting authority, the said consortium did not fulfill the qualification requirements. The consortium agreement between the members of the consortium was claimed to have been in violation of the law, as were similarly the agreements entered into between PPF and subcontractors. Also, according to the contracting authority, the free capacity of the high-capacity disposal site evidenced by PPF for the fulfillment of one of the technical prerequisites for qualification does not correspond to the minimum requirement of the contracting authority. In its decision, the Office did not accept any of those reasons for disqualification. This case constituted the largest public contract that the Office has reviewed.

Appeals and Judicial Review

In public procurement matters in 2009, there was a slight decline in the number of appeals submitted, of which there were 167. However, such a decline relates primarily to a significantly lower number of first instance decisions issued. Of appeals received in 2009, as of the end of January 2010 the Chairman of the Office had issued decisions in exactly 100 cases. In the overwhelming majority of those, the previous first instance decision of the Office was confirmed (76). There is thus a continuing situation in which parties to the proceedings are unnecessarily prolonging the procurement procedure by filing appeals with the Chairman of the Office, with such appeals often not containing any new facts and thus not being capable of changing the course of the case. Six cases were annulled and referred back to the first instance, the petition was withdrawn eight times, six cases were annulled and terminated, three appeals were rejected for lateness, and auto-correction occurred in one case.

Very often, parties to proceedings also submit actions to the courts. In 2009, that occurred 23 times. In 11 cases, the action was rejected by the Regional Court in Brno, and, on the other hand, the decision of the Office was annulled 12 times. The judgment of the Regional Court was subsequently annulled by the Supreme Administrative Court nine times, the court proceedings were terminated eight times, the action was rejected for procedural reasons twice, and in six cases the cassation complaint was rejected (of which 4 times it was in favour of the Office).

One of the most significant cases that the courts dealt with in 2009 was the case of the so-called Karlovy Vary lottery, where the Office imposed a CZK half million fine against the city of Karlovy Vary. The Regional Court in Brno confirmed the fine in its decision issued in January 2010, in which, similarly to the Office, it stated that in the case in question, "the requirement for transparency was not fulfilled by the duration of the lottery drawing of the fourth and fifth bidder (for the contract), which caused doubts in regard to the fairness of the person conducting the lottery drawing". A key piece of evidence in the case in question was a video recording taken of the lottery drawing.

State Aid

State Aid

In addition to the competences in competition, significant market power and public procurement matters, the Office also acts as a coordinating, monitoring and advisory unit for state aid matters. Until 2004, the Office also had decision-making power, but upon the accession of the Czech Republic to the European Union, such power passed on to the European Commission, specifically to its Directorate-General for Competition.

State aid has always been an important instrument for remedying market failures, for economic and cultural development of less developed regions, or for innovative scientific and research projects. However, currently it is growing in significance primarily in connection with the ongoing economic crisis, in which it serves as a means for the restructuring or rescue of undertakings affected by the crisis. However, state aid can only be provided in accordance with the set rules, otherwise it is considered to be illegal aid and it is necessary to require its recovery.

The Office coordinated an anti-crisis state aid scheme in connection with the economic and financial crisis. On the basis of a Commission Communication – Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, the Office notified to the EC an aid scheme on behalf of the Czech Republic. The EC approved it as the Czech Temporary Framework, to which the Office issued an application recommendation. The Office has made both documents accessible on its website.

In connection with the presidency of the Czech Republic in the EU Council, the Office organized a two-day international conference in April 2009 – State Aid Day, which enjoyed the participation of over a hundred experts from the Czech Republic and from other EU member states. Representatives of the European Commission and experts on state aid from Austria and Denmark, among others, appeared with their submissions. Another event organized by the Office as a part of the presidency was a seminar pertaining to Commission Regulation No. 800/2008, declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (general block exemption regulation). The issue of state aid in the area of research, development and innovation and general conditions for the application of the general block exemption regulation were discussed at the seminar, with the participation of representatives of the EC.

One of the most significant events of 2009 was the adoption of the amendment to Act No. 215/2004 Coll., on the modification of certain relationships in the area of state aid and on an amendment to the act on the promotion of research and development (hereinafter the „Amendment"), which came into effect on 1 June 2009. The Amendment introduces the new notion of "state aid coordinating body", which jointly refers to the Office and the Ministry of Agriculture as bodies authorized to perform activities in state aid matters as specified in the act. The Office performs the powers of the coordinating body outside of the sphere of agriculture and fishery. Another new requirement brought about by the Amendment is the provider's obligation to seek the previous opinion of the coordinating body in regard to applications made prior to the initiation of the proceedings before the Commission and in the course thereof. The coordinating body issues an opinion no later than within 5 working days, and in the case of agriculture and fishery within 15 working days of the date of delivery of the application. Should the coordinating body fail to issue an opinion within such period of time, it is assumed that its opinion in regard to the submission is affirmative.

