Office for the Protection
of Competition

ÚOHS

Office in a Nutshell

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Office for the Protection of Competition

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1 About the Office

The Office for the Protection of Competition (hereinafter referred to as "OPC" or "the Office") is a central administrative body for the promotion and protection of competition against its illegal restriction. It was established in 1991 and has its seat in Brno. The OPC is headed by a Chairman appointed by the President of the Czech Republic upon the Government's proposal. The Chairman's term in office is six years with a limit of two terms.

The Office's scope of competence is defined in Act No. 273/1996 Coll., as amended. In addition to creating the conditions for the promotion and protection of competition, the Office also monitors public procurement. In the area of state aid, the Office functions as an advisory, supervisory and consultative body. Since February 2010, the Office has also been monitoring compliance with the Act on Significant Market Power and the Abuse thereof.

Relevant legislation

Office's administrative and decision-making activities are primarily supported by the following legislative provisions:

- Act No. 273/1996 Coll., on the Scope of Competence of the Office for the Protection of Competition
- Act No. 143/2001 Coll., on the Protection of Competition
- Act No. 137/2006 Coll., on Public Contracts
- Act No. 139/2006 Coll., on Concession Contracts and Concession Procedure
- Act No. 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and the Abuse thereof
- Act No. 215/2004 Coll., on the Regulation of Relations in the Area of State Aid and on the Amendment to the Act on the support of Research and Development
- Articles 101 and 102 of the Treaty on the Functioning of the European Union

The Office can not decide on issues of:

- unfair competition,
- consumer protection,
- control of goods quality,
- registered trademarks and patents,
- protection of personal data.

Legal framework

The Office for the Protection of Competition is an executive body of the state administration. Based on its experience of decision-making practice, the Office makes suggestions and contributes in its advisory capacity to the creation of new legislation and amendments to existing legislation. To facilitate the incorporation of EU law within Czech law, or the application of Czech law in practice, the Office issues interpretative opinions, methodologies, manuals and other documents and publishes them on its website.

Decision-making system

In the same way as other administrative bodies in the Czech Republic, the Office for the Protection of Competition uses a two-stage decision making process on the basis of the Administrative Procedure Code (Act No. 500/2004.). Therefore, a case is first decided by a first-instance body. An appeal against a first-instance decision may be lodged within 15 days of its delivery to the Chairman of the Office, who, in cooperation with appellate committees as advisory bodies, acts as the second-instance body. If an appeal is not lodged, the decision comes into force on the expiry of the 15-day term.

In the event of an appeal being lodged, the Chairman will decide whether the first-instance body acted in accordance with applicable legislation and assessed the matter correctly. Second-instance proceedings may result in confirmation of the challenged decision and rejection of the appeal, or in a change of the first-instance decision, for example a reduction of a fine, or the cancellation of administrative proceedings and/or the return of the case for re-processing at the first-instance level. If the decision is confirmed, it comes into force on the day of the receipt by the parties to the proceedings. The OPC's decision in force may be brought before the competent administrative court, which is the Regional Court in Brno, and subsequently a cassation complaint may be brought before the Supreme Administrative Court. In cases where the fundamental rights and freedoms under the Constitution, the Charter of Fundamental Rights and Freedoms and other constitutional laws of the Czech Republic may be touched, the Constitutional Court is the final instance.

A Brief History of the Office

In connection with the political changes after November 1989 and after more than 40 years, an easement of state dirigisme, the restoration of private property and the promotion of effective competition on the principle of equality of both domestic and foreign competing entities took place. New legislation on competition was first included in an amendment to Economic Code No. 103/1990, but in January 1991 the first Competition Act, No. 63/1991, was adopted. In the same year, a new institution was founded - the Czech Office for Competition - which started its operations on 1 July 1991. In 1992, the Office was replaced by the Ministry of Competition. The change was justified by the then ongoing economic transformation and especially by the role that the Ministry played in the privatization process. At present, the protection of competition in the Czech Republic is institutionally performed by the Office for the Protection of Competition. The Office started operating under this name on 1 November 1996, building on the activities of the former ministry.

What We Do

The purpose of the Office is to ensure the functioning of markets in accordance with the rules of economic competition and in so doing to bring benefits to consumers.

In order to achieve our goal, we:

- guide competitors in how to behave in accordance with the principles of competition law,
- participate in the creation and amendment of legislation,
- intervene against practices that restrict competition, such as cartel agreements and abuse of a dominant position; at the same time, we give businesses an opportunity to correct illegal conduct which has not yet had any serious effect on the market,
- supervise public procurement and concession, ensuring greater transparency and saving public funds,
- monitor and provide consultancy concerning issues of state aid in the Czech Republic, to ensure its provision in accordance with the applicable rules of the European Union,
- cooperate with providers on notifications of national measures for state aid, submitting these to the European Commission for assessment,
- supervise the accordance with the Act on Significant Market Power in the Sale of Agricultural and Food Products and the Abuse thereof, by which we seek to establish correct relations between retail chains and their suppliers.

St. Martin Conference 2013

Petr Rafaj

Priorities

The right for a due process

For several years now, the issue of the right for a due process has been connected with the Office's activities in the field of combating the distortion of competition, in particular cartel agreements. The issue of access to all documents forming an administrative file - including trade secrets and the content of leniency applications, as well as the privacy issues of legal entities (competitors) regarding inspections without prior notice, the right to refuse to answer on the basis of the doctrine of the prohibition of self-incrimination, the proper application of the *ne bis in idem* principle, and other procedural aspects of investigating activities of the Office - has recently exceeded the factual questions of administrative proceedings in terms of importance. Reaching a balance between the protection of the interested parties (namely the participants in the proceedings), on the one hand, and the provision of an effective and sufficiently deterring enforcement of the competition law regulations, on the other hand, is, besides the application of the principles of more economic approach, one of the two main objectives of the Office in the area of protecting competition.

Transparency – openness – access to information

For the Office, the requirement for transparency is one of the most important priorities. For its realization, the Office mostly uses its website, www.uohs.cz, as surveys conducted by OPC show that this is the most frequently used source of information about the Office's activities for both the lay public and the professional public. On the website, decisions in force of 1st and 2nd instance are published as well as the judgements of the Regional Court, the Supreme Administrative Court and the Constitutional Court related to the cases of the OPC. The website is regularly updated and press releases are published here; there is the option to subscribe to a newsletter. The pages also provide an overview of current legislation from all areas of the Office's scope of competence: competition, public procurement, significant market power and state aid. Another area of information concerns seminars and conferences organized by the Office, including invitations to these events and news with photographs from the realized events. The website also offers publications issued by the Office for download, fact sheets and annual reports. There is also a summary of the information provided in accordance with Act No. 106/1999 Coll., on the Free Access to Information.

