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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE CZECH REPUBLIC

-- 2007 --

This report is submitted by the Delegation of the Czech Republic to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 11 and 12 June 2008.

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Executive summary

1. This annual report describes recent developments in competition law and policy in the Czech Republic and summarizes the competition enforcement activities of the Office for the Protection of Competition for the year 2007.

2. For the very first time in its history the Office for the Protection of Competition has its own address and its own building which is to become the symbol of this important institution and of the public interest it protects.

3. The year 2007 was a year of big decisions. The Office imposed the biggest fine ever – in the amount of one billion CZK – for a large-scale cartel in the electric industry. Moreover, many other decisions represented a development of our decision-making powers, leading to a stronger emphasis on the improvement of the market in the Czech Republic.

4. The Office kept on focusing on a strict differentiation between malicious and intentional acts on one hand and less significant negligence caused by the lack of knowledge of the subject on the other. While punishing the serious intentional acts and law violations as strictly as possible, the Office focused on prevention in the latter case, as well as on mutual agreements and cooperation and support from the Office for the Protection of Competition to the market players.

5. In 2007 the Office was to a large extent once again involved in the activities of the OECD competition committee and its working parties. The Office prepared several contributions to the sessions of the OECD Competition Committee. Representatives of the Office led by its Chairman also presented these contributions during the sessions. The Office also played a significant role in the preparation of the economic review of the Czech Republic by OECD that shall be made public during the first half of the year 2008. The Office also prepared a statement relating to competition policies in Israel in relation to Israel's planned OECD accession. At the end of the year 2007 the peer review of the Czech Republic's competition law and policy was commenced. It is a complete evaluation of the competition policies of the Czech Republic by OECD experts.

6. Public documents, including more detailed descriptions or full texts of many matters referred to in this document, are available on the Office's web-site in English at www.uohs.eu/en.

1. Changes to competition laws and policies, proposed or adopted

1. 1 Summary of new legal provisions of the competition law and related legislation

7. In December 2007 the Federation of the Food and Drink Industries of the Czech Republic presented a draft law on the significant market power and its abuse that shall contribute to the regulation of activities of the so-called retail chains whose factual market power often enables them to force their contractors into business deals that are advantageous only for them. It is a variation of the legal regulation of economic dependence that has been repeatedly submitted in the Czech Republic since 1999. The Office has repeatedly expressed its opinion in the past that the prohibition of the abuse of the economic dependence has been a standard EU tool for the protection of competition by some competition authorities and thus the Office does not object to this particular proposal in principle. However, the Office shall point out that, especially in relation to the most recent market development the said proposal might affect, a very thorough analysis is necessary prior to the approval of any new legislation that would analyze the impacts, namely in relation to the potential consequences for consumers.

8. The sixth amendment to the Act on the Protection of Competition (71/2007 Coll.) has renewed the full applicability of the competition law in the sector of electronic communications that had been limited against the provisions of the acquis communautaires via the act on electronic communications as of 2005. Upon the adoption of this amendment the European Commission terminated the infringement proceedings with the Czech Republic that had been in progress for the said reason. This amendment also offered a new provision relating to file inspections – parties to the proceeding can make themselves familiar with documents that contain business secret. However they are not entitled to make copies or excerpts.

1.2 Other relevant measures, including new guidelines

9. In 2007, three important documents were adopted. The Office has drafted a new version of a leniency programme, which is supposed to be more flexible and relating to the competition enforcement. Furthermore, in order to declare publicly the method how the Office would proceed during the setting fines on undertakings – parties to the proceedings - in proceedings conducted pursuant to Act No. 143/2001 Coll. on the Protection of Competition, the Office has made public its guidelines on the method of setting fines, setting out the principles which would guide the Office during all the administrative proceedings where the fine is to be imposed. Third document adopted by the Office is the Compliance programme (*Zásady pro tvorbu a dodržování právních norem v oblasti hospodářské soutěže)* stipulating the rules of adopting and compliance with the competition legal rules.