The coordinating bodies were newly granted authority in the area of registering and monitoring the use of de minimis aid, by way of a newly created central de minimis registry. The registry will contain a collection of information on all de minimis aid granted after 1 January 2010. The fully functional use of the de minimis registry is expected as of 1 January 2012, when the registry will contain information on provided de minimis aid for the entire decisive period of time. At the end of the year, the Office held a seminar at which the information on the regime for de minimis aid was summarized and an implementation company presented a trial version of the program application of the de minimis registry. A second seminar on the same topic took place in cooperation with the Ministry for Regional Development in Prague.

The Amendment also newly regulated the penalization provisions of Act No. 215/2004 Coll., whereby the following fines were established: i) for failure to provide the necessary cooperation, ii) for a misdemeanor, and iii) for an administrative offence. The coordinating body takes decisions regarding the imposition of a fine.

Statistical Information

Opinions on the matter of state aid issued to providers/beneficiaries	**587**
Pre-notifications, notifications, communications under block exemption	**49**
Comments on draft legal regulations in the Czech Republic	**73**
Participation in seminars, working groups concerning state aid issues, consultations	**146**
Participation in advisory committees and meetings regarding notified cases	**9**
Professional articles in printed media and information bulletins	**10**
Request for information under Act No. 106/1999 Coll., on free access to information	**6**
Complaints to the EC and related agenda	**12**

Selected Cases

Approval of Interoperability Scheme in Railway Transport
The European Commission approved the implementation of the Czech state aid scheme „Interoperability in Railway Transport", when it declared it compatible with Community rules on state aid. The Commission stated that the measure would affect trade between EU member states and would thus distort competition, but the benefits arising from the increased interoperability would be predominant. The Office for the Protection of Competition, as the coordinating body for state aid matters in the Czech Republic, cooperated in regard to the notification of the said scheme, as well as in regard to the process of its approval within the European Union. The general purpose of the scheme is the gradual ensuring of the technical and operational interconnectability of the systems in the railway network in the Czech Republic with the railway networks in neighbouring states, as well as between individual entities involved in railway transport. The maximum amount of the aid is allowed to reach the equivalent of 50 % of the total eligible costs. The aid will be provided in the form of a direct subsidy, with the scheme being effective until the end of 2013. Total amount of CZK 1 billion has been earmarked for such purposes. The recipients of the aid will be, on the one part, licensed railway transport undertakings, as well as the Railway Infrastructure Administration.

Aid for the Creation of ICT Networks
In February 2009, the EC was notified of the aid scheme "Aid for the creation of ICT networks for access to broadband services operating on open principles and providing L2 connectivity". In the course of the notification procedure, the EC approved the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, which are the basis for the decision-making practices of the EC in these matters. The aid is intended for the creation of NGA networks within the meaning of the above Guidelines in the South-East region of the Czech Republic. The EC requested additional information in regard to the notified scheme. A decision of the EC has not yet been issued in this matter.

Schemes for Public Transport Operators
The EC approved three aid schemes for the Czech Republic for the acquisition and renewal of railway vehicles, vehicles for urban transport and vehicles for regional transport. The EC stated that this is a case of state aid that is compatible with EC rules. The beneficiaries of the aid, which will be provided in the form of direct investment contributions, will be companies established by public authorities and companies providing public transport services. The number of beneficiaries in the railway transport sector should be fewer than 10, and in the case of urban and regional transport, the estimated number of beneficiaries is between 50 and 100. The aid intensity can be as much as 40 % of the total eligible costs. All three schemes will be effective until the end of 2014. The total budget for the railway transport scheme is CZK 4.323 billion, CZK 1.157 billion for urban transport, and CZK 1.179 billion for regional transport.

State Aid

In 2009, the Office was the umbrella body for the notification of the aid scheme being implemented on the basis of a Commission Communication – Temporary Community framework for state aid measures to support access to finance in the current financial and economic crisis (hereinafter the „Temporary Framework"). The content of scheme N 236/2009 consists of direct aid of up to EUR 500,000. The activities of the Office as part of this scheme were comprehensive and consisted in addressing providers of state aid, the purpose of which was to ascertain interest in the provision of such type of aid. Furthermore, it was also necessary to determine the legal regulations on the basis of which the individual providers would grant the direct aid, and most importantly a gross estimate of the budget earmarked by the providers for such a measure. On the basis of such information, the Office drew up the text of the scheme and arranged for the notification process with the EC. As of the approval of decision N 236/2009 on 7 May 2009, the Office was entrusted with the function of monitoring, consisting of submitting continuous reports on the implementation of the scheme. Beyond the scope of such obligation, the Office issued application rules in regard to the decision for the purpose of the application of the decision, in order to facilitate as much as possible the application of such instrument in practice by providers.

Funding of Alternative Charging Stations

In its decision, the European Commission allowed the Czech Republic to implement an aid scheme of public funding of alternative charging stations for public transport operators in the northeastern region (the Liberec, Hradec Králové and Pardubice regions).