Prevention

In addition to decision making, the Office for the Protection of Competition organizes activities to raise awareness about rules of competition, public procurement and state aid. In order to prevent the breach of applicable laws, the Office considers it useful and important to provide interpretative opinions and methodology and to publish these on the website.

The Office also organizes regular conferences and seminars and issues information bulletins on current topics, while the Office's experts give lectures at national and international forums. A thorough interpretation of a given problem contained in the Office's published decisions also contributes to education.

The most important event of the Office's congress activities is the annual St. Martin Conference, reporting on new developments in competition and the latest trends in competition law. The spring conference is often dedicated to topical issues of state aid, and developments in the area of significant market power are also regularly presented at the conference.

Within the project, 'The Education and Transparency of Contracting Authorities', co-financed from EU Structural Funds, the Office has trained almost three thousand employees of contracting authorities. The project is aimed at raising the awareness of public administration employees in the area of public procurement and bid rigging. The Office has also issued two publications, called 'Public Procurement and prohibited agreements of suppliers' and 'Decision-making practice in the area of public contracts and bid-rigging,' which contain the judicature of the OPC, Czech courts and of the European Court of Justice.

Cooperation

Effective enforcement of competition law requires co-operation. On the national level, the Office cooperates with sector regulators, the government and courts. International cooperation consists mostly in negotiations with the European Commission, specifically the Directorate-General for Competition. The Office experts are involved in the activities of the individual committees and working groups of the European Competition Network (ECN), uniting the competition authorities of the European Union. The European Commission has included the OPC experts in the programme of Technical Assistance and Information Exchange (TAIEX) as lecturers in training events organized in order to support the partner countries in the application of EU legislation.

Cooperation and sharing of experience also takes place at conferences and seminars organized by the International Competition Network (ICN). Other important areas of international cooperation are negotiations and participation in conferences organized by the Organisation for Economic Cooperation and Development (OECD). The OECD Competition Committee and the working groups for cooperation and enforcement of competition law meet three times a year. At these forums the issues of competition are discussed and the sharing of experiences among the Member States, international organizations and associated observers takes place. The OECD is a unique platform at the professional level which facilitates the Office's monitoring of current trends in the protection of competition. Cooperation also takes place at the level of international organizations and associations focusing on the issues of functioning competition, such as European Competition Authorities (ECA) and the United Nations Conference on Trade and Development (UNCTAD). The Office successfully develops bilateral contacts with national competition authorities around the world.

Evaluation

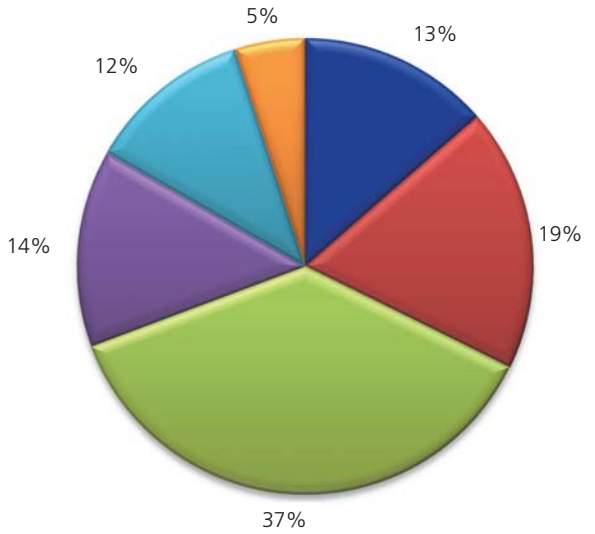
The Office regularly evaluates its activities, particularly in annual reports containing (in addition to the required statistics) the trends and developments in legislation and relevant areas of Czech and international law, and reporting changes negotiated by the European Commission relating to particular areas of the Office's competences.

In the ranking of the world's most successful competition authorities, which is annually produced by the world's leading competition law and policy journal, Global Competition Review, the Office for the Protection of Competition usually gets three stars out of five and is therefore placed in a very prestigious position approximately in the middle of the table of the 40 rated world competition authorities.

Structure of the Office

The Office is headed by the Chairman, who appoints three Vice-chairs. Presently, 214 employees work in the Office, of whom the largest proportion (37%) works in the Public Procurement Section.

Division of employees into sections



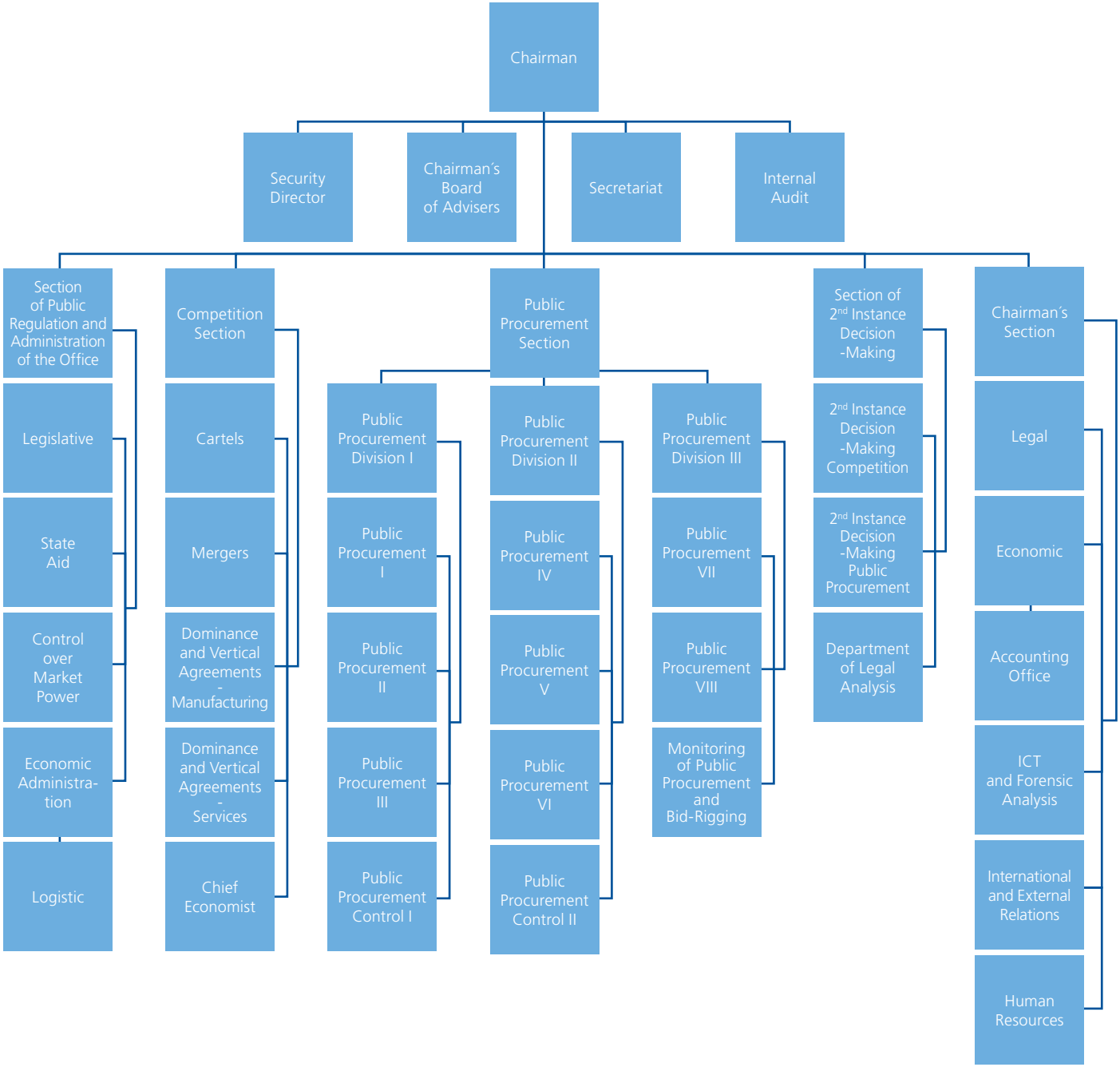
Since July 2009, Mr. Petr Rafaj has been holding a position of the Chairman of the Office. First Vice-chair is Mr. Hynek Brom, who is responsible for Section of Public Regulation and Administration of the Office. Vice-chair Eva Kubišová is in charge of Section of Public Procurement and Mr. Michal Petr works as a Vice-chair and a Head of Competition Section.

