

Unclassified

DAF/COMP/AR(2013)12

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

10-Jun-2013

English - Or. English

Directorate for Financial and Enterprise Affairs  
COMPETITION COMMITTEE

DAF/COMP/AR(2013)12  
Unclassified

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE CZECH REPUBLIC**

-- 2012 --

*This report is submitted by the Czech Republic to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 19-20 June 2013.*

JT03341496

Complete document available on OLIS in its original format

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## TABLE OF CONTENTS

Executive summary .....	3
1. Changes to competition laws and policies, proposed or adopted.....	4
1.1 Summary of new legal provisions of the competition law and related legislation.....	4
2. Enforcement of competition law and policies.....	6
2.1 Action against anticompetitive practices, including agreements and abuses of dominant position .....	6
2.1.1 Summary of Activities of:.....	6
2.1.2 Description of significant cases, including those with international implications .....	7
2.2 Mergers and acquisitions .....	8
2.2.1 Statistics on number, size and type of mergers notified and/or controlled under competition laws .....	8
2.2.2 Summary of significant cases .....	8
3. The role of competition authorities in the in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies.....	10
4. Resources of the Office for the Protection of Competition.....	10
4.1 Resources overall (current numbers and changes over previous year) .....	10
4.1.1 Annual budget of the Office in 2012 .....	10
4.1.2 Number of employees (person-years) as of December 31, 2012 .....	10
4.2 Human resources (person-years) applied to:.....	11
5. References to new reports and studies on competition policy issues.....	11

## 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 2012.

2. The long-term objective of the Office is the promotion of effective competition in all sectors of national economy. This aim has been followed by the Office since its establishment in 1991. It does so primarily by way of decision-making activities and competition advocacy. In regard to these matters, the Office received a total of 488 submissions within the past year most concerning the abuse of dominant position. In the process of detection of anticompetitive practices the Office 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 cooperate with the Office and provide evidence leading to the detection of a cartel agreement. More economic approach has been regularly used in antitrust proceedings of the Office during the 2012 too.

3. The most important cases investigated by the Office in 2012 concerned prohibited agreements concluded among tenderers in the awarding procedures for public contracts, so called bid rigging, cartel cases and also abuse of dominance. In the field of merger control the Office initiated 53 administrative proceedings and issued 54 decisions in 2012.

4. In order to confirm its preference of prevention before repression, the Office has continued with application of alternative resolution of cases and application of settlement procedure in practice. Five less serious infringements in 2012 were concluded in cooperation with the parties without initiating official administrative proceeding.

5. As regards the human resources a substantial changes were implemented also in the year 2012. Staff number increased from 153 to 211 due to significant changes in the scope of the Office’s competence. As the Office belongs to multi-function agencies, the human resources are divided among four areas of competence - protection of competition, public procurement review, monitoring of state aid and control of abuse of significant market power. The increase itself reflected requirements set up by the Amendment to the Act on Public Procurement that would substantially increase number of complaints concerning awarding procedures. Due to this fact, general budget was increased and some of the newcomers strengthened the competition enforcement, having on mind that some of the Office’s experts were during the previous years allocated to the Public procurement division.

6. The Office has substantively stabilized its human resources policy by adjusting the job fluctuation below 10 % while more than half of employees have been working for the competition authority for more than 5 years. Generally, staff age structure indicates positive development while the average age of the Office’s employees is 35 years.

7. Concerning the structure of the Office within the Competition Section the Department of Dominance and Vertical Agreements was divided into two parts – Department of Dominance and Vertical Agreements: Production, Department of Dominance and Vertical Agreements: Services. The Public Procurement Section was divided into three separate divisions each with several departments focused on the public procurement. Within the third division there is a newly established department focused specifically on bid rigging within the public procurement.

8. As for the public and media relations, approximately 90 press releases and 3 information bulletins were issued by the Office in 2012. 37 were related to competition, 30 to public procurement, 24 to the state aid issues and 2 to international affairs. Within the transparency efforts, all the press releases and

other publications of the Office are also made publicly available on its website. Moreover the Office publishes information bulletins that are aimed at professionals as well as general public. In 2012 these publications were focused on bid rigging, state aid and significant issues and cases investigated during the year 2012.

9. As regards the international level the Office has strengthened its participation within the work of EU institutions, the International Competition Network and the OECD, as well as bilateral links with many competition authorities worldwide. The Office organized international St. Martin Conference at the end of November. The conference was focused not only on latest developments in competition law and policy both in the Czech Republic and abroad, but also on the supervision of public authorities, more economic approach in the network industries, the undertaking as an economic unit and competition in the healthcare sector.