Documents available at website:

Leniency (leniency programme of the Office for the Protection of Competition); http://www.compet.cz/en/competition/antitrust/new-leniency-programme/#c211

Guidelines of the Office for the Protection of Competition on the method of setting fines; http://www.compet.cz/en/competition/antitrust/guidelines-on-the-method-of-setting-fines

Compliance programme;
http://www.compet.cz/hospodarska-soutez/kartely-a-dominance/compliance-program/

1.3 Government proposals for new legislation

10. There exists a significant novelty in terms of the protection of competition: possible criminal liability of individuals in case of participation to cartel agreements. Thanks to the initiative from the Office the appropriate provision has been included in the draft criminal code that has been prepared by the Ministry of Justice. If approved, individuals might be criminally liable if and when they actively participate in the activities that go against free competition. It is the category of subjects that are not subject to penalties imposed by competition authorities (the fines are imposed on companies that are managed by the particular statutory bodies, managers, etc.). The future provisions shall ensure the criminal liability of these managers and other individuals who would take part in cartel agreements: they could be sentenced to prison for 3 years and to the prohibition of activity, or criminal forfeiture or other form of value forfeiture. Experience from the countries in which the principle of the criminal liability of individuals who take part in cartel agreements is used and applied show that the fear of criminal punishment, especially the risk of imprisonment is the most effective deterrent that prevents individuals from committing these crimes. Criminal liability for the participation in activities against free competition in the form of cartel agreements is embodied in the law of many EU members, e.g. Denmark, Estonia, France, Ireland, Cyprus, Luxembourg, Malta, Germany, Romania, Greece, Slovakia, or Slovenia. In case of the United States of America cartel agreement conclusion is considered a felony for which an individual might spend ten years

in prison or they can face a one-million dollar fine. The proposed provision relating to the *res gestae* as detailed above shall only apply to horizontal cartels, i.e. agreements distorting competition that are concluded among direct competitors. Hard-core cartels that *res gestae* shall focus on are generally considered the most serious infringements of competition law.

2. International cooperation

11. The main platform on which the cooperation among the competition authorities of EU members and the Office takes place is the European Competition Network (ECN). The most important issues relating to the activities of ECN, along with other key topics of the protection of competition, were negotiated during the meeting of top representatives of national competition authorities in Brussels in November 2007. Chairman of the Office Martin Pecina attended the meeting as well. The summaries of sector inquiries in the sectors of energy and banking were presented there. Among other key topics was the issue of private enforcement of competition law, the modernization of the approaches towards the abuse of dominant position (reform of Article 82) and the issues of optimization of proceedings before the European Commission.

12. Several ECN plenary sessions took place at which representatives of the Office participated. Among the key issues to be dealt with was the extension of cooperation among European competition authorities, the preparation of an agreement on cooperation in competition policy with South Korea or private enforcement of competition law.

13. Last year the Office focused within the ECN network especially on the participation in workgroups that dealt with the issues of abuse of dominant position, leniency and cooperation issues, or in sectoral subgroups dealing with banking, energy sector, motor vehicles and liberal professions. In the framework of the workgroups experience and knowledge is exchanged amongst the representatives of individual member states. The most recent activities of the leniency workgroup was the adoption of the so-called ECN model leniency program. This program was used by the Office in the process of formulation of its own new leniency program.

14. In the scope of broad activities of the liberal professions workgroup initiated the review of legal norms and documents of European associations and unions of particular liberal professions. The Office has initiated a similar review in the Czech Republic. Representatives of the Office also took part at meetings of advisory committees of the European Commission at which specific cases of the application of competition rules are discussed, in order to reach general consensus.

15. In 2007 the participation of representatives of the Office also continued in the workgroups of ECA (European Competition Authorities), especially in the workgroups dealing with financial services and sanctions.

16. Currently, the Office deals with the most recent issue, which is the preparation of the Office for the presidency of the Czech Republic in the Council of the EU in the first half of the year 2009. During this period of time the Office shall focus on four key issues: the promotion of private enforcement of competition law, harmonization of leniency programs throughout the member states, amendment of the Council directive on mergers; and procedural aspects of state aid. The Office serves as a member of the Competitiveness Council. Priority issues for the EU presidency have been discussed by the Office with representatives of French and Swedish competition authorities, i.e. countries that will preside before and after the Czech Republic. In relation to the presidency employees of the Office received extensive training during 2007.

17. In 2007 the ICN conference took place in Moscow and representatives of more than one hundred competition authorities and other experts took part. As for the successes that were achieved within the framework of the cooperation of ICN member countries in the previous year, a detailed report was presented during the conference that dealt with the issue of the abuse of dominant position (unilateral conduct), as was another part of the so-called manual on the fight against cartels or the recommended practices for merger control. Moreover, negotiations on further intensification of the fight against cartels took place. A delegation led by the Chairman represented the Office at this three-day conference. The Chairman moderated a panel discussion that focused on competition issues in state-created monopolies and during one plenary session he presented the achievements of the Czech competition office concerning the implementation of the ICN recommended practices on merger notification. In 2007 representatives of the Office participated in the activities of individual ICN workgroups, especially those dealing with the issue of unilateral conduct, cartels and mergers. Moreover, representatives of the Office took part in workshops on mergers and cartels in 2007. At the end of 2007 preparation for the Merger Workshop began, as the workshop on behalf of ICN was hosted by the Office in March 2008.

