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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE CZECH REPUBLIC

- 2004 -

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Executive Summary

1. The activities of the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as “the Office”) in the year 2004 were related especially to the accession of the Czech Republic into the European Union. On 1 May 2004 the antitrust and state aid law of the European Communities became directly applicable on the territory of the Czech Republic. For the sake of ensuring implementation of the modernised EC competition law principles after 1 May 2004 and enabling the Office to engage in the decentralised enforcement of the EC competition law within the framework of the European Competition Network, the Office prepared two extensive amendments to the Competition Act.
2. The decision making powers in the area of state aid, which were before the accession fully in the hands of the Office, have been, since 1 May 2004, carried out exclusively by the European Commission. The Office newly performs the function of the central coordination and monitoring unit for the state aid. The rules changed also in the area of supervision over public procurement, which falls within the scope of the Office’s powers as well. For the purpose of implementing the relevant EU directives a new Act on public procurement was adopted, which abandons the possibility of more favourable treatment for the domestic tenderers.
3. In 2004 the Office opened its first case pursuant to the competition provisions of the EC Treaty, namely an abuse of dominance in the sense of Article 82 in the telecommunications sector. In line with the pursuit of sufficiently deterring sanction policy, the fines imposed by the Office in 2004 tripled in comparison with year 2003. The so far highest fine in the history of the Office was imposed for a concerted practice of the building savings companies. For the first time, the leniency programme of the Office was used in practice.
4. In the area of control of concentrations between undertakings the Office focused its attention especially on the mergers that may have the most serious impact on the national level. The legal criterion for obligatory notification of a concentration was substantially increased in order to take more respect of the actual impacts on the Czech Republic’s market in line with the application of the “local nexus” principle”. This resulted in a substantial decrease in the number of concentrations dealt with by the Office.
5. The advocacy activities of the Office in 2004 were continuously aimed at sectors with proceeding liberalisation and significant impact on most consumers. The Office successfully intervened against the attempt to extend the monopoly of the Czech Post also to delivering of so called direct mail. In the pharmaceutical sector the Office ensured compliance with the principle of free decision making of business entities on their competition behaviour.

1. PROPOSED OR ADOPTED CHANGES TO COMPETITION LAWS AND POLICIES

Summary of new legal provisions of competition law and related legislation

Amendment to the Act on the Protection of Competition

6. National competition rules in the Czech Republic are set by the Act No. 143/2001 Coll., on the Protection of Competition. In 2004 this act was amended as of 2 June 2004 by the Act No. 340/2004 Coll., which is aimed in particular at ensuring implementation of principles of the modernised EC competition law after 1 May 2004 and enabling the Office to engage in the decentralised enforcement of the EC competition law within the framework of the European Competition Network. Apart from that, an objective of the amendment was also to strengthen the Czech competition law compliance with the current EC competition rules and to respond to the changes in the Community law, which took place since the enactment of the competition act in 2001.

7. In 2004, the Office also elaborated a draft of another amendment to the Act on the Protection of Competition, which is currently being discussed by the Parliament. This amendment aims at ensuring further convergence of the Czech competition law with the Community law in particular in connection with adoption of the Council Regulation No. 139/2004 on the control of concentrations between undertakings. It also incorporates the Community block exemptions directly into the Czech competition law. Newly the block exemptions will be applied in the Czech Republic also to agreements with no effect on trade but falling under the prohibition pursuant to the national competition rules.

8. The changes brought by the amendments include in particular the following:

- replacement of the notification system for agreements distorting competition by direct applicability of the relevant provisions for exemptions from the prohibition of agreements provided for by the Act on the Protection of Competition;
- increase of the market share thresholds for the so called *de minimis* rule to 10% by horizontal agreements and 15% by the vertical agreements;
- cancellation of the so called negative clearance procedure for agreements and abuses of dominance;
- introduction of the possibility of the Office to issue a decision, which would make binding any commitments offered by the parties to the proceeding in order to remedy any alleged anti-competitive agreement or abuse of dominance without the necessity to decide on existence of infringement of the Act on the Protection of Competition;
- more precise definition of the abuse of dominant position in relation to the essential facilities, where the concept should in the future relate not only to facilities owned by the dominant undertaking but also to the facilities used by the dominant undertaking by any other legal means and should include also the intellectual property issues;
- new merger notification thresholds aimed at reducing the number of notified mergers and ensuring adequate local nexus to the Czech jurisdiction so that the Office may fully use its resources in the most serious cases;

- definition of time limits for submission of proposed remedies by the merging undertakings and provisions on extension of the deadlines for issuing a decisions by the Office in cases where remedies are offered.