10. Public documents, including more detailed descriptions or full texts referred to in this document, are available on the Office's web-site in English at <http://www.uohs.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***

11. During the year 2012 the Act No. 143/2001 Coll., On the Protection of Competition has been amended and the revised version entered into force on 1 December 2012 as the previous wording of the Act did not entirely reflect decision-making practice of the Office, especially provisions related to the leniency program or settlement procedure. Both institutes are frequently used by the European Commission and EU Member States to detect anti-competitive practices or to achieve procedural economy. Therefore, the Office prepared draw amendment of the Competition Act which resulted, among others, in incorporation of the leniency program and settlement procedure directly into the legislation.

12. Leniency program as one of the basic policies for detection of cartels has been effectively applied by the Office since 2001, however the rules for the application of this tool were included only in the soft law. Therefore one of the main goals of this amendment was to strengthen the legal certainty of the leniency program applicants and encouraging them to apply for it by enacting this policy tool into the Act on the Protection of Competition. Moreover, the amendment harmonised other legal institutions that have been necessary for successful functioning of the leniency program, in particular the modification of access to administrative file. Newly the leniency application has to be exempted from the case file until the statement of objection is issued. Even after issuing the statement of objection the leniency application could be inspected only by a party to the particular proceeding or by its representative under conditions that apply for inspection of confidential information.

13. The amendment established two types of leniency, leniency I and II. A cartel participant qualifies for leniency I, which means full immunity from sanctions, if it is the first one who provides the Office with sufficient information on undetected cartel and fulfils other conditions, in particular pleads guilty and fully co-operates with the authority. An applicant who did not step up first but fully co-operates with the Office and brings significant evidence regarding the cartel may receive up to 50 per cent reduction of a fine under leniency II.

14. The Amendment includes new provisions regarding sanctions. Particularly three year prohibition to participate in public procurement and concessions will be imposed on members of bid rigging cartels. However, leniency applicants will be granted immunity from the ban.

15. The Criminal Code has been amended too in relation to the leniency program and a new tool called *efficient repentance* was established. The provision exempts the leniency applicant from the administrative responsibility and also the criminal responsibility.

16. Another procedural tool which the Office has been using for many years without being included in the national legislation is the settlement procedure. Enactment of the settlement procedure provided the Office with an option to reduce a fine by 20 % to a competitor who pleads guilty to administrative offense under the condition that the Authority considers the fine to be appropriate to the seriousness of the infringement. Institute of settlement can be applied both in cases of prohibited agreements and the abuse of dominant position as well as for merger cases. Objective of this modification was to achieve better procedural economy in competition proceedings, i.e. focus limited resources of the Office on detection of the most serious infringements of competition rules and not spending valuable resources on lengthy second-instance proceedings or judicial review.

17. The newly established institute of prioritization that helps saving public resources is related to the above mentioned goal too. Prioritization allows the Office to terminate investigation of marginal violations of the Act on the protection of Competition, which constituted a great burden for the Office due to their quantity. Within the new amendment the Office is authorised not to initiate an administrative proceeding provided the preliminary investigation revealed that there was only a negligible impact of the conduct in the relevant market. In this case, the Office is obliged to take into consideration the type of anticompetitive conduct, the way the conduct is accomplished, the number of affected consumers and the significance of the relevant market.

18. With respect to investigation on business premises, the Office's representatives are newly entitled to act only on the basis of written authorization of the chairman or other entitled person, within the legal text of the Act and pursuant to internal regulations of the Office. This new rule just embodies the former continuous practice of the Office.

19. Last but not least, the Amendment also implements new competence which offers the possibility to punish and impose a fine up to CZK 10 000 000 (approximately EUR 400 000) on public authorities for distortion of competition. Therefore the Office's powers to supervise the conduct of undertakings have been extended to the public authorities.

20. Since 2010, the Office has also been enforcing the Act No. 395/2009 Coll., On Significant Market Power in the Sale of Agricultural and Food Products and Abuse Thereof. The Act defines the concept of the significant market power and its abuse for the purposes of the protection of competition and to set up tools for assessment and avoidance of such behaviour. The Act is applicable in cases concerning sale of agricultural products when an undertaking as a buyer abuses its significant market power towards other undertakings – its suppliers. Significant market power is defined by the Act as “the position of the buyer towards the supplier, whereas the supplier becomes dependent on the buyer in relation to delivery of goods to the customers as a result of the market situation and the market power enables the buyer to enforce unilaterally preferential terms”. There is a rebuttable presumption of significant market power if the net turnover of the buyer exceeds 5 billion CZK (approx. EUR 200 mil) in the last accounting period in the region of the Czech Republic. It is prohibited to abuse the significant market power to the detriment of suppliers; the abuse is to be understood as a systematic conduct which has as its object or effect significant distortion of competition in the relevant market. There is a list of conducts considered to be abusive in five annexes to the Act. The fines for breaching the Act can be imposed in amount of up to 10 million CZK or up to 10 % of the net turnover.