18. In 2007 the Office was to a large extent once again involved in the activities of the OECD competition committee and its working parties. The Office prepared several contributions to the sessions of the OECD Competition Committee. Representatives of the Office led by its Chairman also presented these contributions during the sessions. Last year the Office played a significant role in the preparation of the economic review of the Czech Republic by OECD that shall be made public in spring of 2008. The Office also prepared a statement relating to competition policies in Israel in relation to Israel's planned OECD accession. At the end of the year 2007 the peer review of the Czech Republic's competition law and policy was commenced. The outcome of the peer review is the formulation of recommendations and measures the purpose of which is to improve the quality of competition law and enforcement.

19. A delegation of the Office attended the session of the permanent United Nations Conference on Trade and Development (UNCTAD) in Geneva. At the meeting of the competition section the Chairman of the Office gave a speech on the intensification of global competition and fighting poverty in developing countries. The other issues discussed related to the competition on the energy market, competition related to intellectual property rights and the evaluation of effectiveness of competition authorities.

20. Intensification of the relations with competition authorities abroad has been one of the long-term goals of the Office. The Office attempts to intensify contacts that were established in the past, as well as to establish new ones. Participation of the Office at international forums is an important method of the development of effective cooperation.

21. A delegation from the Office led by its Chairman visited, among others, the Austrian and Dutch competition authorities in 2007. They discussed especially the issue of competition law enforcement in key sectors of economy, such as the energy sector, retail business and banking, as well as the cooperation between the authorities within the European Competition Network.

22. The Office also cooperated significantly with competition authorities outside the European Union: both within international conferences and seminars and on bilateral levels. Last year a delegation from the newly established Moldovan competition authority visited the Office to discuss the development of competition policies in Moldova. Pursuant to Memorandum on Cooperation with the Federal Antimonopoly Service of the Russian Federation an exchange internship program between the two offices was realized.

3. Enforcement of competition law and policies

3.1 Action against anticompetitive practices, including agreements and abuses of dominant position

3.1.1 Competition advocacy

23. It is the opinion of the Office that cooperation taking place between the Office and an undertaking in case of which there exists the suspicion that it took part in anticompetitive action can, under certain circumstances, lead to fast and effective remedy of the distorted or endangered competition. When the undertakings are willing to remedy their actions on their own free will the Office is keen to help them in doing so. If the anticompetitive status is remedied the Office is willing to drop or not to press charges or to terminate the proceedings that have already been launched, without the necessity to issue a decision that the action in question had indeed represented administrative offence. According to the opinion of the Office "alternative solution" means the remedy of a competition-related problem before the administrative proceeding is launched (competition advocacy) and the acceptance of commitments by the parties in the first-instance proceeding. The Office has issued a methodological document on this issue to provide distinction among various degrees of infringements.

24. The Office sees competition advocacy as a very effective tool leading to faster remedy of competition issues. This tool has been developed since 2005 when Martin Pecina became Chairman of the Office. Since 2005 the number of cases that were settled via competition advocacy instead of in administrative proceeding has risen (there were 17 in 2006 and 13 in 2007). Individual participants to the anticompetitive action do not face any fine or administrative proceeding, provided they respond to the inquiry from the Office promptly.

25. Another category of the alternative solutions of competition issues is the chance for the participants against whom the administrative proceedings have already been launched to submit a commitment proposal that shall be sufficient in protecting competition and that shall enable the remedy of the detrimental situation, if fulfilled as stated. This method of solution of competition issues has already been legitimized, i.e. stipulated by the Act on the Protection of Competition, both in case of agreements that distort competition and in case of the abuse of dominant position. It is the opinion of the Office that in given legal conditions the proposed commitments shall be accepted not only in relation to less serious infringements but also in relation to more serious infringements in the form of agreements distorting competition that have never been really carried out, or also in case of serious infringements that were terminated, it their effect on the competition was largely limited and did not manifest the signs of hard-core restrictions. Also in case of proposed commitments that the Office finds sufficient in order to protect competition the undertakings might avoid being fined.