International Cooperation

International Cooperation

Cooperation Within the European Union

On the European level, the first half of 2009 was significantly affected by the presidency of the Czech Republic in the EU Council, which also brought about a greater number of challenges and increased international connections for the Office. In competition matters, the Czech presidency was successful in achieving the approval of a final version and signing of an agreement between South Korea and the EU on cooperation in fight against anticompetitive behaviour. That agreement facilitates the exchange of information and cooperation between the competition authority of South Korea, the European Commission and the competition authorities of the EU member states in the area of competition and thereby increases the probability of effective detection of cartels, abuse of dominant position or other practices that distort the markets of the parties to the agreement. In the course of the entire presidency, the Office actively cooperated with the Permanent Representation of the Czech Republic to the EU, the European Commission and the General Secretariat of the EU Council in preparing agendas that could be discussed and dealt with under the Czech leadership.

The European Competition Day conference, which the Office organized in Brno on 13 and 14 May 2009, was also associated with the role of the presidency of the Office. Nearly 300 experts from the Czech Republic as well as from over 30 countries from around the world took part in the said conference. The top-ranked officials of foreign competition authorities and the European Commission were represented as well. Moreover, the Office also organized the State Aid Day conference at its headquarters, focusing on state aid matters, which become of greater importance primarily in times of global crisis.

The formal as well as informal cooperation of the Office with other European competition authorities and the European Commission under the auspices of the European Competition Network (ECN) continued throughout all of 2009. The Office was represented by its staff in many ECN working groups and advisory committees taking part in preparing new EU law, revision of existing EU law, dealing with specific cases or the mutual exchange of information and experience. In several working groups in 2009, the Office also brought forth its own projects for discussion (e.g., the topic of parallel application of national and EU competition law). In three cases this year, Office staff also took on the significant role of rapporteur in advisory committees for mergers and antitrust matters.

The exchange of written information through secured ECN communication networks is also more and more frequent, where the staff of European competition authorities can, literally on a daily basis, deal with the current issues in competition law and policy that are common to several or many countries, or which one member state needs to resolve with the help of the others.

Cooperation within International Organizations

In 2009, representatives of the Office continued to actively represent the Czech Republic through their appearances at international conferences and seminars. More than twenty presentations and submissions were made by the Office, e.g. at conferences and seminars held by the most important organizations dealing with competition issues (OECD, ICN), CECI (Central European Competition Initiative) seminars, IDRC (International Development Research Center) conference, conference on enforcement of competition law in newly acceded EU countries, annual IBA (International Bar Association) conference, etc.

In 2009, the Chairman or staff of the Office participated in all three sessions of the Competition Committee and working groups of the Organization for Economic Cooperation and Development (OECD) in Paris. At each session, they presented their submissions in regard to the given topic and answered questions posed by OECD staff. The topics included, for example, competition issues pertaining to patents and intellectual property rights, standards for the assessment of mergers, generic pharmaceuticals, state owned enterprises, or passing experience on to newly established competition authorities.

Within the International Competition Network (ICN) in 2009, the Office was primarily engaged in working groups that, in the course of the year, prepare recommendations, reports, surveys and other non-binding documents serving to facilitate the work of the member competition authorities and share experience in individual areas. For example, the Office was represented in a working group dealing with mergers, a working group focusing on unilateral conduct issues, and prioritization and effectiveness of the activities of competition authorities. The Czech delegation was present at the annual conference of the ICN in Zurich and staff of the Office also made use of the opportunity for a further exchange of experience and recommended practices in the course of interactive ICN workshops focusing on mergers, cartels and dominance.