Petr Rafaj

Hynek Brom

Eva Kubišová

Michal Petr

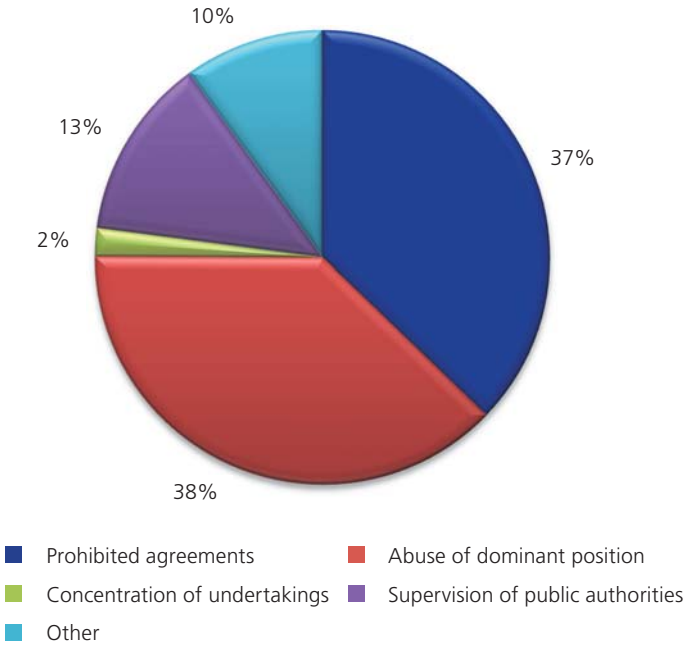

Chairman
Security Director
Chairman´s Board of Advisers
Secretariat
Internal Audit
Section of Public Regulation and Administration of the Office
Legislative
State Aid
Control over Market Power
Economic Administra-tion
Logistic
Competition Section
Cartels
Mergers
Dominance and Vertical Agreements - Manufacturing
Dominance and Vertical Agreements - Services
Chief Economist
Public Procurement Section
Public Procurement Division I
Public Procurement I
Public Procurement II
Public Procurement III
Public Procurement Control I
Public Procurement Division II
Public Procurement IV
Public Procurement V
Public Procurement VI
Public Procurement Control II
Public Procurement Division III
Public Procurement VII
Public Procurement VIII
Monitoring of Public Procurement and Bid-Rigging
Section of 2nd Instance Decision -Making
2nd Instance Decision -Making Competition
2nd Instance Decision -Making Public Procurement
Department of Legal Analysis
Chairman´s Section
Legal
Economic
Accounting Office
ICT and Forensic Analysis
International and External Relations
Human Resources

2 Competition

Competition is the process which allows each party free access to the market and creative freedom, which in the end leads to the optimal satisfaction of consumer preferences. Effective competition promotes competitiveness and economic growth. In some cases, however, the idea of an undertaking about operating in the market is connected with the effort to dominate the market and to eliminate the competition, which endangers the freedom of enterprise of other market participants. The role of competition policy and competition law is to create a set of legal rules governing competition among businesses operating in the market and entering into mutual competition relations with each other.

The protection of competition in the market of goods and services against its exclusion, restriction or other distortion and threats is regulated in the Czech Republic by Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts. Competition can be distorted by the conclusion of prohibited agreements between undertakings, the abuse of a dominant position, the concentration of undertakings or activities of the state administration or local government favouring a specific competitor.

Proportionality of received complaints



The role of the Office for the Protection of Competition is to create conditions for the promotion and protection of competition and to supervise compliance with the Act on the Protection of Competition. In the event of a possible distortion of competition in individual markets, the Office conducts an investigation of competition conditions in these markets – a so-called sector inquiry - and suggests measures for improvement. If the Office finds a possible breach of the law, it initiates an administrative proceeding and has the power to impose remedies to restore competition in the market, and possibly to impose a fine of up to ten percent of the company´s yearly turnover. Where there is a possible effect on trade among EU Member States, the Office cooperates with the European Commission.

The Competition Section considers the detection of prohibited agreements to be their main priority. Currently, the most serious types are tender cartels, so called bid-rigging agreements. The advantage of the Office in such detection is the connection of competences in the areas of competition and public procurement in one institution.

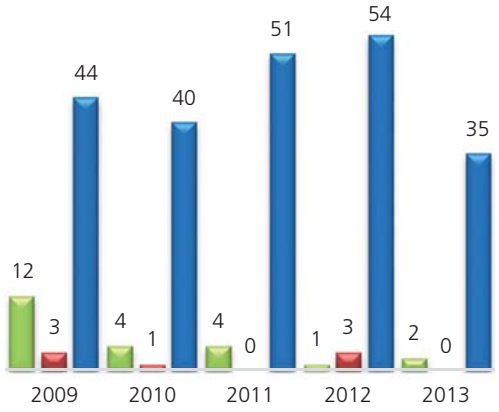
Analyses

The Office carries out economic/econometric analyses in cases of abuse of a dominant position, prohibited agreements and mergers, and provides independent economic viewpoints on the investigated cases. The analyses are elaborated by the Chief Economist department in cooperation with other departments. The Office deals with matters concerning, in particular, the analytical approach to investigation, identification of appropriate economic methods/tests and the data required, and the processing of analytical data and its interpretation. The activities of the section also include preparing methodological materials and presentations, formulating the expert opinion of the Office for the professional and general public, as well as cooperating internationally in dealing with individual cases. For example, the Office has conducted an analysis of markets of medical equipment, civil engineering and communal machinery.