26. Among the issues relating to the competition advocacy is also the so-called passive legislation (the comments of the Office on draft laws), or the cooperation with particular regulatory bodies in applicable sectors of industry. The Office employs this method for example in the negotiations on the issue of gas supply storage, or in relation to the access to underground gas supply storage facilities. This situation is caused by the insufficient capacity of the underground storage facilities in the Czech Republic and by the fact that the majority owner of most of these facilities is only one dominant undertaking – the RWE Group. Most cases of this kind are investigated after complaints that are submitted by companies concerned, from the media or pursuant to the Office's own investigation. In 2007 the Office received 448 complaints relating to possible violation of the competition rules. The Offices investigates or monitors some markets pursuant to its own information or pursuant to administrative proceedings that took place in the past. Extra attention is paid to brown coal markets, especially in relation to the vertical arrangement between the exploitation and its subsequent use in power plants or heating power stations within one

conglomerate. This is the reason why insufficient volumes of brown coal come to the market (in terms of demand) which makes the bargaining position of the exploitation companies very strong and the prices of this commodity can rise steeply.

3.1.2 Statistics on number of cases

27. In 2007 a total of 70 new administrative proceedings were initiated by the Office, with 7 administrative proceedings still ongoing at the end of the year 2007. In 2007 in total 14 first-instance decisions were challenged. The Office reviewed in total 439 complaints on possible distortion of competition; 252 of possible abuse of dominant position; 91 agreements possibly distorting the competition; 12 cases of mergers and other 84 complaints (20 of which regarding the unfair competition issues). The total amount of fines imposed by a decision of the Office reached CZK 957 million.

3.1.3 Appeals and judicial review

28. The number of appeals lodged with the Chairman of the Office increased dramatically in 2007: there were 46 of them. Eleven second-instance decisions were issued in proceedings in which there were more participants: in four cases the first-instance decision was upheld; the decision was changed five times; in one case the first-instance decision was annulled and remanded; and in one case the administrative proceeding was terminated altogether. Six second-instance decisions in force imposed fines in the overall amount of 1,393,995,000 CZK.

29. As for the judicial review of individual decisions of the Office, the Office has been successful in two-thirds of cases, continuing in the same trend as in previous years. Out of the total number of 30 verdicts of all kinds of judicial instances (which is to include the Constitutional Court) the court found in favour of the Office 21 times, the other party succeeded 8 times. One case was remanded by the Supreme Administrative Court to the Regional Court in Brno, thus the court had not ruled on the merits and found partially in favour of both parts.

30. The immediate review instance for the decisions of the Office is the Regional Court in Brno. The court overruled several key decisions of the Office in 2007, namely the case of the abuse of dominant position by the RWE company which was imposed a significant fine. This decision was overruled due to procedural issues, as the Office had applied (just like it had done in similar cases before) both Czech national legislation and *acquis communautaires*. However, according to the standpoint of the Office parallel application of both national legislation and *acquis communautaires*, when some activity is evaluated from the point of view of two legal systems, is normal and it has been practiced in vast majority of EU member states and it is being foreseen by *acquis communautaires*. This is the reason why the Office has filed a cassation appeal in this case (just like in many other cases for other reasons) to the Supreme Administrative Court. The Supreme Administrative Court overruled 8 verdicts of the Regional Court in Brno relating to the protection of competition in 2007.

3.1.4 Description of significant cases

Agreements distorting competition

Historic sanction for a cartel on market division

31. The Office imposed record sanctions on sixteen multi-national machinery companies that had divided the market with gas-insulated switchgear devices. The overall amount of the legitimately imposed sanction was 941,881,000 CZK. The companies of the ABB, ALSTOM, AREVA, Fuji, Hitachi, Mitsubishi, Toshiba and Siemens holdings took part in a cartel agreement: the most sophisticated, largest and longest in terms of duration in the history of the Office. The Office initiated administrative

proceedings in August 2006. It was inspired by a previous motion from the ABB company that had admitted its involvement in the cartel and it had submitted evidence thereof. This company avoided financial sanctions within the Leniency program. The interesting aspect of this case is that for the very first time fines were imposed on companies that had no business activities in the Czech Republic and that had no profit from the Czech market with gas-insulated switchgear devices. All companies paid the fines. The companies that paid the sanctions had concluded an agreement among themselves in 1988 based on which they had created a very sophisticated system according to which they took part in tenders for gas-insulated switchgear devices in the sector of electrical energy transmission and distribution in coordinated manner. The companies had split into two groups, European manufacturers and Japanese manufacturers. The contracts have never been signed but the companies were mentioned in appendices under specific codes. These codes were then used in mutual communication, either in fax messages or in e-mails that were sent from free e-mail accounts from public-access servers. One of the cartel members even obtained for others special secured cell phones to make the mutual communication even easier. In order to coordinate their activities the companies that were fined organized regular meetings that took place for example in hotels at international airports. Once a year a general meeting took place at which the cartel members would express their willingness to continue with the cooperation, they defined general strategies and they solved potentially conflicting issues, if any. Every two weeks representatives of the companies would meet in various airport centres and hotels to hold board meetings of European or Japanese manufacturers. The goal of the meetings was to negotiate on the requirements of individual companies, to award particular orders, or to determine bid prices with which the companies would take part in tenders. Each group (European and Japanese manufacturers) was assigned a joint sales quota based on their global agreement. The quota for the European group was 62.5 percent, whereas the quota for the Japanese group was 37.5. This quota was derived from the market share percentage on the global gas-insulated switchgear market. Moreover, the contract included a mechanism based on which the companies would measure the value of particular projects thanks to which the companies were able to ensure that the projects are divided among individual companies pursuant to the said quota. By doing so the companies secured their market shares and they were certain that they would not be competitors to one another. Via the concluded contracts the companies had been making deals on prices when they communicated and discussed the bid prices in the process of awarding projects to specific companies. Particular price was brought to the attention of the other companies so that they would know what amount (meaning a higher price than the price of the company that won the bid) they were supposed to offer. Moreover the companies discussed and made arrangements in terms of maintaining the lowest bids for cases in which a project was not allocated to a specific company.