Cooperation with Foreign Competition Authorities

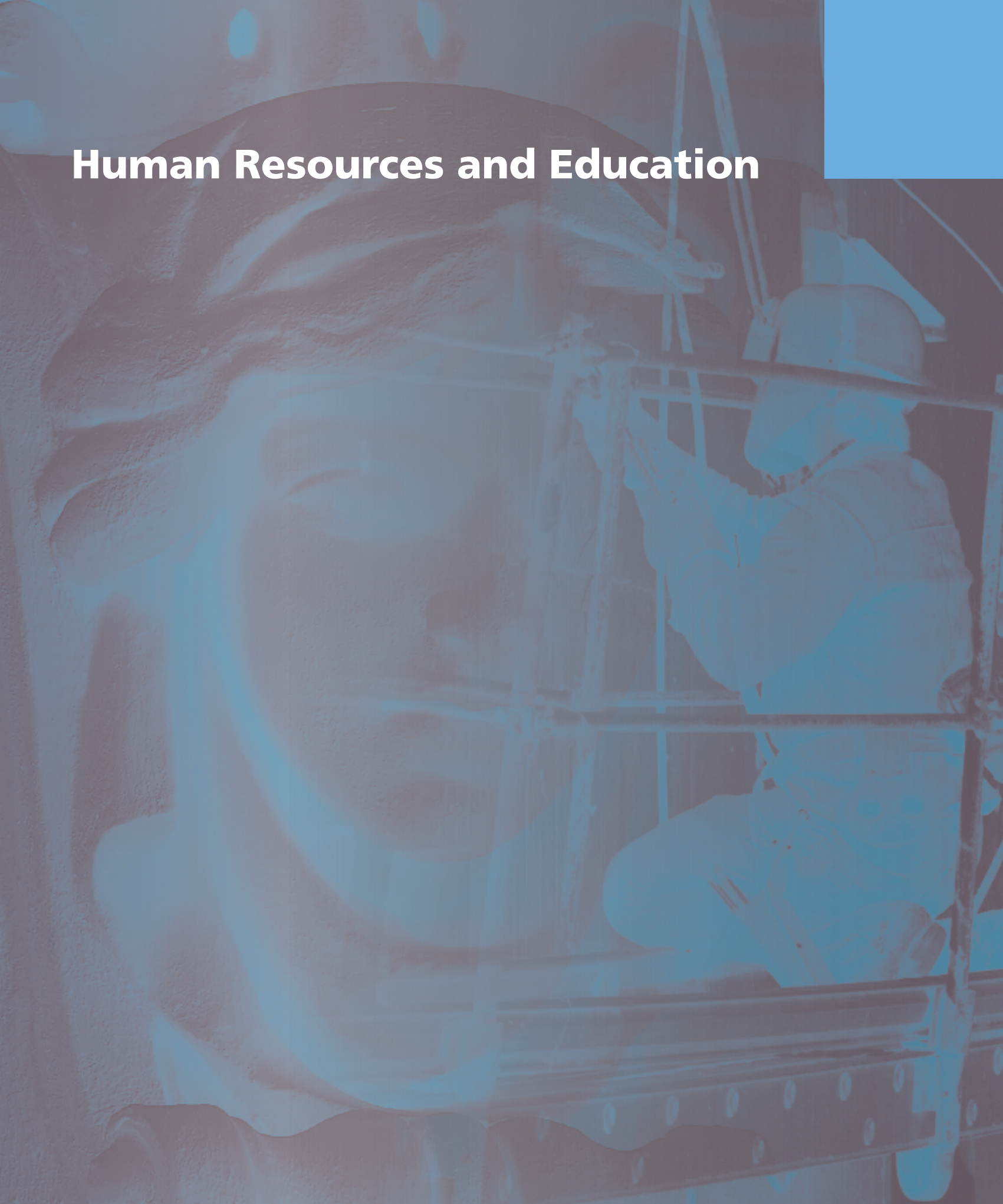
The Office also maintained successful relationships with its foreign counterparts in 2009, regardless of a change in the person of the Chairman of the Office, who is supportive of further growth of bilateral cooperation. There were opportunities to meet at many international conferences, as well as two regular meetings of the heads of competition authorities – in the spring under the auspices of the European Competition Authorities (ECA) and in the autumn there was a meeting organized by the European Commission, Directorate-General for Competition. To a great degree, the cooperation with certain non-EU-member states was also deepened; for example, representatives of the Office were invited to visit the competition authorities in Albania and Serbia and to appear at local competition conferences. The Office was also actively represented at the annual conference of Baltic competition authorities, which took place in 2009 in Latvia. Further, cooperation also continued with Austrian partners in the activities of the Marchfeld Competition Forum; member states of the said group, under the leadership of the Austrian and Czech authorities, created and published a joint opinion regarding the role of competition authorities in the financial crisis.

International Conferences Organized by the Office

In addition to the European Competition Day and State Aid Day conferences mentioned above, which the Office organized as part of the Czech presidency in the EU Council, the traditional St. Martin conference focusing on new trends in competition law and policy also took place at the headquarters of the Office in November 2009. With abundant international participation, the current issues were discussed, e.g., intellectual property rights, abuse of significant buyer power, leniency, and the activities of the Office in the past year were presented as well.

A further significant and topically very current event, at which the Office took on the role of co-organizer, was the international conference on private enforcement of competition law organized at Charles University in Prague.