Draft Amendment to the Act on the Protection of Competition

9. The purpose of the so called second amendment to the Act is to adapt the Czech legal order to the effects of the new EC Council Regulation No. 139/2004 on the control of concentrations between undertakings. The second amendment elaborated by the Office and submitted on 19 March 2004 to the Czech Government was approved on 12 January 2005. Currently the amendment is being discussed in the Economic Committee of the Chamber of Deputies of the Czech Republic's Parliament.

Changes in the area of assessment of concentrations

10. The amendment significantly changes the economic criteria for assessment of the concentration's impact on competition. The concept for approval or disapproval of a concentration has been explicitly changed by amending the hitherto dominance test by a new system, which combines the dominance and SLC (*Substantial Lessening of Competition*) test. The Czech system of control of concentrations between undertakings will be in future based on new economic principles allowing prohibition of concentrations capable of causing negative impacts on competition regardless whether they occurred as a result of creation or strengthening of dominant position of the concentrating undertakings or other adverse effects of such concentration (especially the so called *unilateral effect*).

11. The proposed amendment also explicitly prohibits implementation of any steps whatsoever aimed at implementation of a concentration before the approval by the Office. The prohibition covers for example the holding of shares of the acquired company by the acquirer. A new exemption is stipulated for the case of receivables acquired in the stock exchange, to holding of which is the acquirer entitled upon meeting the legally defined conditions before the legal effect of the Office's decision, however he may not execute the voting rights connected to it. The draft also stipulates that in case of a non-compliance with the prohibition by the parties to the concentration the Office may impose both a fine up to 10% of their turnover and the duty to restore the situation on the market existing before the concentration, e.g. sell an unlawfully acquired company.

Changes in the area of prohibited agreements

12. The proposed legal regulation contains a so called reception clause, which enables application of the Community block exemptions to behaviour which does not affect the trade between the EU Member States. In the future the Office will not carry out transformation of the Community block exemptions into the national law by means of its decrees precisely adopting the block exemptions' wording, but will directly apply the relevant Regulations also to the competition behaviour without the Community dimension. This will significantly simplify the legal regulation, as there will not be two systems of legal regulation with principally identical content anymore.

Changes in the procedural area

13. The proposed amendment shall ensure smooth functioning of the merger control system brought by the Council Regulation. For this purpose the amendment especially introduces procedural rules which shall ensure the contact between the Office and the Commission in the case referrals and in cooperation with other competition authorities.

14. A new investigation power of the Office's employees shall be introduced, consisting in the power to seal for the purpose of investigation the business premises, or cupboards, cases, business books and other business records located there, for the period necessary for performance of the investigation.

Act No. 215/2004 Coll., Setting Certain Relationships in the State Aid Area

15. The accession to the European Union brought significant changes to the control and monitoring of state aid in the Czech Republic, which was originally ensured by the Office on the basis of the Act No. 52/2000 Coll., on State Aid. As of 1 May 2004, the EC state aid legislation is directly applied in the Czech Republic and the European Commission is the only institution with decision-making power in relation to exemptions from the prohibition of state aid. In order to reflect these changes, the Office elaborated the Act No. 215/2004 Coll., Setting Certain Relationships in the State Aid Area and Amending the Act on Support to Research and Development, which as of 1 May 2004 replaced the Act on State Aid. The purpose of the new Act is to create a legal framework ensuring fulfilment of obligations of the Czech Republic pursuant to the EC state aid rules and assistance to the European Commission in performance of its powers. Pursuant to this act the Office functions as a co-ordination and monitoring unit for state aid matters assisting the providers in making notifications of the state aid measures to the European Commission, monitoring state aid granted in the Czech Republic and preparing reports to the European Commission. The act also obliges providers and beneficiaries of state aid to provide the Office with information necessary for performance of its tasks and to submit to the inspections carried out by the European Commission. Furthermore, the act provides for provisions ensuring recovery of illegal state aid. The new Act also stipulates that in individual proceedings before the European Commission it is the state aid provider that shall act on behalf of the state.

