

Unclassified

DAF/COMP(2010)12/26



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

04-May-2010

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP(2010)12/26
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN CZECH REPUBLIC

-- 2009 --

This report is submitted by Czech Republic to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16-17 June 2010.

JT03282868

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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 (hereinafter referred to as “the Office”) for the year 2009.

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

3. The most important cases dealt with by the Office in 2009 concerned prohibited agreements (including cases of vertical agreement – resale price maintenance) and also abuse of dominance. In the judicial practice majority of the decisions of the Office were confirmed by the courts. Several big decisions pending from previous years were also judged in favour of the Office.

4. Mergers witnessed a significant decrease in number in 2009, due to the ongoing economic crisis, however, no big cases of mergers between undertakings in difficulties appeared. The Office issued several soft law documents concerning mergers. Two guidelines in the framework of so called ‘jurisdictional package’ and two in the framework of so called ‘crisis package’.

5. In order to confirm its preference of prevention before repression, the Office continued with application of alternative resolution of cases and application of settlement procedure in practice. Less serious infringements were in 2009 concluded in co-operation with the parties without opening an official administrative proceeding and three cases were solved by settlement procedure.

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

7. In regard to human resources, the Office is a stabilized institution. The limit on the number of employees has continued to be the same within the last three years, the limit being 126 staff members, who are sharing four areas of competence as of 2010. In addition to the traditional areas of protection of competition, overseeing public procurement and monitoring of state aid, as of February 2010 there is the addition of a new power, established by the act on so-called significant market power.

8. Very important personnel change to have taken place in the course of 2009 was the abdication of the Chairman of the Office, Martin Pecina, who became the Minister of the Interior of the Czech Republic. In July 2009, he was replaced at the helm of the Office by Petr Rafaj.

9. More than one hundred press releases, information bulletins and other publications were issued by the Office in 2009, relating to the competition, state aid and public procurement issues. In view of maximum transparency, all the press releases and other publications of the Office are also made public on its website, where they can be also downloaded. In order to improve its co-operation with the media, and thus with the general public, the Office had a public opinion survey conducted in 2009. The survey showed, among other things, that a considerable majority of the persons surveyed are convinced of the usefulness of the existence of the institution of the Office for the functioning of the economy. A majority of the persons responding were also well acquainted with the powers of the Office.

10. On the international level, the first half of 2009 was greatly influenced by the presidency of the Czech Republic in the EU Council. Besides its regular duties brought about by the presidency, the Office also organized two international conferences – European Competition Day and State aid day, covering a wide range of current competition topics and hosting a large number of experts from all over the world. In November 2009 the Office hosted its traditional autumn St. Martin conference, focusing on latest developments in competition law and policy both in the Czech Republic and abroad.

11. 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.compet.cz/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

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

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

significant distortion of competition on the relevant market. A list of conducts that are considered prohibited is contained in the annexes to the act. A penalty in the amount of CZK 10 million or up to 10% of turnover can be imposed for a breach of the act. For the purpose of oversight in regard to compliance with the act, the Department of Control over Market Power has been established as part of the Office.

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

1.2 Other relevant measures, including new guidelines

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

1.3 Government proposals for new legislation

16. In 2009, there was a proposal to amend the Competition Act in order to enact new competences of the Office. In particular, the prohibition to distort competition was to be applied not only to the undertakings, but also to public authorities, including regions and municipalities. It was a proposal of the Members of the Parliament, not the Government; the Government opposed it, claiming that the regulatory effects of such a new competence were not substantiated sufficiently. The Parliament only started to discuss the proposal, but it was not approved in 2009. Since the term of the Chamber of Deputies is coming to an end in May 2010, the probability of it being passed is very low.