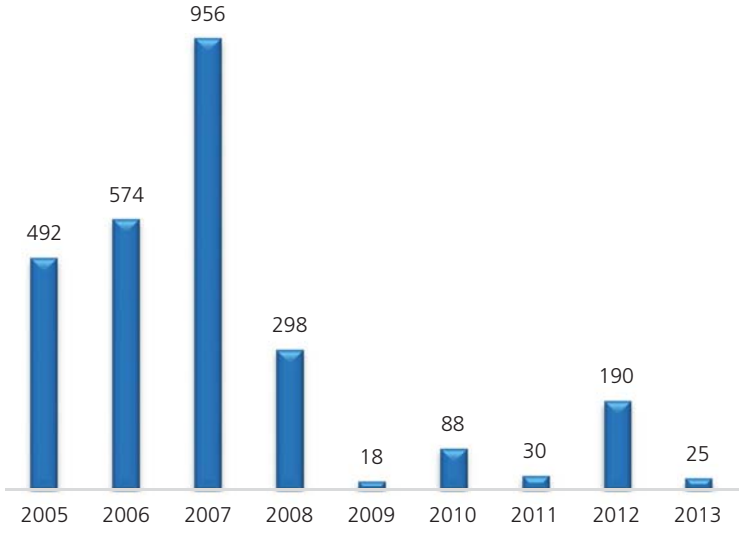
Statistics

The number of initiated administrative proceedings

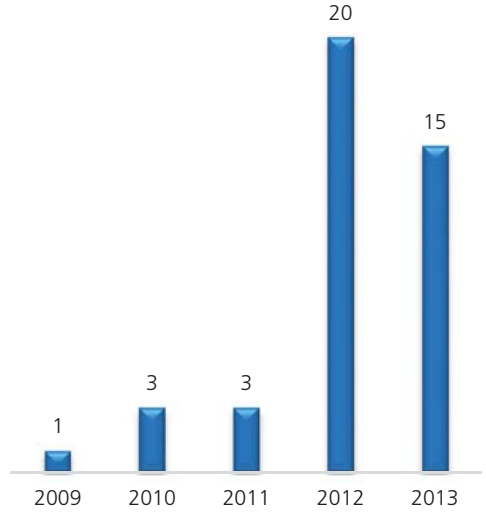
The number of first-instance decisions adopted



The fines imposed by 1st instance, in millions of CZK



Dawn-raids



Prohibited Agreements

Agreements that result in the distortion of competition are prohibited, in particular:

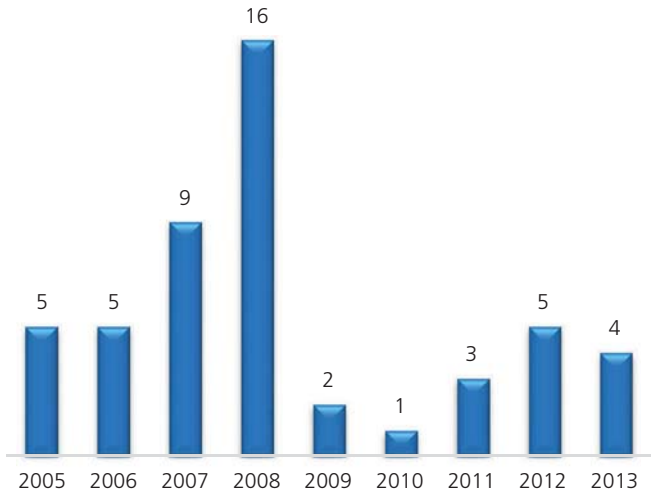
- direct and indirect fixing of prices
- restriction or control of production, sales, research and development and investment,
- sharing of markets and source of supply,
- tying the conclusion of a contract to the acceptance of supplementary obligations unrelated to the subject matter of the contract;
- applying dissimilar conditions to the disadvantage of some competitors;
- a boycott of cooperation with competitors that are not parties to the agreement.

The Office is mainly engaged in the detection of horizontal agreements between mutual competitors in the market. Cartel agreements constitute a major distortion in the economic environment and cause an associated reduction in consumer welfare. Cartel agreements aim to limit competition and to share and control the market, and the gained advantage also prevents the market entry of new competitors. In such cases, there is no natural competition of undertakings and no investment, and so the market does not develop; on the contrary, it stagnates. Consumers are therefore limited in their choices. Moreover, with low competition come higher prices for the offered goods and services.

However, what is prohibited are not only typical "hard-core cartels," i.e. market-sharing agreements and the price-fixing, but all agreements whose object or effect may be a distortion of competition in the market, unless their impact is only negligible. In this context, the Office also addresses the conduct of chambers and associations as well as concerted practices.

Cartels are usually kept secret, may have complex delivery mechanisms and may not even exist in written form. Therefore, evidence for their existence is very hard to find. However, their regulation is essential. Leniency programmes are an effective tool for the detection of prohibited agreements.

Initiated administrative proceedings in the area of prohibited agreements



Bid rigging

Currently, the priority of the Office for the Protection of Competition in the field of investigating illegal practices is the prohibited agreements of tenderers of public contracts, usually including elements of both price-fixing and market-sharing agreements. Before submitting their bids, the tenderers agree on a joint approach in dealing with the contracting authority and submit concerted bids to achieve more favourable conditions for the winner of the award procedure. Bid rigging is especially dangerous behaviour in the market, as it significantly threatens the economy, leads to an increase in prices and reduces the quality of performance, thus siphoning off public resources and harming all consumers. In this area, the cartel department cooperates closely with the Public Procurement Section, particularly the Monitoring of Public Procurement and Bid Rigging department.

Dominant Position and Vertical Agreements

The dominant position does not in itself distort competition. However, if a company uses it to restrict competition, it is considered to be the abuse of a dominant position. It does so primarily by setting unreasonably high prices or, conversely, by underselling at prices that smaller undertakings cannot compete with, causing them to lose their customers; further, by tying the sales to the purchase of another product, and rejecting or favouring of certain customers depending on the amount of goods purchased.

While investigating these cases, the Office must define the relevant market, determine the market power of the individual competitors and prove the existence of the dominant position of a competitor. Generally, the dominant position is not held by an undertaking whose share in the market is less than 40% in the examined period. Moreover, the company's economic and financial strength, barriers to market entry and competitors' market share and the purchasing power of buyers are all examined.