Human Resources and Education

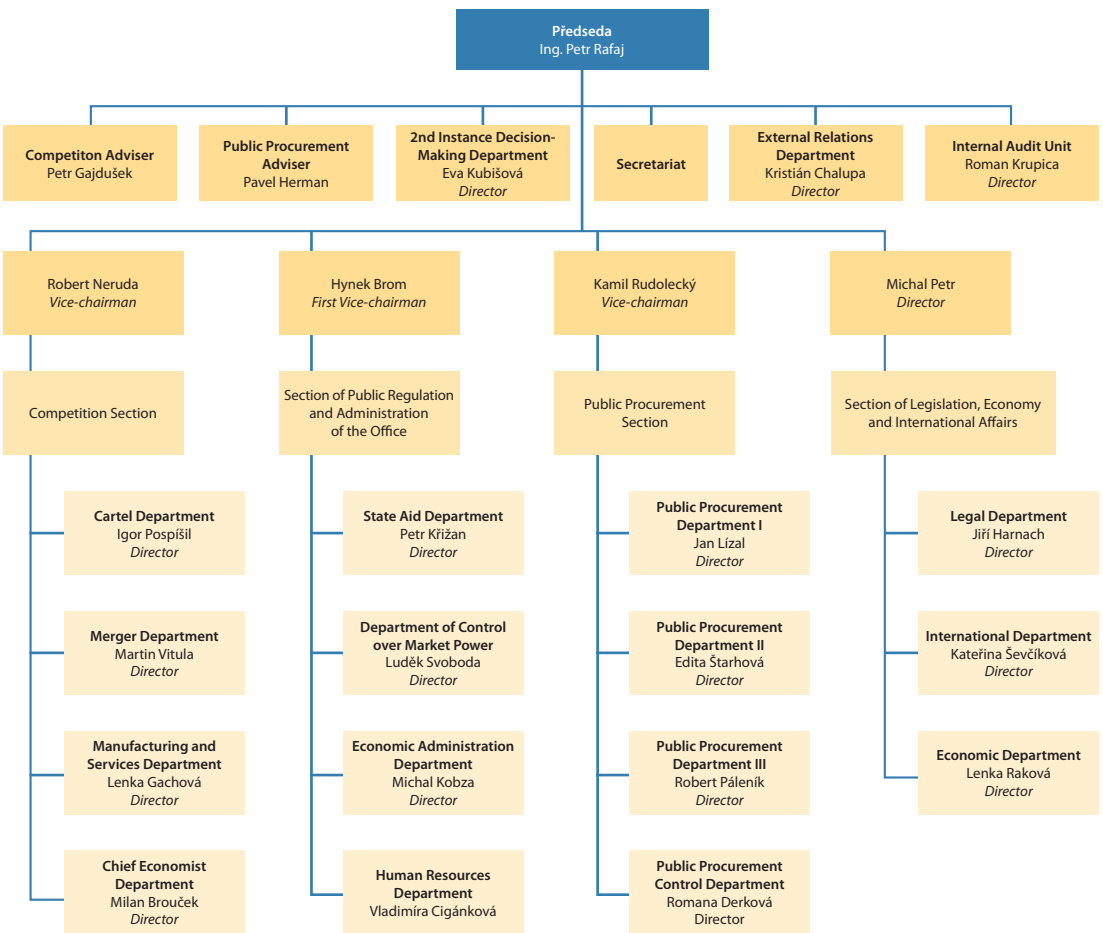


Human Resources and Education

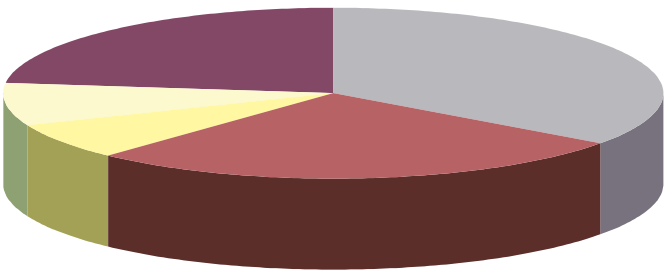
In regard to human resources, the Office for the Protection of Competition is a stabilized institution. The limit on the number of employees has continued to be the same within the last three years, the limit being 126 staff members, who are sharing four areas of competence as of 2010. In addition to the traditional areas of protection of competition, overseeing public procurement and monitoring of state aid, as of February 2010 there is the addition of a new power, established by the act on so-called significant market power. In connection with the said law, which was approved in the autumn of 2009, an internal reorganization of the Office took place. On the basis of an amendment to the Act on the scope of competence of the Office for the Protection of Competition, the number of vice-chairmen was increased from two to three.

The most significant personnel change to have taken place in the course of 2009 was the abdication of the Chairman of the Office, Martin Pecina, who became the Minister of the Interior of the Czech Republic. In July 2009, he was replaced at the helm of the Office by Petr Rafaj. In December 2009, Hynek Brom became the first vice-chairman managing the Section of Public Regulation and Administration of the Office. Vice-chairman Kamil Rudolecký heads the Public Procurement Section, and Robert Neruda heads the Competition Section in the role of vice-chairman.