21. The application of the Act has been complicated since the beginning because of several ambiguous terms and definitions that were broadly criticised by law practitioners as well as stakeholders.

In 2011, the Government of the Czech Republic decided that the law should be abolished and some of its parts transferred to the Competition Act and to the Price Act. The Office has been entrusted with the task to draw an amendment in this respect. However, the discussions about the amended continued during 2012 and the overall concept has not been drafted.

## **2. Enforcement of competition law and policies**

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

#### **2.1.1 Summary of Activities of:**

- **Competition authorities**

The competition enforcement of the Office focused primarily on detection of bid-rigging agreements in 2012. As a multi-function agency with powers in the area of competition as well as in control of public procurement, the Office can make use of resulting synergies.

The Office initiated a number of bid rigging investigations and the important fact is that the Office started the proceedings on the basis of its own findings not on the basis of a leniency application or other external notification. The Office conducted a significant amount of dawn-raids and specific inspections.

In 2012 a total of 5 new administrative proceedings concerning prohibited agreements were initiated by the Office and several administrative proceeding rolled over from the previous year. The Office reviewed in total 488 complaints on possible distortion of competition (244 on abuse of dominant position, 149 on prohibited agreements, 11 on mergers and 84 others). During the 2012 the Office conducted 18 dawn raids. In the first instance 1 decision on prohibited agreements, 3 on abuse of dominance and 54 merger decisions were issued. The total amount of fines imposed by the first instance decisions of the Office reached CZK 190 million (€ 7.6 million).

In 2012, 7 appeals were filed against first instance competition decisions. The Chairman of the Office issued a second instance decision in a total of 21 cases, 13 of them dealt with procedural issues.

- **Courts**

Parties to the proceedings very often lodge actions against the decisions of the Office to administrative courts. During the course of 2012, the Office received 24 actions concerning the competition cases that have not been decided yet. The Regional Court has issued 4 judgments regarding competition cases, 2 of them in favour of the Office and 2 judgments remanded the cases back to the Office. Supreme Administrative Court ruled on 3 actions, in 2 cases the Court confirmed the decision of the Office.

In connection with the gas insulated switchgear cartel case that was fined by the Office in 2007, the Regional Court submitted request for preliminary ruling to the European Court of Justice. In 2012 the ECJ confirmed the Office's competence to sanction the undertakings as the Commission's decision and the decision of the Office were not related to the same material acts, which means that the Office did not infringe the prohibition against punishing the same offence twice (ne bis in idem principle).

### 2.1.2 *Description of significant cases, including those with international implications*

- **Agreements distorting competition**

The Office continues to place an emphasis primarily on pursuing cartels, recently especially bid rigging cartels. Priority sectors for the year 2012 were energy sector, telecommunications, transport and waste disposal. The Office has been actively applying the leniency program and receiving leniency applications. In 2012 three applications were received. In matters concerning agreements distorting competition, the Office issued in total 1 decision concerning the prohibited cartel agreement and imposed a fine of CZK 96 579 000 (approximately EUR 3.7 million).

- **Abuse of dominant position**

In 2012 the Office initiated one administrative proceeding concerning the abuse of dominant position and five cases rolled over from the year 2011 as these kinds of cases were significantly complicated and required complex evaluation and analysis of a great amount of data. In 2012 the Office issued one decision, investigations of two cases were terminated and in three cases the decision has not been issued yet.

- **Cartel in the waste disposal sector**

On 19 November 2012, the Office imposed by its first-instance decision a fine amounting to CZK 96.579 million (approximately € 3.8 million) on companies A.S.A., spol. s r.o., van Gansewinkel, a.s., SITA CZ a.s. a AVE CZ odpadové hospodářství s.r.o. (hereinafter referred to as “ASA“, “AVE“, “SITA“ and “van Gansewinkel“).

The undertakings, which are active in the market of waste collection and disposal and some of them also in the market of road maintenance, entered into prohibited agreements on market sharing that led to the distortion of competition. The sanction and prohibition decision have already come into force. The appeal against the decision was not submitted.