New Act on Public Procurement

16. A new Act on Public Procurement, prepared by the Office, together with the Ministry of Regional Development, came into force on 1 May 2004 and replaced the former Act No. 199/1994. The aim of the Act No. 40/2004 Coll., on Public Procurement is to ensure full transposition of the relevant public procurement directives of the European Union and also to utilize the practical experience of the Office, which acts as the review body in the area of public procurement. The new Act on Public Procurement not only ensures compliance with the EC legislation but also streamlines the whole process of awarding public contracts, thus leading to more efficient and competitive tendering procedures. It transposes the EC public procurement directives in the field of water resources management, energetics and transportation. An important aspect of the new act is the abolition of the possibility to give more favourable treatment to domestic tenderers. In relation to adoption of new EC regulations Nr. 2004/17 EC and 2004/18 EC, the Office in the end of the year 2004 started preparation of a new Act on public procurement, aimed at establishing a simplified and transparent procedure for contracts under certain minimum limit.

Act on Financial Transparency

17. During the year 2004 the Office elaborated, in cooperation with the Ministry of Finance, a draft Act on transparency of financial relationships between state administration bodies and public undertakings and on financial transparency inside certain entities that implements the relevant European Community directive. The aim of the draft Act is to ensure transparency of the financial relationships between public undertakings and the state in a way that would enable proper supervision over the financial flows from public resources, which may be often considered a state aid incompatible with the Community law.

2. ENFORCEMENT OF THE ACT ON THE PROTECTION OF COMPETITION

Overall statistics on the enforcement activities of the Office

18. In 2004 a total of 194 new cases were opened by the Office, consisting of 17 cases of agreements distorting competition, 12 cases of abuse of dominant position and 134 concentrations of undertakings. Total number of cases closed by a decision on the merits amounted to 199, consisting of 26 cases of agreements distorting competition, 9 cases of abuse of dominant position and 164 concentrations of undertakings. The total amount of fines imposed by a decision of the Office reached CZK 1.065 billion (approximately USD 47 million), which is the so far highest amount in the history of the Office. In 2004 an appeal against the first stage decisions of the Office was filed in total in 36 cases and 9 legal actions against the final decision of the Office were filed with the relevant review courts. The leniency programme of the Office was applied for the first time to undertakings, which voluntarily announced a cartel and submitted evidence on its existence.

19. In the framework of involvement in the newly established European Competition Network the Office in 2004 received information about 749 cases of behaviour in breach of Article 81 and 82 of the EC Treaty. In three cases the impact on competition on the territory of the Czech Republic was identified. One of these cases resulted in commencement of the Office's first proceeding under the competition rules of the EC Treaty in the case of an abuse of dominance in the sense of Article 82 in the telecommunications sector. The other two cases are dealt with by the European Commission.

Agreements distorting competition

Statistics

20. In 2004 a total number of 17 new cases of agreements distorting competition were opened, consisting of 3 cases of horizontal agreements and 4 cases of vertical agreements. Out of these new cases, 3 cases of horizontal agreements and 4 cases of vertical agreements were opened on the Office's own initiative. The rest of the new cases concerned either application for an individual exemption (2 in total) or application for a negative clearance (8 in total). An overall number of 30 cases of agreements distorting competition were closed by a decision of the Office, comprising 7 cases of horizontal agreements and 6 cases of vertical agreements. Out of these, 6 cases of horizontal agreements and 5 cases of vertical agreements were closed by decisions prohibiting the agreements and imposing fines and 1 case of horizontal agreements was concluded by a decision rejecting the complaint. The rest of the cases closed concerned either individual exemption decision (5 in total) or negative clearance decision (12 in total). In the area of agreements distorting competition fines have been imposed in the total amount of CZK 1.065 billion (approximately USD 47 million). 1 leniency application was received.