2. International co-operation

2.1 Co-operation within the European Union

17. On the European level, the first half of 2009 was significantly affected by the presidency of the Czech Republic in the EU Council, which also brought about a greater number of challenges and increased international connections for the Office. In competition matters, the Czech presidency was successful in achieving the approval of a final version and signing of an agreement between South Korea and the EU on co-operation in fight against anticompetitive behaviour. That agreement facilitates the exchange of information and co-operation between the competition authority of South Korea, the European

Commission and the competition authorities of the EU member states in the area of competition and thereby increases the probability of effective detection of cartels, abuse of dominant position or other practices that distort the markets of the parties to the agreement. In the course of the entire presidency, the Office actively co-operated with the Permanent Representation of the Czech Republic to the EU, the European Commission and the General Secretariat of the EU Council in preparing agendas that could be discussed and dealt with under the Czech leadership.

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

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

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

2.2 Co-operation with other International Organizations and National Competition Authorities

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

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

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

of the ICN in Zurich and staff of the Office also made use of the opportunity for a further exchange of experience and recommended practices in the course of interactive ICN workshops focusing on mergers, cartels and dominance.

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

3. Enforcement of competition law and policies

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

3.1.1 *Alternative resolution of cases*

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

- **Gas Storage Tanks**

In the course of the first half of 2009, the Office concluded its investigation on the market of natural gas storage in underground storage tanks. The investigation, which was under way from the end of 2007, pertained to a suspicion that companies belonging to the RWE group, through long-term reservations on storage capacities and not allowing access to such capacities, may have made access and functioning on the relevant natural gas supply market more difficult for their competitors. Access to storage capacities is an essential prerequisite for supplies of gas to households and other small customers. The result of the investigation and several months of

intensive trilateral meetings, which were participated in by the Office, the companies under investigation, as well as the Energy Regulatory Authority, was a proposal of a remedial measure for the maintenance and protection of competition on the part of RWE group companies. Specifically, the RWE group undertook to gradually unblock and offer for use to third parties by 2013 storage capacity with a volume of 500 million m³, i.e. approximately 20 % of its capacities. At the same time, the effective period of the agreement on storage of gas, as entered into between RWE Transgas and RWE Gas Storage, was reduced by 12 years, which significantly reduced the period of intra-company reservations of natural gas capacity for RWE Transgas. Thereby, the conditions should be created for effective competition on the natural gas supply market.

- **Zetor Case**

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

- **Prohibited Agreements on Export**

In December 2009, the Office imposed a fine of CZK 5 million against Karlovarské minerální vody a.s. The said company, together with its subsidiary HBSW, entered into prohibited agreements on the prohibition of export. These agreements could have led to the distortion of competition on the carbonated non-alcoholic beverage market and on the non-carbonated non-alcoholic beverage market. Prohibited agreements were concluded with distributors of KMV and HBSW in the Czech Republic and abroad (primarily in Slovakia), from February 1999 until December 2008. The investigation by the Office established that such agreements were complied with on the part of purchasers. On the other hand, the party to the proceedings did not in any way conduct inspections of compliance with agreements on bans on export. KMV effectively cooperated with the Office in the course of the administrative proceedings and contributed to the detection and proving of anticompetitive conduct. In the course of the administrative proceedings, KMV stopped using agreements containing problematic provisions and proposed to its customers a contractual amendment approved by the Office. The case was resolved within the settlement procedure, thanks to which significant procedural economy was achieved on the part of the Office. Thanks to effective co-operation, KMV was given a resulting fine that was reduced by fifty percent.

3.1.2 *Statistics on number of cases*

26. In 2009 a total of 43 new administrative proceedings (including mergers) were initiated by the Office, with 6 administrative proceedings still ongoing at the end of the year 2009 (only prohibited agreements and abuse of dominance). The Office reviewed in total 325 complaints on possible distortion of competition. In the first instance 11 decisions on prohibited agreements and 4 decisions on abuse of dominance were issued in 2009. The total amount of fines imposed by the first instance decisions of the Office reached CZK 18.164 million.

3.1.3 Appeals and judicial review

27. In 2009, 17 appeals were filed in regard to competition issues. The Chairman of the Office issued a decision in a total of 22 cases; only one half of those pertained to decisions on the merits, of which in five cases the previous first instance conclusions were confirmed, and three decisions were changed. One of the key cases was the fine imposed on the company České dráhy for abuse of dominant position. Out of the non-merit cases, five concerned the matter of interest on fines (fuel cartels and GIS), three concerned the renewal of proceedings, one deferment of payment of a fine, and two the access to file.