Organizational diagram of the Office effective as of 1 January 2010



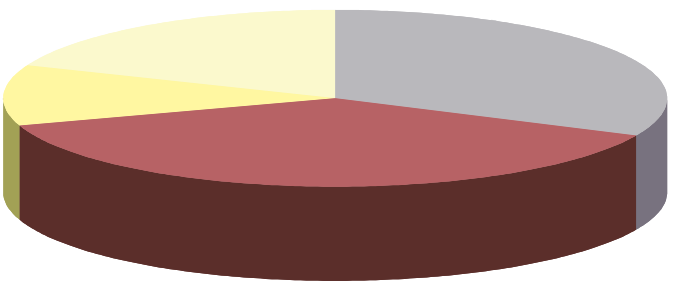
Employees of the Office according to sphere of activity



- Competition 35 %
- Public procurement 27 %
- State aid 7 %
- Legislative and international departments 8 %
- Other (especially administration of the Office) 23 %

(valid as of 1 February 2010)

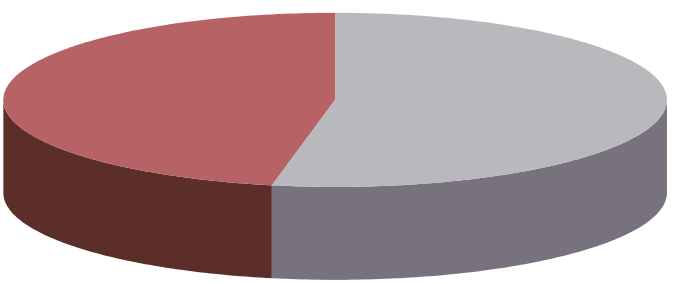
Age structure of employees of the Office



- up to 30 years 32 %
- 31–40 years 38 %
- 41–50 years 11 %
- above 51 years 19 %

(valid as of 1 February 2010)

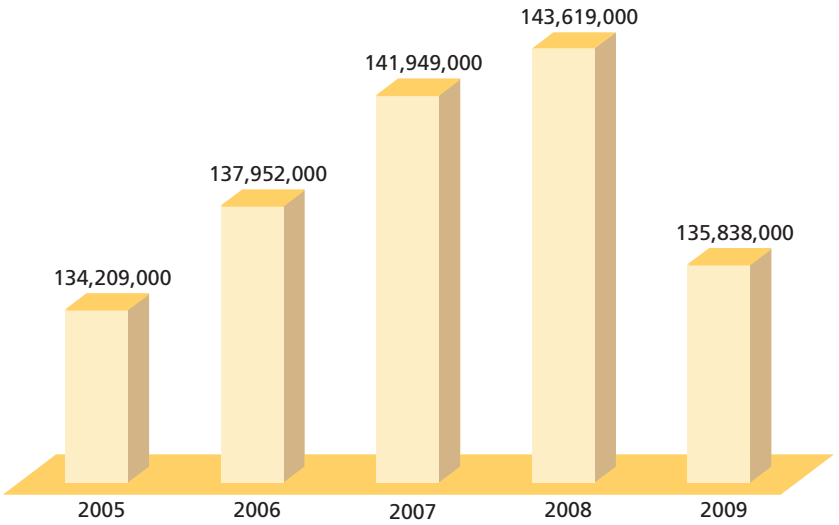
Structure of employees of the Office according to gender



- Number of men 47 %
- Number of women 53 %

(valid as of 1 February 2010)

Budget (in CZK)



In 2009, the Tax Authority for Brno I conducted an inspection at the Office that focused on the management of funds that the Office obtained in past years from the state budget in order to finance the construction of the new headquarters for the Office at třída Kpt. Jaroše 7. The inspection did not determine any violation of the law in implementing the historically most significant investment by the Office and did not have any comments in regard to the actions of the Office.

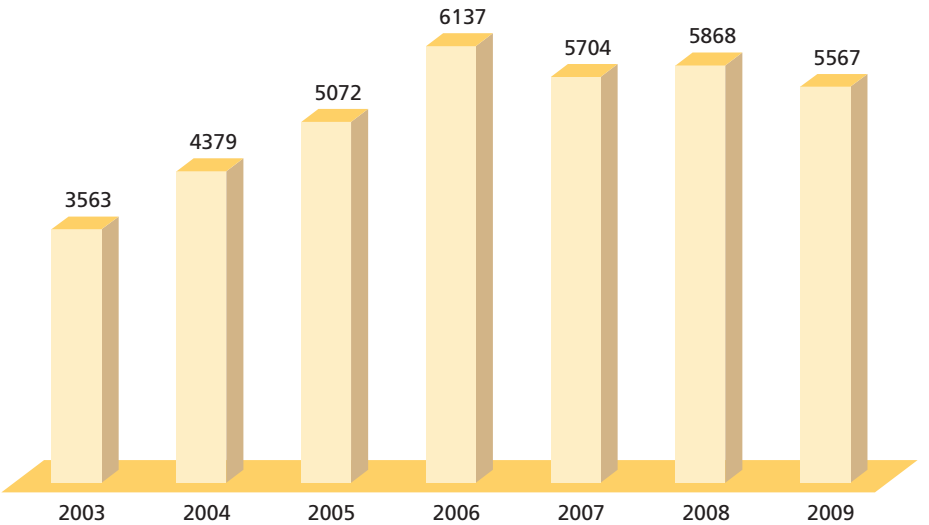
Information Activities

The Office places a great emphasis on cooperation with the media. It is through the media that the conclusions of the individual decisions of the Office are seen by the general public. For that reason, the Office had a public opinion survey conducted in 2009. The survey showed, among other things, that a considerable majority of the persons surveyed are convinced of the usefulness of the existence of the institution of the Office for the functioning of the economy. A majority of the persons responding were also well acquainted with the powers of the Office. The Office is associated primarily with the prosecution and penalization of cartel agreements and oversight of public procurement.