The Office detected the cartel on the basis of its own investigation and initiated the administrative proceeding with companies ASA, SITA and van Gansewinkel in September 2010. In 2011, a company AVE was added to the proceeding. In the course of investigation, the Office found out that between 2007 and 2011 the parties had divided the customers among themselves through mutual contacts and exchange of information, particularly by coordinating their bids for public tenders for waste disposal or road maintenance.

The agreements in question were not concluded multilaterally among all participants. The cartel consisted of six bilateral agreements related to particular public tenders for waste disposal and, in case of the companies ASA and AVE, also to tenders for road maintenance. In the course of dawn raids on the premises of colluding companies, the Office gathered evidence showing that the companies had maintained business contacts that gradually turned into anticompetitive coordination of their actions towards customers. This was demonstrated especially by submitting fake bids in awarding procedures to create an impression that there was a strong competition among bidders or, on the other hand, not entering into tendering procedures and not addressing customers of other cartel members.

In the course of the proceeding, companies ASA and AVE successfully applied for leniency programme. Their fines were cut by 50 % (ASA) and 30 % (AVE) in exchange for providing the Office with substantial information and evidence on alleged cartel activities. Furthermore, all

parties applied for settlement and agreed with the legal assessment of the conduct provided by the Office. As a result, the fines were decreased by another 20 %. Resulting fines for individual members of the cartel have been set as follows: .A.S.A., spol. s r.o. – CZK 24,289,000 (€ 961,940), van Gansewinkel, a.s. – CZK 10.87 million (€ 0.43 million), SITA CZ a.s. – CZK 19,753,000 (€ 782,297), AVE CZ odpadové hospodářství s.r.o. – CZK 41,667,000 (€ 1,650,178).

The case is one of the most significant ones in the history of the Office due to the amount of gathered evidence, sensitivity of the relevant market of waste collection for consumers, a use of a higher number of leniency requests of type II and an application of the settlement procedure. Furthermore, the administrative proceeding led to the collection of fines already in the first instance. The application of leniency requests was the first of this type in the Czech competition history as they were not related to any case investigated by European Commission or another national competition authority in the European Union. As such, it was the first case of purely domestic leniency application.

- **Enhancing the competition in the area of certification and education in the gas sector**

The Office examined a complaint against the activity of undertakings operating in the gas sector particularly the association Český plynárenský svaz (“ČPS) and the company GAS. The Office concluded that the particular conduct of ČPS could have a negative impact on competition. As the effect of the conduct subject to examination was not significant the Office decided not to initiate the administrative proceedings and to settle with the undertakings directly.

ČPS was asked to revise its technical rules that included specific requirements regarding the provision of professional training. Pursuant to the rules such training could be provided only by undertakings registered in the company GAS. Also ČPS was required to cancel the decision regarding the establishment of only one certifying authority. ČPS accepted the Offices’ requirements and removed the anticompetitive provisions and proved the application of remedies proposed by the Office. ČPS was informed about its duties pursuant to the Act on the Protection of Competition.

## 2.2 *Mergers and acquisitions*

### 2.2.1 *Statistics on number, size and type of mergers notified and/or controlled under competition laws*

22. As regards concentrations of undertakings, the Office initiated 53 administrative proceedings and issued 54 decisions on merit. 33 cases were concluded under the simplified procedure. 21 mergers were investigated under the standard procedure. Second phase of the proceeding had to be carried out in three cases. The Office cleared three mergers after imposing legally binding commitments on the undertakings. No merger was blocked in 2012.

### 2.2.2 *Summary of significant cases*

- **Merger of pharmacies**

In November 2012 the Office approved an acquisition of pharmacies Lékárny Lloyds and Lloyds Holding CZ by the Česká lékárna subject to conditions. The clearance was conditional upon the structural commitments as the Office was concerned about a potential distortion of competition in the relevant markets of retail sales of pharmacy products to the end consumers.

The company Česká lékárna is a part of a group PENTA HOLDING. The PENTA group operates also in the upstream market of the wholesales of pharmacy products through the company GEHE Pharma Prague.

The Office was concerned particularly about the potential distortion of competition by the horizontal linking of activities of the merging parties in the relevant market. The effect of vertical linking of merging parties was examined to. As regards the market shares in the Czech pharmacy market the PENTA group would have gained a 10 % share but the Office was concerned rather about the local impacts and market shares in the regional perspective. As the end consumers often purchase the pharmacy products in their home towns the competition effects were examined in narrower defined market from the geography perspective.

The Office assessed the possible effects in the relevant regions, cities and towns where both undertakings operated. In case of two local markets in the cities of Trutnov and Frýdlant the Office concluded during the first phase assessment that the merger could have led to a decrease of number of active undertakings in the relevant market and therefore could have had a negative impact on competition.