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

- **Fine imposed on České dráhy**

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

- **Wholesale Distributors of Pharmaceuticals before the Court**

The Regional Court in Brno confirmed the fine of CZK 113.064 million imposed on the principal domestic distributors of pharmaceuticals. Alliance Healthcare s.r.o. (CZK 23.859 million), GEHE

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

3.1.4 *Description of significant cases*

- **Agreements distorting competition**

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

- **Sokolovská uhelná**

On 8 January 2010, the Office imposed a fine of CZK 17.283 million against Sokolovská uhelná. In the period of time from 1997 to 2007, the party to the proceedings concluded and performed prohibited agreements on the prohibition of export, which had as their object the distortion of competition and which could have led to the distortion of competition on the pressed brown coal, brown energy coal and graded brown coal market in the Czech Republic. In its decision, the Office established a breach of the Czech competition act, as well as Art. 81 of the EC Treaty (currently Art. 101 of the TFEU). On the other hand, the execution and performance of agreements on the fixing of prices for further sale or obligations of exclusivity of supplies of brown coal and pressed coal were not established in the course of the administrative proceedings. Under Czech as well as European law, agreements on the prohibition of export are considered to constitute a serious distortion of competition. They are distorting by object, and thus in such a case it is not necessary to prove a negative impact on competition. Nevertheless, in the given case the Office reached the conclusion that a negative effect of the assessed agreements could be a restriction of competition within one brand. Through agreements on the prohibition of export, the supplier was able to divide the common market, and thereby contribute to the closure of the market in regard to intra-brand competition (within the same brand). The assessed agreements thus led to the reduction in the number of purchasers who were able to export the goods purchased from the party to the proceedings. On the basis of agreements on the prohibition of export, the distributors of the goods were limited in their choice of the end customer, which could have led to a reduction in the supply to consumers.

- **Vertical Cartel in the Outdoor Sector**

In two of its first instance decisions, the Office imposed a fine in the amount of CZK 2,316,000 against HUSKY CZ s.r.o. and CZK 425,000 against the entrepreneur Ing. Zdeněk Král (Penguin brand) for entering into prohibited agreements on resale price maintenance on the outdoor equipment market. According to the evidence that the Office was able to obtain in an unannounced on-the-spot investigation, HUSKY CZ committed repeated breaches of competition rules in its business relationships with purchasers from among internet shops. The company

based its pricing policy on oral agreements on obligatory compliance with so-called recommended prices, which it further specified in a price list sent out by e-mail. The relevant price lists contained a wholesale price not including VAT and a retail price that was always marked as recommended. Under the act on the protection of competition, recommended prices are not considered anticompetitive provided that the seller is not directly or indirectly restricted in setting resale prices and has the option of setting a final price that may even be less than the amount of the recommended sales price. Pricing policies that include instructions or penalties binding or motivating contractual parties to comply with the set (recommended) prices are prohibited under the law. Through the investigation, it was established that HUSKY CZ s.r.o. did actually monitor the performance of agreements on recommended resale prices on the part of its customers and also enforced compliance with the same under the threat of suspension of supplies of goods or other penalties. The other entity on whom a fine was imposed, Ing. Zdeněk Král, sent his customers an e-mail containing a written draft of an agreement on setting resale prices, which was accepted by them. Prohibited agreements were thus entered into and subsequently performed.

- **Abuse of dominant position**

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

- **Incorrectly Charged Advance Payments**

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

The Office confirmed that the said commitment was fulfilled by the said party to the proceedings. The total amount of such compensation to the affected customers reached up to over CZK 5.5 million.