Farmers making deals on prices

32. The Office for the Protection of Competition has issued a first-instance decision (not in force so far) by which it fined seven poultry producers in the amount of 14.208 million CZK for prohibited cartel agreement. On December 13, 2006 the undertakings AGRODRUŽSTVO JEŠOVICE, Zemědělské družstvo (farm) PETŘÍN, Zemědělské družstvo "Roštýn", ZEVA CHLÍSTOVICE, a.s., SUŠÁRNA POHOŘELICE, s.r.o., Karlov, a.s. and AGROPRODUCT concluded an agreement in Ješovice on their joint strategies of determination of sales price for poultry for slaughter as of January 1, 2007. Their goal was to achieve the minimum price of at least 20 CZK per 1 kilogram of live weight in the 1st Quality Class from their most important common purchaser, the Kostelecké uzeniny, a.s. company (meat producer). The aforementioned companies also agreed upon joint actions and on joint negotiations on the purchase price increase for poultry for slaughter with the aforementioned purchaser on December 14, 2006 and they proceeded successfully according to that. By doing so the undertakings eliminated the risk of competition on the market where individual undertakings have no knowledge of the intentions of their competitors. It is natural for a normal development of a market that an undertaking must accept less advantageous offer in order to remain on that particular market. Not even persistent disadvantage of the participation in competition justifies anticompetitive actions of participants who are natural competitors in principle. The

aforementioned behaviour cannot be justified even by circumstances that affect poultry production (such as bird flu or higher energy prices) and the subsequent production costs, or by the behavior of other market players. Joint actions of undertakings that are natural competitors in principle shall be deemed as being anticompetitive as every undertaking shall act independently and bear the associated risks on their own. Undertakings shall be aware of the fact that their actions might affect prices of poultry, which happened in this case when the prices of poultry for consumers indeed went up. The signed memorandum from Jevišovice is a clear proof of the willingness to intentionally coordinate and unify poultry for slaughter prices in relation to consumers.

Undertaking had ignored an inquiry from the Office – and was fined

33. The Office has imposed a procedural fine in the amount of 100,000 CZK on a Luhačovice-based company, VAVRYS CZ s.r.o. that had repeatedly failed to provide the Office with information and documentation it had been asked to provide. The Office conducted its investigation in the sector of outdoor equipment distribution and it asked the VAVRYS company (repeatedly) to provide information and documentation to facilitate the said investigation that the Office could not obtain otherwise (the investigation was focused on the possible existence of a vertical cartel). The undertaking did not respond despite the fact that the company had been warned of the investigative authority of the Office and that the company had been informed of its obligation to assist the Office and of the risk of being imposed a procedural fine. The Office initiated administrative proceeding with the VAVRYS company the result of which was that this company intentionally broke the law by not providing the information and documentation it had been told to provide. When determining the amount of the fine the Office considered the severity of that particular offence and the fact that the VAVRYS company acted deliberately, but on the other hand it also considered the company's clean record and the fact that the company pleaded guilty.