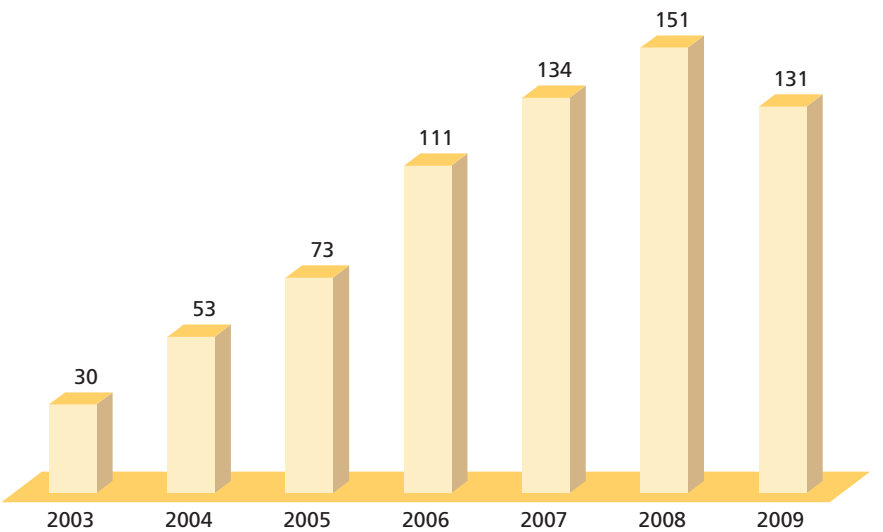
The primary means of communication between the Office and members of the media are press releases, of which the Office issued a total of 131 in 2009. Of those, 50 concerned competition issues, 49 public procurement, and 26 state aid issues. The greatest interest on the part of the media was associated with the decision regarding České dráhy, the appointment of the new Chairman of the Office, and the commencement of the European Commission´s investigation in energy sector companies in the Czech Republic. Press releases are sent out to all significant periodicals in the Czech Republic as well as abroad, which often occurs as soon as the day immediately after the issuance of a relevant decision. The court did not find anything wrong with such a procedure, although, for example, in the case of the Karlovy Vary lottery, an objection had been raised against the Office by the relevant party to the proceedings for its openness in regard to the media. In that matter, the fact was taken into consideration that the Office "is a central body of state administration, whose activity is monitored by the media, with the head of the said central body of state administration being exposed to pressure by the media in regard to the course of individual cases, and thus the media expect such person's statement in regard to the individual cases," as stated in the text of the relevant judgment by the Regional Court in Brno.

In view of maximum transparency, the press releases of the Office are also made public on the internet at www.compet.cz, where there are also other documents, primarily information bulletins that may be downloaded. The issues of the bulletins for 2009 focused on the following topics: the Office and the presidency of the Czech Republic in the EU Council, resale price maintenance agreements, competition policy and the economic crisis, public procurement, the energy sector, and significant events of 2009. A special brochure was issued in connection with the organization of the European Competition Day conference, which took place in mid-May 2009 in Brno.

Number of articles regarding the activities of the Office in 2003–2009 in the monitored media



Number of press releases issued in 2003–2009



The External Relations Department cooperates with several periodicals, in which articles about the Office are regularly published. Those media are the following: Prosperita, Parlament, Vláda, Samospráva, Moravské hospodářství magazine, Veřejná správa. A total of 5567 mentions of the work of the Office have appeared in the assessed media.

In an attempt to increase the quality of its presentation to the public, the Office started, as of the beginning of 2010, to make use of a graphics manual. Now, information bulletins, press releases, annual reports and other materials are issued in a unified visual style. However, the graphics manual pertains not only to public relation issues; rather, it pertains to all of the documents issued by the Office, which therefore include decisions, resolutions, as well as letters.

Education

Besides the publishing of a whole range of press materials, the Office actively engages in specialized discussions regarding Czech and international competition law, the process of public procurement procedures, as well as regulation in state aid matters. It does so primarily at international conferences and seminars, of which a number are also organized by the Office. During the first half of 2009, the role of organizer was all the more significant as the Czech Republic held the presidency position in the European Union. During that time, two international events took place in Brno, those being European Competition Day and State Aid Day. In both these areas, international conferences also took place at the headquarters of the Office at the end of 2009. A conference on public procurement took place in Brno in January 2010.