Description of significant cases

- **Agreement of Building Savings Companies on Information Sharing and Concerted Practices on Setting of Fees**

21. All six building savings companies providing services related to building savings in the Czech Republic shared on the basis of their mutual agreement confidential information, among others about the number of building savings contracts closed, the amount of the sum saved, credits provided and their market share, that all in a monthly period. This agreement consequently in 1999 created conditions for prohibited concerted practices of building savings companies in setting fees for administration of building savings accounts. In case of five parties to the proceeding these practices consisted also in adopting

different fees for administration of building savings accounts related to new and older contracts on building saving, in other words in adopting a so called fee for interest benefit in older contracts.

22. For the abovementioned conduct, by which the parties to the proceeding eliminated the risk of uncertainty about their competitors' future behaviour in the market and achieved a distinctive increase of fees for building savings account administration or set a new fee for interest benefit, the Office imposed penalties in total sum of CZK 484 million (approximately USD 16 million). This is at the same time the so far highest fine in the history of the Office. The remedies ordered on the parties to the proceeding included also setting the amount of fees for building savings account administration to the level existing prior to the cartel agreement and eliminating different fees for building savings account administration in case of new and older contracts (eliminating the fees for the so called interest benefit). An appeal was lodged against the Office's decision and the appeal proceeding is pending.

– **Concerted Practices of Bakery Goods Producers on Prices**

23. The Office's investigation was initiated on the basis of information obtained from the press and other media monitoring, indicating the planned substantial increase in sale prices of bakery products in the autumn of the year 2003. The administrative proceeding was commenced by the Office in November 2003. It was found within this procedure that the three most important producers of bakery products in the Czech Republic had mutually shared information on their respective behaviour towards customers. In this way they consequently reached an appreciable increase of their bakery products sale prices (along with maintaining their respective market shares).

24. The Office declared in its decision that the parties to the proceeding had been provably applying concerted practices in setting the selling prices of bakery products from 26 September 2004 to at least 12 November 2004, by which they violated the restriction contained in the Competition Act. By the abovementioned concerted practices the parties to the proceeding distorted competition in the market of standard fresh baked products and bread and also in the market of fresh confectionery baked goods (two of the parties to the proceeding also breached the competition in the market of long-life confectionery baked products, where the third party is not present). The Office in its decision prohibited any future concerted practices related to setting of bakery products' sale prices to all the parties to the proceeding and imposed a penalty on all three bakery companies in total amount of CZK 120 million (approximately USD 4 million). An appeal was filed against the Office's decision and the appeal proceeding is pending.

– **Agreements Among The Sugar Producers on Exchange Of Information and Market Sharing, Concerted Practices in Setting up Sale Prices of Sugar**

25. The Office in its administrative proceeding assessed whether the three most important Czech sugar producers concluded an agreement on fixing the prices of sugar or alternatively, whether they applied concerted practices in fixing the prices of sugar. In the course of the administrative proceeding it was proved that the parties to the proceeding were exchanging among themselves confidential information on the production of sugar, the supplies, the sales, the exports and the imports of sugar, the market shares and other information. This behaviour was implemented on a monthly basis via a sugar refinery association, whose members all the parties to the proceeding are. In the course of the administrative proceeding the Office came to a conclusion that there had existed an agreement among the parties to the proceeding on dividing the percentual amount of sugar supplies into the market. It was also proved that one of the parties to the proceeding tried to reach an agreement with the other two sugar producers that would have ensured it the possibility to supply sugar for an important customer commercially related to another party to the proceeding, in exchange for its non-continuance in the negative influence on the market.

26. The Office declared in its decision that the parties to the proceeding had been applying concerted practices in fixing the prices of sugar from 1 May 2004 until 30 June 2004 at least, thus breaching the provisions of the Czech Competition Act. The sugar producers had also concluded a prohibited, null and void agreement on the exchange of information and since 1998 they had been performing this agreement, by which they had been intentionally breaching the Competition Act from 1998 until November of 2004 (one of the parties to the proceeding had been committing the infringement only until August of 2004). The parties to the proceeding had also been performing from September of 2002 at least until August of 2003 an agreement on sharing the sugar market. In this way the sugar producers distorted the competition on the market of industrial sugar for further processing and on the market of retail sugar. The companies were imposed a fine that amounted to CZK 118.7 million (approximately USD 4 million) in total. An appeal was lodged against the Office's decision and the appeal proceeding is pending.