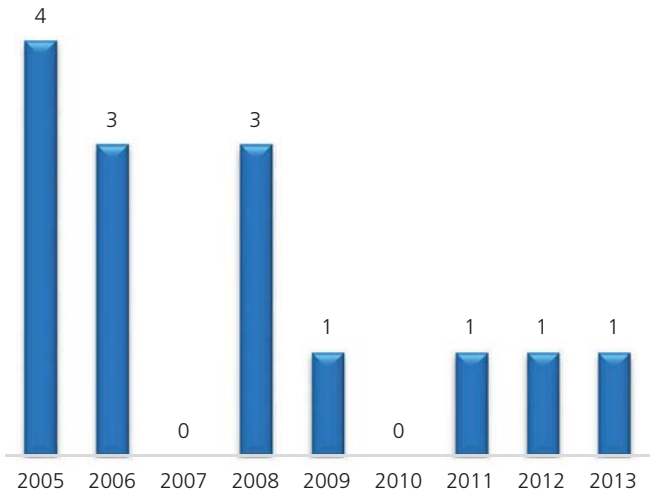
In the area of abuse of a dominant position, the Office's agenda is divided into sectors of production and services. One of the key, continuously monitored areas is the energy industry, the production and supply of electricity, gas and heating. The Office compiles conceptual materials and comments on legislative proposals. International cooperation is also important, as well as effective cooperation with sector regulators, in particular the Energy Regulatory Office and the Czech Telecommunications Office.

The Act on the Protection of Competition is stricter toward competitors in the dominant position than to their competitors, whose position in the market is marginal. The basic condition for the actus reus of the abuse of a dominant position is the proof of the dominant position of the undertaking.

Even if the competitor has the dominant position in the relevant market, they have the right to defend their position, i.e. to behave competitively in the market, provided the condition is fulfilled that this behaviour is not manifestly unreasonable under the given circumstances. If there are objectively justifiable reasons for the behaviour of the dominant undertaking then this behaviour, which under other circumstances would meet the criteria for abuse, cannot be deemed illegal. Cases of the abuse of a dominant position are often very demanding professionally, both in terms of resources and of time. If the Office does not find direct evidence demonstrating the intentional behaviour of the dominant undertaking, the anti-competitive conduct must be demonstrated using advanced economic models and analyses (for example, whether the dominant undertaking used below-cost pricing to drive competitors out of the market).

Vertical agreements also require regulation. These may be agreements between competitors in the distribution chain, which most commonly concern price-fixing, i.e. direct and indirect fixing by determining the resale price for the purchaser, or the provision of the absolute territorial protection of the purchaser for resale.

Initiated administrative proceedings in the area of abuse of a dominant

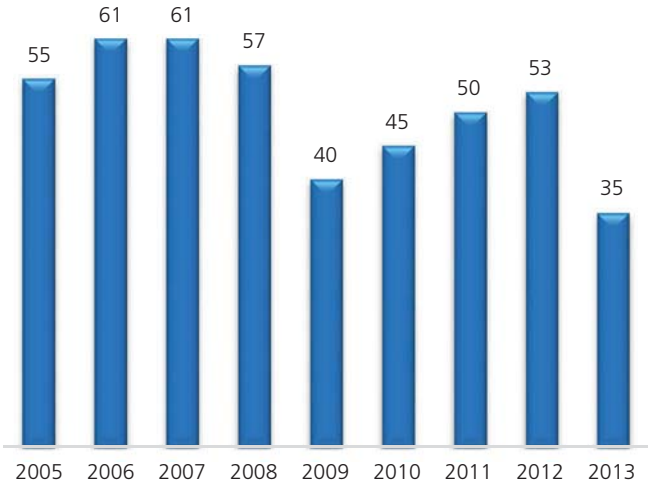


Concentration of Undertakings

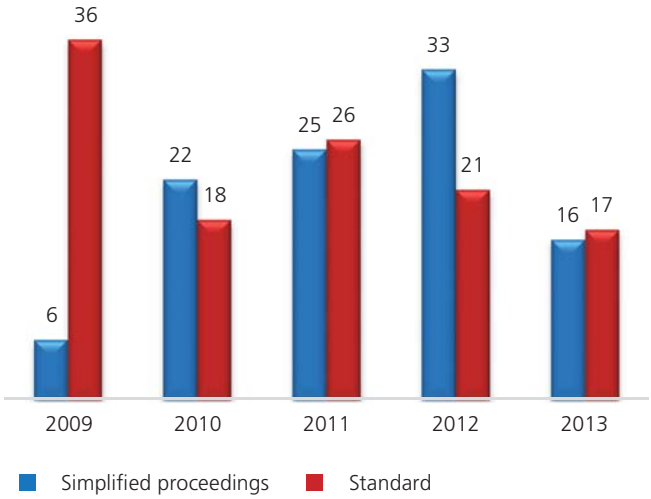
Assessing the impact of concentrations of undertakings is another tool for the protection of competition. Mergers are a commonplace phenomenon in a healthy market environment. The larger players buy off the smaller ones in order to get even a more influential position in the market. Therefore, the Competition Authorities assess large mergers, given by the amount of turnover of merging companies laid down in law, and examine whether the concentrations do not disturb market equilibrium, which might lead to the distortion of competition or result in the dominant position of one of the undertakings and possible subsequent abuse. In such cases, commitments are adopted by the merging firms according to which they may, for example, commit to the sale of part of the company or provide a license for certain technology to another company in the market. Only then is the merger approved. However, the competition authority continues to monitor fulfilment of the commitments. Only very rarely is the proposed merger prohibited. The Office has also registered cases in which undertakings whose merger was not authorized again requested approval of their merger. If significant changes in the market have occurred meanwhile, they have a chance to succeed with their request. The purpose of the protection of competition in the area of mergers is not to thwart business plans but to intervene only if the proposed merger is likely to distort competition in the market.

In addition to monitoring the fulfilment of commitments and conditions set out in decisions, the Office checks whether mergers of undertakings do not take place before the notification of the merger to the Office and before the coming into force of the decision by which the merger is approved; it may grant exceptions to the prohibition of the premature implementation of a concentration of undertakings. The Office also assesses the need for the possible transfer of powers in this area to the European Commission, and it takes part in advisory committees convened by the European Commission in connection with cases of significant international impact.

Initiated administrative proceedings in the area of concentrations of undertakings



Concentration of undertakings according to a type of a decision



Supervision of Activities of Public Administration Bodies

The amendment to the Act on the Protection of Competition of December 2012 extended the scope of this Act to public authorities, which means state administration bodies and local self-governing bodies. Institutions are prohibited to provide support favouring certain undertakings and so distorting competition. Factually, the law includes all cases of distortion of competition as the result of activities of an administrative body, including decision-making and legislative activities.

The Office already had similar power in the 1990s; however, the new legislation differs in three key aspects. Firstly, it also applies to local self-governing bodies. Secondly, the law allows for a fine of up to 10 million CZK, while in the past, only a declaration of a breach of obligation was required. Thirdly, the law also foresees the intervention of other bodies that should provide redress, i.e. ensure the removal of conditions distorting competition.

The Office is preparing a methodology for the application of a new provision of the competition act in accordance with which it will conduct the supervision of the activities of public administration bodies.