Agenda 2010

Agenda 2010

Competition

In the following time period, the Office will be further developing a more economic approach. It will be applying such an approach not only in administrative proceedings, but also in sector analyses, which it intends to focus on with greater intensity than in previous times. We are convinced that we can expect an increase in the number of decisions pertaining to the most serious of anticompetitive behaviour, i.e. cartel agreements, in 2010. This area continues to be a priority for the Office. In this regard, the Office will be focusing primarily on the area of services, where even on the EU level a greater number of cartels have not been revealed yet. The Office also focuses on bid rigging agreements, on the prevention and detection of which the Competition Section will be cooperating with the Public Procurement Section. The plan also includes the issuance of information materials concerning this issue.

The Office will also continue to monitor the behaviour of the dominant players on the market. This pertains primarily to the energy sector with a focus on matters of setting retail and wholesale prices. In 2010, we will also continue to monitor the telecommunications sector, distribution and repairs of motor vehicles, and the railway transport market for both freight and passenger transport. The Office will continue to issue methodical materials, thus so-called soft law. Newly, rules of the settlement procedure should be compiled, and a revision should be made in regard to setting fines and competition advocacy. A modification of the leniency programme is also being considered.

Significant Market Power

As of 1 February 2010, Act No. 395/2009 Coll., on significant market power in the sale of agricultural and food products and the abuse thereof, came into effect, which broadens the powers of the Office into an area that until then had been regulated only through private law, primarily through rules on protection against unfair competition. The new regulations pertain to undertakings that purchase agricultural and food products for the purpose of sale to consumers (typically so-called retail chains). If such purchasers have a significant market power in relation to their suppliers, i.e. if the supplier becomes dependent on the purchaser in regard to the option of supplying its goods to consumers and the purchaser can force the supplier to provide it with unilaterally advantageous terms of trade, they are prohibited from abusing such market power. The existence of market power is presumed if the purchaser's turnover exceeds CZK 5 billion.

As an buse of significant market power is understood only systematic, not random, activity on the part of the purchaser that is not merely of a negligible significance, i.e. if the object or effect thereof can be the distortion of competition. In six annexes, the said act demonstratively lists the conducts that can be considered abusive.

Public Procurement

Amendments to the public procurement act and concessions act came into effect as of 1 January 2010, thus broadening the powers of the Office with the option of imposing a prohibition on the performance of an agreement, primarily in cases where the contracting authority enters into an agreement without conducting a public procurement procedure or concession procedure, despite having the obligation to apply such a procedure. Further, there will newly be the option of imposing a prohibition on the performance of public contracts against suppliers who will have submitted false information regarding their qualifications. Both these changes should lead to an increase in the effectiveness of review procedures, but will simultaneously also place greater demands on decision-making activities, since the cases in question will be those with a direct impact on the performance of specific contracts and suppliers' business opportunities.

The Chamber of Deputies is also discussing a material amendment to the public procurement act. There is also a legislative process under way that should lead to the approval of a new act on public passenger transport services. Such a law will contain, among other things, rules for the tender procedure for the selection of transport providers, adherence to which will be overseen by the Office. The adoption of the

said amendments will have a direct impact on decision-making activities in the field of public procurement and will also manifest itself in the methodical area, educational events will be organized and methodical materials pertaining to current issues will be prepared.

Legislative work in the field of public procurement will continue with the participation of the Office; it will primarily be necessary to prepare a transposition of the EU directive on public procurement in the defense and security sector.

State Aid

As of 1 January 2010, the Office has an obligation to register and monitor the granting of small-scale aid, so-called de minimis aid. The attention of the Office will therefore be focused primarily on putting the registry into operation, accepting providers' applications for registration in the system, and completion of a methodical guideline for the operation of the registry.

In connection with the effectiveness of an amendment to Act No. 215/2004 Coll., on the modification of certain relationships in the area of state aid and on an amendment to the act on the promotion of research and development, the competence of the Office's State Aid Department has been extended, with the Department being authorized to conduct administrative proceedings in connection with the imposition of penalties against providers and beneficiaries of state aid for non-fulfillment of statutory obligations. The performance of the said new power is expected primarily in connection with the existence of the de minimis registry, as the Office can impose a fine of up to CZK 100,000 on a provider for the non-fulfillment of the obligation to register granted de minimis aid in the registry.

The State Aid Department will continue to actively disseminate information on state aid, once again in the form of organizing seminars and conferences on current issues and development in this area of EU law, creating methodical recommendations, as well as in the form of publication activities.

In regard to the European Commission, activities will be focusing on intensifying contacts with individual employees of the European Commission – Directorate-General for Competition, under whose authority state aid matters fall.

International Cooperation

In 2010, the Office anticipates continually more active involvement in events on the international scene, primarily within the International and European Competition Network, the Organization for Economic Cooperation and Development (OECD), as well as other structures. In the spring of 2010, an international Conference on the Enforcement of Competition Law in Newly Acceded EU Countries will be held at the headquarters of the Office, and in November, yet another year of the St. Martin Conference will take place, with an ever-increasing focus on international participation.

OFFICE FOR THE PROTECTION OF COMPETITION

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