– **Agreement on Exclusive Sale of IONT And Energy Drinks**

27. The Chairman of the Office declared in his second instance decision that the agreement on exclusive sale of energy drinks concluded by companies PINELLI, spol. s r.o. (hereinafter referred to as "PINELLI") and ATEA EXPORT IMPORT, s r.o. (hereinafter referred to as "ATEA"), both soft drink producers, was subject to the prohibition of agreements distorting competition within the meaning of the Czech Competition Act. With respect to the findings gathered in the course of a declaratory administrative proceeding, the Office in May of 2004 opened an administrative proceeding concerning a possible infringement of the Competition Act. The Office subsequently declared in its decision that the parties to the proceeding had breached the prohibition stipulated in the Competition Act by concluding an agreement on exclusive sale. The agreement could have resulted in distorting competition on the market of energy drinks sold in small – consumer size. The Office prohibited the performance of the agreement and imposed a fine on ATEA.

28. In case of PINELLI the Office took into account that at the time of submitting an application for a negative clearance the company had asked for application of the leniency programme. At the same time the company stated it was ready to provide the Office with all the necessary additional information proving existence of the cartel and cooperated with the Office during the administrative proceeding. At the time of submitting an application for assessment, the Office was not aware of the existence of the agreement in question. The Office therefore decided that PINELLI had met all the conditions necessary to avoid imposition of a fine within the Czech leniency programme.

Abuse of dominant position

Statistics

29. In 2004 the Office opened 12 new cases concerning abuse of dominant position, out of which 11 cases were opened on the Office's own initiative and 1 case consisted in application for a negative exemption. Total number of 15 abuse of dominance cases were closed by a decision of the Office, out of which 6 were decisions prohibiting the abuse and imposing fines and 3 were negative clearance decisions. The total amount of fines imposed for abuse of dominant position amounted to CZK 160.5 million (approximately 7 million USD).

Description of significant cases

– **Infringement of The Article 82 of The EC Treaty in the Telecommunication Sector**

30. In August of 2004 the Office opened its first administrative proceeding related to an infringement of the Article 82 of the EC Treaty. The incumbent in the telecommunication sector offered to its end –

customers (e.g. households, small undertakings and customers using the ISDN) unregulated price plans that comprised a monthly lump – sum payment for a lease of a telephone station. An inseparable part of this lump sum were call credits or free minutes for „free“ calling (calls up to the level of such a credit are perceived by the customers as a performance free of charge, for they are not charged separately to them).

31. The incumbent also offers a service called „the Internet Express“ in addition to which a customers obtain a „Universal type“ price plan at an advantaged price of the monthly lump – sum payment. At the same time customers obtain lower price for a minute of call payment, respectively a uniform price for the first hour of calling is charged to the customers (such a possibility is not available to those customers who use other price plans). The administrative proceeding aims at assessing whether the incumbent, by this bundling of services, does not impede the development of competition and does not create a barrier to the entry of new operators to the market, the development of current alternative operators and whether this results in limiting the consumers‘ possibility to obtain services of the highest possible quality at a competitive price.

– **Publishing the Change of Wholesale and Retail Offer of ADSL Services**

32. In January of 2004 the Office received a complaint by alternative operators about a possible abuse of dominant position by the incumbent in the telecommunication sector which made public a new structure of its services provided on the market for procurement of access to the Internet services and for the transmission of data via broad – band xDSL technologies (ADSL). These services were intended to substitute the services provided by the incumbent's unit since 1 January 2004. The company also made public the change of its wholesale offer on the basis of which the end – customers were provided with ADSL services by other operators. By making both the offers public on the same day the incumbent failed to provide the other operators with a time period sufficient for assessing the wholesale offer in a way that would have enabled the operators to start negotiations with the incumbent about the new form of ADSL services and conclude an agreement with the incumbent that would have made providing these services possible.