Abuse of dominant position

Case of RWE TRANSGAS conduct

34. The Office issued a second-instance decision by which it imposed a fine in the amount of 240 million Czech crowns on the RWE Transgas, a.s. gas distribution company. Between November 5, 2004 and August 10, 2006 the said company failed to allow the operators of competitive regional distribution networks to conclude agreements under such natural gas purchase conditions which would allow these companies to become competitors to RWE holding companies in the operation of regional distribution networks. The Jihočeská plynárenská (South Bohemian Gas) and Pražská plynárenská (Prague Gas) companies were disadvantaged in the competition for the so-called eligible customers. Moreover, the RWE company refused to deliver natural gas elsewhere than to the so-called balance zone of the individual regional distributors by which it inhibited and prevented the creation of competitive environment. Under the situation when regional distributors purchase natural gas on the input into their balance zone, the fact of the matter is that they must accept the unilateral conditions that have been set by the party to the proceeding. The Jihočeská plynárenská company was interested in gas supplies outside its balance zone but the RWE Transgas company repeatedly refused. It was the opinion of the Office that the dominant company had been creating artificial entry barriers that prevented new undertakings from entering the market, or barriers that prevented the existing undertakings that were competitors to the company's regional distributors from expansion. The decision of the Office was overruled by the Regional Court in Brno in the middle of the year 2007 with a verdict saying that only one legislation can be applied in one proceeding, either *acquis communautaire* or national legislation. The Office does not agree with the verdict and so it filed a cassation appeal. It is the opinion of the Office, also being supported by the constant judicature of the European Court of Justice, that *acquis communautaire* and the national legislation pursue different goals so their parallel application is indeed possible, especially when there is only one fine for the violation of both of them. In no way did the Office sanction one anti-competitive conduct twice.

Fine to a public transportation authority upheld

35. The Chairman of the Office upheld the imposition of a fine via his second-instance decision on the Ústí Region public transportation authority in the amount of 700,000 CZK. The authority ceased to provide its bus transportation services as of August 1, 2006 due to financial problems. More than 2,000 bus connections were halted immediately, most of which had been until then provided as the service of general interest. The authority found itself in such bad a financial situation that it could no longer objectively operate the bus lines which the Office thought had been in accordance with the Act on the Protection of Competition. However, a dominant undertaking that provides long-term and regular services to customers cannot cease to provide them without sufficient prior warning that would enable timely reaction and adaptation to a new business strategy of the service provider. Considering the nature of public transportation bus lines and the extent of these lines on which the service was terminated by the authority, a five-day notice that was issued on July 26, 2006 could not be deemed as being sufficient for the Ústí Region. Consumers were affected by the actions of the public transportation authority, i.e. passengers who demand the services of public service bus transportation in the said region who could not adapt to a new situation and seek services of other transportation providers. The extent of the detriment was even intensified by the fact that the transportation services were halted in the whole of the Ústí Region, and also by the fact that it affected the bus lines that passengers need in order to satisfy their basic needs in terms of transportation.

3.2 Mergers and acquisitions

3.2.1 Statistics on number of mergers

36. During the year 2007 the Office for the Protection of Competition concluded 66 merger examinations, with 5 examinations still ongoing at the end of the year 2007. The Office issued in total **60** decisions on the merits including decisions approving the concentration without any conditions and **1** decision approving the concentration with conditions.

3.2.2 Description of significant cases

Merger that did not adversely affect market environment

37. The Office approved the merger of the ICELANDAIR HF company and Travel Service, a.s. company. In this transaction the Icelandic company acquired 100-percent business share in the Travel Service company. Travel Service is a domestic airline carrier that provides airline transportation services, especially charter passenger flights and low-cost regular service under the brand name Smart Wings. In the process of evaluation of this merger the Office considered the fact that the ICELANDAIR HF company had no direct or indirect business activities in the Czech Republic and thus the level of market environment would not be adversely affected. Moreover, there are numerous other leading competitors in the airline transportation market, among them Czech Airlines.

Strengthening of the Heineken Group position

38. The Office approved the takeover of the Královský pivovar Krušovice, a.s. company (Krušovice brewery) by the Austrian company BRAU-UNION Aktiengesellschaft which is a member of the group of one of the leading beer producers in the world - the Heineken company. Many companies are active in the beer production and distribution sector in the Czech Republic. Plzeňský Prazdroj (Pilsen brewery) is the most significant undertaking on the market, followed by Pivovary Staropramen, a.s. Upon the takeover of the Krušovice company the Heineken company gained the third place. As for the situation on the beer production market in the Czech Republic, it can be said that this market is specific thanks to the presence of several economically strong companies and their strength is enhanced by their involvement in global

business concerns. The Office approved this merger without conditions, especially in consideration of the fact that the two merging undertakings have a relatively minor role on the market and that there exist other strong competitors. The Office therefore concluded that the merger shall not increase the market power of the two merging undertakings in a way that would cause the creation or promotion of dominant position of the merging undertakings, or either one of them, which would in effect cause a significant distortion of competition.