Legislation and Legal Framework

Act No. 143/2001 Coll., on the Protection of Competition and on the Amendment to Certain Acts, has been repeatedly amended to achieve full compatibility. The amendment of 2004 regulates the procedure in the application of Articles 101 and 102 of the Treaty on the Functioning of European Union by the Czech authorities and

certain issues of their cooperation with European Commission and with the Member States. The latest amendment of December 2012 brought many changes, in particular the integration of leniency and settlement into the legislation, but also the possibilty to prioritize during the investigation of cases and new competence in the form of sanctioning the anti-competitive behaviour of public authorities. The new Act also amends the Criminal Code by inserting special provisions on effective repentance in relation to cartels. The applicant for leniency should thus avoid not only administrative, but also criminal responsibility. The amendment also brought changes regarding sanctions. Possibly the most significant amendment is the introduction of a completely new sanction for bid-rigging agreements, which is a three-year ban from procurement and concession management. The register of persons on whom a sanction was imposed is maintained by the Ministry for Regional Development.
In 2013, the Office issued new notices on leniency and settlement and a notice on the alternative solution of competition issues, and on the postponement of matters. A new notice on the methodology of the calculation of fines is being prepared for publication, which should result in a noticeable increase in fines for hard core cartels. The Office has also commenced work on an amendment to the Act on the Protection of Competition, induced among other reasons by the need to react to the new Civil Code.

Leniency

The leniency programme created and implemented by competition authorities is the most important tool for detecting and combating cartels. Its essence is the willingness of competition authorities, or of the European Commission, to waive entirely or partially the imposing

St. Martin Conference 2013 - (from the left) Michal Petr, Jiří Kindl, Rainer Lindberg, David Anderson

of fines for a prohibited cartel agreement, if an undertaking allows the provision of evidence for taking action against the cartel. A cartel agreement is not always so advantageous to all the participating parties that they do consider engaging in a fair competition might be more beneficial, but they are discouraged from voluntary abandonment of the cartel by the severity of the fine that might be imposed on them. The leniency programme guarantees the undertakings concerned immunity from the imposition of a fine in full or partially, if the prescribed cumulative requirements are fulfilled and the company terminates its participation in a cartel as of the day when it provides evidence of the actual or alleged breach of the law.

The Office introduced the leniency programme more than ten years ago; however, it was based only upon the notice of the Office, without explicit statutory support, which complicated its interconnection with other legislation, in particular the Administrative Procedure Code and the Criminal Code The leniency programme was included in Czech legislation by the amendment to the Act on the Protection of Competition of December 2012. The leniency programme provides significant motivation which may fundamentally contribute to the detection of cartels and their destruction from within.

Settlement

The amendment of the Act on the Protection of Competition of December 2012 regulates so-called settlement for the first time. The settlement procedure consists of consent of a party to administrative proceedings with the description of the factual and legal classification of the offence as formulated by the Office in the Statement of Objections, for which the imposed sanction will be reduced by 20 percent. In this way, the administrative proceedings can be quickly concluded and an early remedy of the defective state of the market may be achieved. The decision issued has a more concise form and it states only a summary of the facts of the case, its legal assessment and references to the main evidence are given. Apart from the reduction of the fine, the Office does not impose a ban from public contracts or from the performance of concession contracts. Neither it is expected that a participant in a settlement would file an appeal against the decision or an administrative action. Besides speeding the course of administrative proceedings, the settlement procedure will release capacity for other administrative proceedings.

Prioritization

Recently, the Office received authorization to initiate proceedings only in matters of public interest if a significant distortion of competition occurs. These matters include major cartels and abuse of a dominant position. In contrast, the Office may stop the investigations in cases with little detrimental effect on competition. In assessing the extent of the detrimental effect, the Office takes into account the nature of the conduct, the importance of the market concerned and the number of competitors. In practice, the possibility to prioritize should apply only to prohibited agreements, in relation to the very low market share of the participants. Unlike the de minimis rule, which does not deem some agreements with a very low market share as prohibited, in the case of prioritization these agreements are considered prohibited, but the Office will not deal with them. As, due to this amendment, not even a detailed preliminary investigation needs to be opened, the Office is allowed to concentrate its limited resources on more significant breaches of competition law. Nevertheless, for the potential damaged party, this procedure still retains recourse to the courts in a private action.

Alternative solutions to competition problems

The alternative solutions to competition problems are a set of tools which, at various stages of the investigation of a case, allow faster removal of competition problems and remedy the defective state of the market. In this way, the Office may deal with some competition issues even without the initiation of administrative proceedings, if the undertakings concerned commit themselves to changing their behaviour in the market. The Office will accede to alternative solutions when the harmful effects of the action are limited or when it may be expected that if the competition problem is not speedily resolved, its range will increase significantly, while an undertaking may be able to take actions leading to the rapid removal of the competition problem and thus restore effective competition. The pre-requisite is that no extensive investigation will be needed to reach a conclusion about a suspected breach of the law. In its notice, the Office specifies in which type of anti-competitive practices competition issues may be removed in this way, and in what way the negotiations with the affected undertakings will be conducted.

Initiated administrative proceedings do not need to be concluded with a sanction decision. The parties to the proceedings may offer commitments to the Office that would lead to the restoration of effective competition. Therefore, another part of the notice specifies how to negotiate these commitments and under what conditions the Office will accept such proposed commitments and issue a decision on them. The Office must find the proposed commitments sufficient for the protection of competition and the removal of the defective state of the market. The commitments decision may not be adopted if the undertaking's conduct resulted in a significant distortion of competition.

Brno - Náměstí Svobody Square (photo Marie Schmerková)

3 Significant Market Power

The protection of competition in the area of the purchaser-supplier relations of non-dominant competitors in the food sector in the Czech Republic is regulated by Act No. 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and the Abuse thereof. Since 1 February 2010, the Office for the Protection of Competition has been authorized to monitor compliance with this Act.

The Act on significant market power is a legislative piece aimed primarily at the protection of competition. Nevertheless, the reason for its creation was the inability to apply the competition rules to the specific environment of purchaser-supplier relationships between retail chains and their suppliers. Retail chains often have a position in the market in which, generally, they represent for suppliers an important distribution channel for offering their goods to consumers, and therefore they may, in principle, act as dominant companies in relation to the suppliers. To give an example, the late payment of invoices for goods delivered may be mentioned, or various fees a supplier is obliged to pay to the chains, such as fees for launching products in the market, advertising campaigns, and so on. However, in terms of the standard competition law, this kind of behaviour could not previously be sanctioned, as none of the retail chains in the Czech Republic was in a dominant position, and also the Office had not revealed any signs of prohibited agreements among the chains. Therefore, the Act on Significant Market Power brings an opportunity to sanction certain negative conduct by the retail chains, and it considers companies operating in food retail with a turnover exceeding five billion CZK to be holders of significant market power. If the market power of a customer is classified as significant, the Act is applied to all business relations between the customer and the supplier.