33. On the basis of the complaint the Office carried out a preliminary investigation resulting in a factual suspicion of a possible abuse of dominant position by the incumbent and commencing an administrative proceeding against the company. It was found that by its conduct the incumbent prevented the alternative operators from offering ADSL services to the end – customers under comparable conditions. It has to be stressed that alternative operators are not able to provide ADSL services without the access to the infrastructure possessed by the incumbent. The incumbent therefore acquired a considerable competitive advantage and caused damage to its competitors and the end – customers who had a limited choice of the ADSL services provider during the time period in question. The Office imposed a fine amounting to CZK 90 million (approximately USD 3 million) upon incumbent for the infringement of the Competition Act, consisting in making the wholesale and retail offer public on the same day and not giving the other operators a time period sufficient for assessing the change of the wholesale offer in such a way that would have enabled them to compete effectively with the incumbent since 1 January 2004. An appeal was lodged against the Office´s decision and the appeal proceeding is pending.

– **Exercising Different Terms and Conditions on Equal or Comparable Performance**

34. In March 2004 the Office received a complaint by a professional association of companies offering lease services, concerning alleged anticompetitive conduct of a major Czech car producer. The company was refusing to grant a discount for purchase of larger quantities of its personal motor vehicles to the companies that were offering a so called operational lease (under which the ownership of the object of the lease is not transferred to the lessee after the completion of the lease). In the course of the administrative proceeding it was proved that the party to the proceeding negotiated different conditions of

the wholesale purchase of its products in agreements with individual wholesale purchasers. It was also proved that the car producer refused to grant the same conditions following from wholesale – supply agreements even to the lease companies. As a result of this conduct, the lease companies were disadvantaged in comparison with other business partners of the party to the proceeding, notably because of the lack of possibility to conclude wholesale – supply agreements with the company in question and enjoy advantages arising from such agreements, that is, in particular, discounts granted to other wholesalers.

35. By the above – mentioned conduct the party to the proceeding abused its dominant position in the sense of the Competition Act. The Office imposed a fine that amounted to CZK 55 million (approximately USD 1.8 million) upon the company and ordered it to refrain from such a conduct in future. A remedial measure was also imposed, consisting in adjusting the content of the agreements on supply of personal motor vehicles to wholesalers that had been in effect so far. An appeal was lodged against the Office's decision and the appeal proceeding is pending.

Concentration of undertakings

Statistics

36. In 2004 a total 134 cases of concentrations of undertakings were notified. The Office issued in total 164 decisions on the merits including 119 decisions approving the concentration without any conditions, 1 decision approving the concentration with conditions or obligations attached, 1 decision prohibiting the concentration and 43 decisions declaring that the concentration does not fall within the scope of the merger control provisions of the Act on the Protection of Competition. Out of the 164 decisions on the merits 159 decisions have been issued within one month of notification in the phase I of the proceeding and 5 decisions have been issued in the phase II of the proceeding within 5 months of notification. These 5 phase II decisions included 1 prohibition decision.

37. The Office received 185 submissions via the ECN Network in the area of concentrations of undertakings in 2004. 13 of these submissions met the notification criteria set by the Competition Act, which is approximately 7% of the overall number. As none of the cases meant a distortion of competition on the territory of the Czech Republic, the Office did not file any request for referral of a case with the European Commission.

Description of significant cases

– Concentration Between two Bakery Goods Producers

38. The assessed merger was to be realised on the market of bakery products by the two most important entities operating on the market of the fresh common bakery products and bread in the Czech Republic. The undertakings operate in the Czech market also via their respective networks of subsidiary companies. The Office stated in its decision that implementation of the concentration would have led to restriction of competition on the market, particularly on the fresh bakery products and bread market. The entity created by the concentration would have operated as a single producer on the whole territory of the Czech Republic and would have been capable of covering the demand for bakery products wherever on the national territory it would have occurred. The market share of the entity created by the concentration would have been three times bigger than the market share of its closest competitor. The entity established by the concentration would have been able to significantly influence the overall trade policy in the area of bakery products, as one of the parties to the concentration is vertically integrated with the biggest mill goods producer in the Czech Republic, supplying 50% of its production to the competitors of the merging companies. As this would have given it a better bargaining position in relation to other competitors in the