To address the competition concerns mentioned above the undertakings offered to the Office commitments, specifically a sale of three pharmacy stores. The Office found the offered commitments as efficient for maintaining the sufficient level of competition and cleared the merger. The decision was issued within the so called first phase assessment.

- **AGROFERT HOLDING, a.s./EURO BAKERIES HOLDING a.s.**

In 2012 the Office investigated a notified acquisition of EURO BAKERIES HOLDING (EBH) by AGROFERT HOLDING (AGROFERT). AGROFERT operates in markets of agricultural, food and chemical products both in the Czech Republic and abroad. Company UNITED BAKERIES which was a part of the EBH group operated in the markets of bakery products.

On the basis of the analysis of the relevant market and potential effects of the acquisition the Office concluded that the transaction would have an impact on the wholesale market of fresh bread and bread-like products, wholesale market of fresh rolls, wholesale market of other fresh bakery products as well as wholesale market of fresh confectionary, wholesale market of sweet and non-sweet durable bakery products.

During the so called second phase assessment the Office was concerned about substantial impediment of competition in several relevant markets as the market power of AGROFERT would be significantly increased. Before the notification both parties to the proceeding were already the strongest competitors in the relevant markets therefore the Office was concerned about the potential dominant position of AGROFERT and its possible effects. Without any structural changes the AGROFERT would have gained the possibility to increase the wholesale prices of bakery products which would affect the end consumers.

However, the parties to the proceeding submitted a number of commitments in order to maintain effective competition in the market. According to the Office, the package of structural commitments was appropriate to address the competition concerns. Thus, the concentration has been conditionally cleared.

### 3. The role of competition authorities in the in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

23. Promoting the procompetitive provisions within the Czech legislation belongs to a long term strategic goals of the Office. Experts of the Office constantly monitor the process of adopting the new legislation related directly or indirectly to competition, state aid and public procurement. Representatives of the Office attend government meetings on the working level and focus on competition related aspects of new legislative proposals with the aim to support procompetitive character of the proposals.

24. The Office is a member of the government's advisory committee focused on fighting the corruption as competition could not be efficient in the corrupted environment. The Anticorruption strategy of the Czech government is a part of transparency efforts, increasing the legal certainty and supporting the development of competitive environment. The advisory committee seeks to identify the most suitable anticorruption provisions, provides comments to government proposal focused on fighting corruption, identifies government priorities of anticorruption policies and determines potential risk areas for corrupted activity.

### 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 2012

		Change over previous year
Approved budget in CZK	246,5 million	+100 million <sup>1</sup>
Approved budget in EUR	9.86 million	
Approved budget in USD	12.32 million	

##### 4.1.2 Number of employees (person-years) as of December 31, 2012

25. (For all the competences of the Office – antitrust, public procurement, state aid)

		Change over previous year
Economists	58	+21
Lawyers	98	+32
Other professionals	23	+3
Support staff	33	+7
All staff combined	<b>211</b>	<b>+58<sup>2</sup></b>

<sup>1</sup> The significant increase reflects the change of the Czech legislation on public procurement supervision and related capacity needs of the Office.

<sup>2</sup> Number of employees increased in the section of public procurement supervision which reflects the change of the Czech legislation on public procurement supervision and related capacity needs of the Office.

#### 4.2 *Human resources (person-years) applied to:*

		<b>Change over previous year</b>
Enforcement against anticompetitive practices, advocacy efforts	33	
Merger review enforcement	7	+2
Significant market power	6	+1
Surveillance over the public procurement	77	+32
State aid control	8	

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

Information Bulletin: 20 years of the Office for the Protection of Competition. ENGLISH: [http://www.compet.cz/fileadmin/user\\_upload/Informacni\\_listy/2011/Infolist\\_2011\\_02\\_03\\_20years\\_EN.pdf](http://www.compet.cz/fileadmin/user_upload/Informacni_listy/2011/Infolist_2011_02_03_20years_EN.pdf)

Information Bulletin: Significant events of the year 2012 (<http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html>)

Information Bulletin: State Aid (<http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html>)

Information Bulletin: Bid Riggin (<http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html>)

Press release: Cartel in waste disposal sector (<http://www.uohs.cz/en/information-centre/press-releases/competition/1562-cartel-in-waste-disposal-sector-fined-nearly-czk-100000000.html>)

Press release: Merger of Bakeries cleared, subject to conditions (<http://www.uohs.cz/en/information-centre/press-releases/competition/1435-merger-of-bakeries-cleared-subject-to-conditions.html>)