The Act also contains annexes, which enact specifically the rules for invoicing, general business conditions, contractual terms and other conditions of sale, and further provides a list of types of behaviour which entities with significant market power must not engage in.

The agenda of the control of market power includes: investigating whether in concrete cases there is a breach of the law; conducting administrative proceedings, including the issuing of administrative decisions and possibly also the imposing of sanctions for breaches of the law; conducting sector inquires; cooperating with the working group FOOD of the European Commission; and other activities. In its activities, the Office uses both its own findings, obtained in sector inquires or from public sources, and proposals delivered to the Office in the form of complaints.

The Office has cooperated with the European Union on the creation of the Green Paper of Unfair Commercial Practices among companies in Europe in the supply chain of both food and non-food goods, and provided the European Commission with material based on its own monitoring and decision-making practice. The document contains a list of unfair occurrences in purchaser-supplier relations in the supply of goods for retail sale.

Forthcoming Legislation

The Office, in cooperation with the Ministries of Industry and Commerce, Finance and Agriculture, has prepared an amendment to the Act on Significant Market Power. The major modifications include changing the concept of the responsible entity, and extending the potential liability for the abuse of significant market power to the suppliers, in addition. An exhaustive list of the constituent elements of offences by statutory bodies is replaced by a more general definition. There is also an alteration in the procedure for accepting commitments, making it consistent with the Act on the Protection of Competition.

However, the issue of unfair commercial practices in the supply chain does not concern only the sale of food. The Office's next step will be to propose complex legislation, in cooperation with the competent institutions, which will deal with other sectors in which the abuse of a position occurs and in which, therefore, the conditions for the abuse of significant market power are fulfilled.

4 Public Procurement and Concessions

Supervision of public procurement award procedures has been conducted by the Office for the Protection of Competition since January 1995, according to currently valid Act No. 137/2006 Coll., On Public Contracts, as amended. The scope of the supervisory activities is significantly influenced by the transposition of the directives of the European Commission, in terms of public contracts and concessions as well as in the area of supervision with regard to improving the effectiveness of review procedures concerning public procurement; also, an increase in supervision and transparency in public procurement results from the supervisory directives of the European Parliament and Council. The current (technical) amendment to this Act was made by Senate statutory measure No. 341/2013 Coll., which came into force on 1 January 2014; some sections will come into force on 1 January 2015. The purpose of the Office's monitoring activities is to ensure fair, transparent and non-discriminatory competition, ultimately resulting in savings of public finances. It is clear that providing a framework for the effective use of financial resources by contracting authorities in the procurement of supplies, services and construction work can only be achieved by transparent competition.

The Office decides whether the contracting authorities in public procurement award procedure proceeded in accordance with the law, imposes remedial measures and fines, discusses administrative offences and performs other tasks stipulated by the relevant acts. The decisions are published in compilations of judicial decisions on the Office's website www.uohs.cz.

Since 1 July 2006 the Office has also overseen the concluding of concession agreements pursuant to Act No. 139/2006 Coll., on Concession Contracts and Concession Procedures, and since 1 July 2010 the concluding of public service contracts in passenger transport by tender or direct entry, pursuant to Act No. 194/2010 Coll., on Public Passenger Transport Services.

St. Martin Conference 2011 - (from the left) Jaroslav Kračún, Eva Kubišová, David Petrlík

Public Procurement Principles

In public tenders, contracting authorities are obliged to treat the candidates in a transparent, non-discriminatory and fair manner in order to provide equal conditions for all potential suppliers. Maintaining these three basic principles ensures fair competition among the bidders in the award procedure, and the contractor gets the most economically advantageous tender. The Office, as a supervisory authority, monitors whether the conduct of the contracting authority during the award procedure was in compliance with relevant acts. This means that it focuses mainly on the procedural aspects of public procurements and on compliance with and proper implementation of the individual steps that must be performed by the contractor. The Office does not have at its disposal any investigative tools with which it would be able to effectively detect corruption in public procurements; this area is the domain of the criminal justice authorities.

Public procurement award procedure rules are always a compromise between the attempt to reach maximum transparency, which is required by the public but needs more complicated legislation, and simpler procurement, which is in the interest of the contracting authorities and the business sphere. Therefore, the Office transfers their experience from decision-making practice to the area of legislation, where it proposes amendments to the Act on Public Contracts to the Ministry of Regional Development, which is responsible for this law. These proposals focus mainly on making award procedures more efficient, as well as the actual review of public contracts.

The Course of Administrative Proceedings

The OPC initiates administrative proceedings ex officio, or upon written proposal by a complainant to which a surety bond is attached. If the OPC finds out that the contracting authority committed an administrative offence by which it influenced or may have influenced the selection of the best bid, the surety bond is returned. Otherwise, the OPC shall terminate the administrative proceedings and the bond will become income to the state budget.

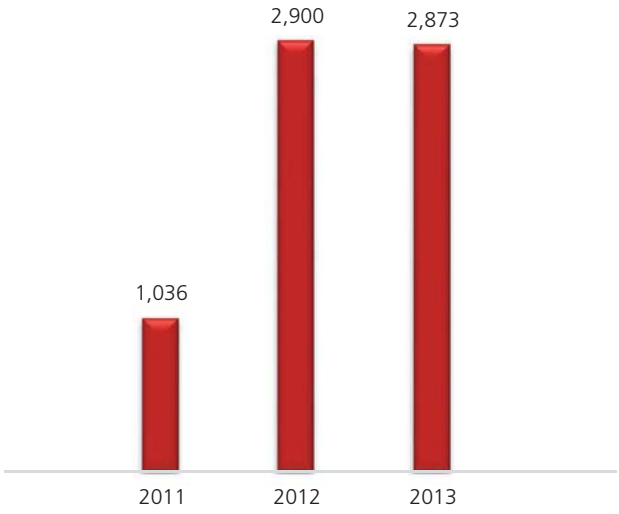
Before issuing a decision, the Office may order preliminary measures by which it prohibits the contracting authority from concluding a contract or award procedure or temporarily stops the tender. In case of a breach of law, the Office imposes a remedies – making the actions of contracting authorities void; for example, it puts the illegally excluded bidder back in the tender, or cancels the award procedure as a whole. The Office considers the imposing of remedies an important pro-competitive element. If the situation can no longer be remedied - for example, if the contracting authority has already signed a contract with the selected tenderer - the Office imposes a fine on the contracting authority of up to 10 percent of the contract price, or up to 20 million CZK if the total value of the public contract cannot be ascertained. Since the beginning of 2010, the OPC has had the power to prohibit fulfilment of a contract, but only when this prohibition is required by the complainant. The same amendment introduced the possibility to impose a three-year ban on the fulfilment of public contracts and concessions to the tenderer which during the award procedure submitted false information to the contracting party. The register of companies banned this way (the blacklist) is available on the website of the Ministry for Regional Development.