market, the possibly established entity would have been able to transfer its market power to all regions of the Czech Republic and thus eliminate competition. Its economic and financial power would have allowed it to behave to a considerable extent independently on both competitors and consumers, with high probability of negative impact on consumers. The prominent position of the merging entities could have lead to increase in price of bakery goods for consumers. The reduction in the number of important competitors could have also resulted in easier implementation of anticompetitive practices and in distortion of the market structure.

39. The Office did not approve the merger, as the merging companies did not propose convincing commitments that would have eliminated the competition concerns arising from the concentration. The final decision of the Office, issued on 1 February 2005, confirmed the decision not approving the merger.

– **Aliatel A.S. / GTS CZECH, A.S.**

40. In the end of 2004 the Office commenced assessment of a concentration of two of the alternative telecommunication operators active in the Czech Republic - Aliatel a.s. and GTS CZECH a.s. The companies provide services and products in the telecommunications sector to the corporate clients and the state administration sector, households and other operators. The concentration strengthens the competition on the relevant market by creation of a significant competitor for the incumbent telecommunication operator ČESKÝ TELECOM, a.s., while the entity established by the concentration will still face competition in the Czech Republic in the future, since services interchangeable with the services offered by it will be broadly accessible from other competitors. As a result of the joint technological potential of GTS group and company Aliatel and their respective know-how, an increase in quality and an extension of the services portfolio in favour of consumers is expected. The concentration will also bring better coverage of the Czech Republic's territory with telecommunication services, as the infrastructures of the merging competitors are in certain regions complementary. Thus, the transaction will not have a negative impact on the choice of relevant services for consumers. With respect to the abovementioned facts the Office approved the concentration.

– **Bijouterie Trading Company A.S. / Swarovski Bohemia Spol. S R.O. / Ornela A.S. / Bižuterie Česká Mincovna, A.S.**

41. In the year 2004 the Office assessed a merger on the market of costume jewellery, utility glass, small-sized glass gifts and other markets. After receiving the commitments proposed by the merging competitors, the Office approved the merger of companies Bijouterie Trading Company a.s. and Swarovski Bohemia spol. s r.o., as one contracting party and ORNELA a.s. and Bižuterie Česká Mincovna, a.s., as the other contracting party. A merger of these subjects would have caused significant increase of their economic and financial power that would have exceeded the power of their competitors on the relevant markets, where small producers often operate. The entity established by the merger would have been able to use both economic and financial capacities of Swarovski group. The entity would have also gained a wide product portfolio resulting from both vertical and horizontal character of the merger. Considerable synergic effects would have even multiplied the strong market position of the entity, the result of which would have been a stronger bargaining position towards its customers. On the basis of these facts the Office stated that the competition in the defined markets would have been significantly distorted and invited both merging parties to consider adoption of commitments and restrictions in favour of competition.

42. Bijouterie Trading Company and Swarovski Bohemia committed themselves to keep open and impartial demand for supplies needed for production of costume jewellery goods of all their business partners, including companies outside the group controlled by the parties to the proceeding, in line with standard trade conditions. Furthermore, the parties to the proceeding committed themselves to offer related

services under similar business conditions. Another commitment consisted in maintaining open and impartial demand for supplies designed for export of costume jewellery goods produced by competing companies through the company JABLONEX that started to operate under control of the new entity. The Office found the above mentioned commitments sufficient to eliminate possible concerns about significant distortion of competition in the relevant markets and approved the concentration with these commitments.

Appeal and court proceedings

Appeal proceedings

- Total number of decisions appealed to the second-instance in 2004 36
- Total number of second-instance decision on appeals issued in 2004 21

43. In 2004, in total 21 first-instance decisions have been appealed to the Chairman of the Office for review in the second-instance compared with 32 first-instance decisions in 2003. Out of the 21 second-instance decisions issued, 16 decisions concerned appeals lodged in 2003 and 4 decisions concerned appeals lodged in 2004.