Conditional merger

39. The Office approved the merger of undertakings Telefónica O2 Czech Republic, a.s. (hereinafter also referred to as "Telefónica") and DELTAX Systems a.s. (hereinafter also referred to as "Deltax") under the condition of fulfilment of a commitment proposed by the parties to the proceeding in order to maintain effective competition. The Office investigated this merger in the so-called second phase proceeding as there existed the fear of distortion of competition. Telefónica promptly proposed a commitment that the Office evaluated as sufficient and it helped conclude the administrative proceedings quickly, otherwise it might have taken as long as 5 months. The other undertaking, Deltax, must - according to this commitment – withdraw from a public contract concerning an information system for the maintenance of interactive forms (IS ASDM) for the Czech Telecommunication Office. It was the opinion of the Office that there had existed the risk that upon the merger the new entity would get access to secret data on its competitors that it could use in competition. Therefore Telefónica would have gained unfair advantage to other undertakings on the market. This fact was brought to the attention of the Office in the course of administrative proceeding by one of Telefónica's competitors. The said public contract was transferred onto independent entity.

4. The role of the Office for the Protection of Competition in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies.

4.1 Price regulation

40. Generally, the price regulation is covered by Act No. 526/1990 Coll. of 27 November 1990 On Prices, as amended (further referred to as “AOP”). The AOP sets out rights and obligations of natural/legal persons, central state authorities and other subjects for fixing, regulation and supervision of prices. The Ministry of Finance approves the list of goods with regulated prices each year. In case that a market is threatened by restrictive effects of restriction of competition or of extraordinary market situation, central state authorities can regulate price fixing under the AOP.

41. The AOP also prohibits resale below cost for undertakings with significant economic power.

42. Although it had been claimed in many proceedings that the Office has due to this regulation no power as far as excessive or predatory prices are concerned, the courts stated repeatedly that its competences are not limited by it.

4.2 Agriculture

43. Agriculture has a specific position among other sectors subject to specific legal rules. The main reason for this is that agriculture performs not only the economic function. According to the Community law, competition law cannot be fully applied to this sector; competition rules apply to agriculture only to the extent set out in Council Regulation (EC) No. 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products.

44. In 2004, an amendment to the Competition Act[1] set special provisions concerning its application in this sector; it was adopted against the advice of the Office. So far, it has not been used in practice.

45. According to Art. 1 Para. 8, the Competition Act shall not apply to actions of undertakings in the field of production of and trade in agriculture products provided that they act in compliance with the law of the European Communities. However, it is not perfectly clear why the legislators have incorporated this provision into the Competition Act, since in case of behaviour that could effect trade between Member states, the EC law would be applied and the Czech law would not be able to alter its application, and on the contrary, if the behaviour does not have Community dimension and thus Community law cannot be applied, such a behaviour cannot be "in compliance" (or indeed *not* in compliance) with it at all - since the Community law cannot be applied to such an action it is pointless to ask whether the Community law is breached or not because it has no impact on this activity.

46. Another provision, Art. 6 Para. 1 (c) of the Act, excludes from the general prohibition of agreements the agreements of sales organizations and associations of agricultural producers on sale of unprocessed agricultural commodities. Firstly, this provision appears not to fit in the structure of the Act since Art. 6 contains the *de minimis* rule whose main purpose is to exclude certain agreements from general prohibition on the grounds of low market shares of its participants as it is presumed that these agreements cannot significantly harm competition. However, Art. 6 Para. 1 (c) tries to exclude these agreements regardless of the market shares but just because of the agricultural character. This exemption however does not apply to:

a) horizontal agreements on direct or indirect price fixing, restriction or control of production or sales or division of market or sources of supply or customers,
b) vertical agreements on direct or indirect price fixing relating to resale of goods by the purchaser or granting the purchaser full protection for such resale in a defined market,
c) individual agreements, forming a part of system of agreements pertaining to identical, comparable or substitutable goods, provided that:

    1. the aggregate share in the relevant market of the parties to agreements forming such system, where at least one and the same undertaking is party to all these agreements, exceeds percentage limits set in paragraph 1 above, or
    2. the system of vertical or mixed agreements restricts access to the relevant market for undertakings which are not parties to such agreements and the competition in the relevant market is significantly restricted by the cumulative effect of parallel networks of similar vertical or mixed agreements entered into for the purpose of distribution of identical, comparable or substitutable goods provided the combined share of parties to the horizontal agreement or the share of any of the parties to the vertical agreement exceeds 5 % in the relevant market.