- **Brown Coal Market**

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

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

3.2 Mergers and acquisitions

3.2.1 Statistics on number, size and type of mergers

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

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

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

3.2.2 *Description of significant cases*

- **Merger Approved with Remedies**

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

- **Concentration in the Logistics Sector**

The Office approved a transaction as a result of which BXR Logistics B.V. acquired the undertaking Čechofracht a.s. In the course of the preliminary part of the investigation, the Office held a concern, on the basis of several complaints, that the concentration could lead to a significant distortion of competition, and therefore it assessed it more thoroughly in the so-called second phase of the administrative proceedings. In the Czech Republic, the activities of the undertakings concerned overlap primarily in regard to the provision of comprehensive logistical services. The Office also focused its attention on, among other things, the segment of transport and forwarding of brown coal, in which the entity created through the concentration would have an important position and in regard to which complaints were also received. However, a number

of competing companies also operate in this area and the customers of such services are companies in the electricity production sector, steel industry and chemical industry, which have a strong negotiating position and can react to a possible change in prices by turning to an alternative carrier. On the basis of a detailed analysis of the relevant markets and the possible effects of the concentration, the Office reached the conclusion that the *BXR Logistics/Čechofracht* concentration would not have the effect of a significant distortion of competition, and therefore it approved the concentration without remedies.

4. Resources of the Office for the Protection of Competition

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

4.1.1 Annual budget of the Office in 2009

		Change over previous year
Approved budget in CZK	135.8 million	- 5.2 million
Approved budget in EUR	5.36 million	
Approved budget in USD	7.22 million	

4.1.2 Number of employees (person-years) as of December 31, 2009:

		Change over previous year
Economists	41	+1
Lawyers	57	-1
Other professionals	7	0
Support staff	21	0
All stuff combined	126	0

(for all the competences of the Office – antitrust, public procurement, state aid)

4.2 Human resources (person-years) applied to:

		Change over previous year
Enforcement against anticompetitive practices, advocacy efforts	38	+2
Merger review enforcement	6	0
Surveillance over the public procurement	34	+1

5. References to new reports and studies on competition policy issues

- Information Bulletin: The Office and the Czech Presidency of the Council of EU. ENGLISH: http://www.compet.cz/fileadmin/user_upload/Informacni_listy/2009/infolist_2009_01_CZPres_EN.pdf.
- European Competition Day Brochure. ENGLISH: http://www.compet.cz/fileadmin/user_upload/Ke_stazeni/Comp_Day_EN_web_maly.pdf
- Common position of the Marchfeld Competition Forum on the role of competition policy and enforcement in times of economic crisis. ENGLISH: http://www.compet.cz/fileadmin/user_upload/Sekce_HS/Guidelines/CommonPosition_MCF.doc

- Notice of the Office for the Protection of Competition on agreements of minor importance which do not appreciably restrict competition (*de minimis*). ENGLISH:
http://www.compet.cz/fileadmin/user_upload/Sekce_HS/Guidelines/de_minimis_notice_UOHS_eng.doc
- Notice on the application of the failing firm defence concept in the assessment of concentrations of undertakings. ENGLISH:
http://www.compet.cz/fileadmin/user_upload/Sekce_HS/Guidelines/Failing_Firm_Defence_eng.doc
- Notice on the notion of undertakings concerned. ENGLISH:
http://www.compet.cz/fileadmin/user_upload/Sekce_HS/Guidelines/Pojem_spojujicich_se_soutezitelu_eng.doc
- Notice on the prohibition of implementation of concentrations prior to the approval. ENGLISH:
http://www.compet.cz/fileadmin/user_upload/Sekce_HS/Guidelines/Prohibition_of_concentration_prior_to_approval_eng.doc
- Resale Price Maintenance. Information Bulletin of the Office. CZECH:
http://www.compet.cz/fileadmin/user_upload/Informacni_listy/2009/infolist_2009_02_RPM.pdf
- Competition Policy and Economic Crisis. Information Bulletin of the Office. CZECH:
http://www.compet.cz/fileadmin/user_upload/Informacni_listy/2009/infolist_2009_03_Hospodarska_krize.pdf
- Energy Sector. Information Bulletin of the Office. CZECH:
http://www.compet.cz/fileadmin/user_upload/Informacni_listy/2009/Infolist_2009_05_Energetika.pdf
- Key Events of 2009. Information Bulletin of the Office. CZECH:
http://www.compet.cz/fileadmin/user_upload/Informacni_listy/2009/infolist_2009_06_Vyznamne_udalosti.pdf