Actions filed against the decisions of the Office

- Total number of actions against final decisions of the Office filed in 2004 16
- Total number of judgements on the actions against decisions of the Office in 2004 8

44. During the year 2004, 9 court actions against second-instance decisions of the Office in the competition law area were filed compared with 11(8) actions filed in 2003. Due to changes in the administrative judiciary system brought about by the Act No. 150/2002 Coll., Administrative Court Proceedings Code, these petitions are no longer lodged to the High Court but to the Regional Court in Brno, with the possibility of further judicial review by the Supreme Administrative Court. In 2004 total 8 court judgements were issued on petitions against final decisions of the Office. In 2004 no action on the merits of the Office's decision was complied with.

45. The Supreme Administrative Court dismissed an action of the company Karlovarské minerální vody, a.s. against a decision of the Office on non-approval of a concentration of undertakings. The judgement of the Court stated, among others, that "the standpoint of the Office was consistent not only with the national legal regulation but also with the European legal climate". The subsequent constitution action in this case was dismissed by the Constitutional Court as unreasonable.

3. THE ROLE OF THE OFFICE IN THE FORMULATION AND IMPLEMENTATION OF OTHER POLICIES

46. Similarly as in the previous years, the Office used as an effective instrument for competition advocacy in relation to newly proposed legislative acts, policies or other materials the so called interministerial commentary procedure, within the framework of which the Office receives all these documents for comments before their adoption. If the Office indicates any of its comments as "essential", the institution proposing the document may only agree with such comment in full and modify the material accordingly. Otherwise, the comment is subject to further consultations between the Office and the proposing institution. If an agreement on the issue is not reached, it is finally resolved by the decision of

the Government after consideration of both the proposing institution and the Office's arguments. However, most comments of the Office are fully accepted already by the proposing institutions. Apart from the interministerial commentary procedure, the Office co-operates closely in particular with sectoral regulatory institutions, such as the Czech Telecommunications Office or the Energy Regulatory Office and where appropriate also with other relevant entities. The following text provides examples of competition advocacy activities of the Office:

– **Liberalisation of Postal Sector**

47. In 2004 the Office successfully intervened against an attempt to extend the monopoly of the Czech Post Office to include the delivery of direct-mail advertising, or so called direct mail. Within the framework of so called passive legislation the Office applied its comments to the draft Act on Post, and after the intervention of the Office the Czech parliament adopted the Act in form which banned the extension of the post monopoly. The Czech Republic has therefore ranked itself among the eleven EU countries that have abolished any exemptions for the direct mail services, and it can be presumed that the postal services as a whole will be gradually exposed to market principles.

– **Advocacy Towards a Pharmaceutical Supplier**

48. The Office applied its competition advocacy also on activities of company Roche, a supplier of the medicament Pulmozyne used for a respiratory illnesses treatment, towards the pharmacies in the Czech Republic. Roche sent out a letter to the pharmacies, in which it referred to the decrease in reimbursements paid for the medicaments by the General Health Insurance Company and stated that it was beyond its possibilities to lower the prices of the above mentioned drug any further. Selected pharmacies were asked, whether they would be willing to offer Pulmozyne without additional surcharge or whether Roche should have addressed their competitors. Some of the pharmacies accepted a decrease of their retail margin, which could have been considered as a detriment caused to other competitors. Within its competition advocacy, the Office called upon Roche to take remedial steps with respect to the fact that pharmacies, as independent business entities, have the right to set their pricing policy on the basis of their own consideration. The issue was accordingly resolved in favour of competition and final consumers.

4. RESOURCES OF THE OFFICE

Annual budget of the Office in 2004

Total expenditure in CZK:	143 million
Total expenditure in USD:	6,4 million

Number of employees of the Office as of 31 December 2004

Lawyers	47
Economists	45
Other professionals	7
Support staff	27
All staff combined	126

Human resources of the Office as of 31 December 2004 (according to activity areas)

Enforcement of the Act on the Protection of Competition and of the competition principles	40
Surveillance over the public procurement process	31
Control of state aid (state aid department was established with effect as of 1 December 1999)	9