47. Finally, this amendment increased the list of behaviour deemed to constitute abuse of dominant position by prohibiting direct or indirect requirements of monetary or non-monetary remuneration for entering to the evidence of an undertaking in position of a purchaser, for placing goods in an undertaking's outlet or direct or indirect requiring of special sales and financial benefits in connection with opening outlets or holding different sales campaigns of an undertaking in position of a purchaser. The aim of this provision was to protect agricultural producers from some unfair practices of the retailers. However, to be eligible for getting protection from this provision, a retailer would have to abuse its dominant position; pursuant to the Office's analyses and documents no retail chain exercised such a market power that it could be deemed in dominant position. Moreover, in case that an infringer had been a dominant undertaking, it

[1] Act No. 484/2004 Coll. of 5 August 2004 on Amending the Act on the Protection of Competition.

would have been possible to declare such practices unlawful under other provisions of the Art. 11. This provision has already been removed from the Act.

4.3 Banking

48. Banking is subject to the Office's analyses and inquiries on a long-term basis. The Office investigates banking sector with regard to entry barrier, fees, credit cards, interchange fees etc. The Office also participates in the working group of ECN dealing with banking where interchange fees are currently being discussed.

49. The Office inquired building savings banks on the ground of suspicion of prohibited agreement concluded among them and held that the agreement on exchange of detailed information about statistics and the fees that they intended to charge was in breach of competition law. However the Regional Court has reversed the Office's decision and now the case is pending before the Supreme Administrative Court.

50. The main change in the banking sector after the accession of the Czech Republic to the European Union is the introduction of the *single passport* into banking and insurance sectors. To set up the business in the field of financial services in other Member State it is no longer necessary to apply for another similar licence in the respective State, as the licence which has been already issued in the home state of financial institution enables the financial institution to provide its services freely all over the EU territory only on the grounds of the simple notification procedure made between the supervisory bodies of home and host Member States.

4.4 Professional services

51. Professional services are the services governed by special legal rules requiring the membership in an association or a chamber and which can be provided only on the basis of a special permit or licence. The sector is characterised by high levels of regulation. This is often a mix of State regulation, self-regulation and custom and practice, which has evolved over a number of years.

52. Professional services are entrusted with delivery of services of considerable public importance and are a key sector of the European and the Czech economy. Professional services include legal services (lawyers, notaries, executors), accounting services (auditors, accountants, tax consultants), health services (doctors, pharmacists, dentists) or techno-consultation services (architects, engineers etc.).

53. As far as experience of the Office with professional services is concerned, the Office submitted to the Czech Government the report on necessary restrictions of economic competition under applicable legislation in the sector of independent professions in the Czech Republic (further referred to as the "Report") in June 2007. The aim of the Report was to find out whether there is the need to amend legal provisions relating to professional services and which of them are considered as incompatible with the principles protected by competition law.

5. Resources of the Office for the Protection of Competition

5.1 Resources overall (current numbers and changes over previous year)

5.1.1 Annual budget of the Office in 2007

Approved budget in CZK	**138 million**
Approved budget in EUR	**5,55 million**
Approved budget in USD	**8,85 million**

5.1.2 Number of employees (person-years) as of January 31, 2008:

Economists	39
Lawyers	58
Other professionals	7
Support stuff	21
All stuff combined	**125**

5.2 Human resources (person years) applied to:

Enforcement against anticompetitive practices	31
Merger review enforcement	7
Advocacy efforts	8
Surveillance over the public procurement	32
State aid control	**9**

6. Summaries of or references to new reports and studies on competition policy issues

Reports and studies available at:

The Statistics of the highest fines imposed by the Office and subsequent consequences (*Souhrn nejvyšších pokut uložených ÚOHS za porušení zákona o ochraně hospodářské soutěže s následným vývojem jednotlivých kauz)*; CZECH: http://www.compet.cz/hospodarska-soutez/statistiky/prehled-nejvyssich-pokut/

Vystoupení předsedy ÚOHS na konferenci EGU 2007 (*Speech of the Chairman of the Office at the EGU Conference*), 26.9. 2007; CZECH: http://www.compet.cz/fileadmin/user_upload/Clanky/2007/EGU_2007_Pecina.ppt

Kartel trestným činem (*Cartel as a delict*) (Prosperita, 10.9. 2007, str. 7); CZECH: http://www.compet.cz/fileadmin/user_upload/Clanky/2007/Kartel_trestnym_cinem.pdf

Proti horizontálním kartelům (*Against the horizontal cartels*)(Ekonom, 28.6. 2007, str. 16); CZECH: http://www.compet.cz/fileadmin/user_upload/Clanky/2007/Ekonom_proti_kartelum.pdf

ÚOHS není shovívavější, sankce jsou naopak vyšší (*the Office doesn't tend to be lenient, sanctions rise higher*) (Prosperita, 18.6. 2007), str. 6; CZECH: http://www.compet.cz/fileadmin/user_upload/Clanky/2007/pokuty_Prosperita.pdf