There is a two-instance system for proceedings of the Office. If an appeal is filed, the final decision is issued by the Chairman of the Office based on the proposal of the Appellate Committee. Parties to the proceedings may file an appeal against the decision in force to the Regional Court in Brno, and possibly furthermore, a cassation complaint may be taken to the Supreme Administrative Court. In cases when fundamental rights and freedoms may be infringed the court of last instance is the Constitutional Court.

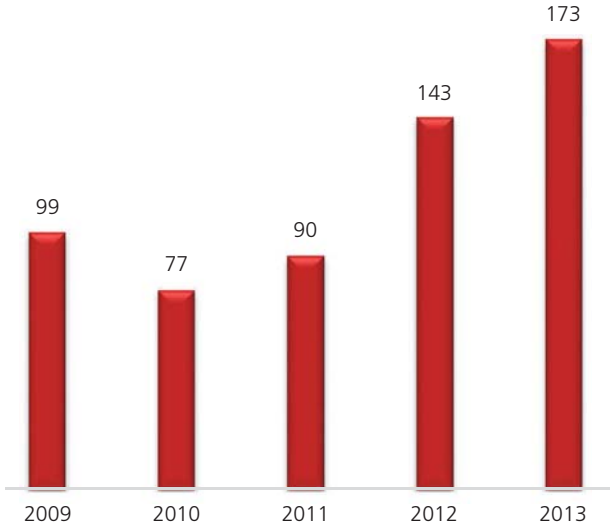
Statistics

Supervision of compliance with the Act on Public Contracts constitutes the largest agenda for the Office. The increase in activities in this area has been enormous in recent years, at both first and second instance levels. Based on the complaints received, the Office reviews almost three thousand public contracts a year, and for another nearly 500 proposals received, administrative proceedings are immediately initiated. In comparison with 2008, the number of initiated administrative proceedings at the first-instance level has nearly tripled. The number of ex officio proceedings has more than doubled in the last three years. The number of appeals against first-instance decisions is more than twice that of 2009.

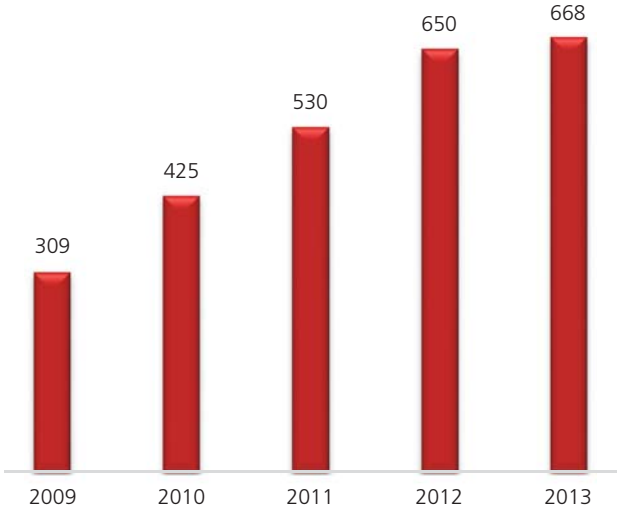
The number of public contracts reviewed on the basis of complaints received



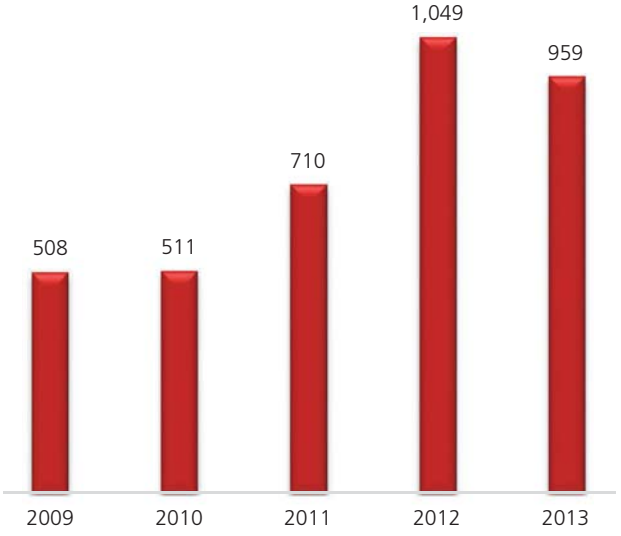
The number of administrative proceedings initiated ex officio



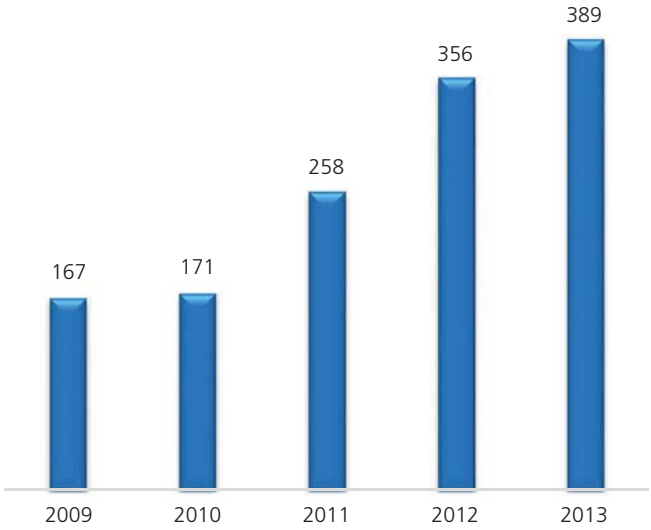
The number of initiated first instance administrative proceedings



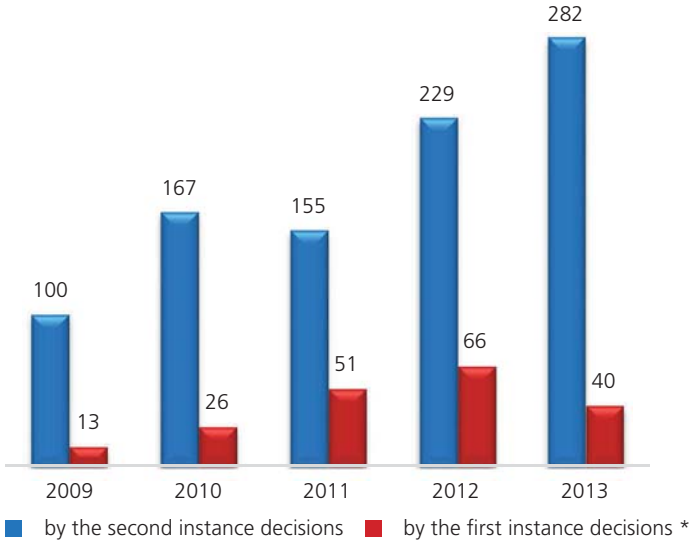
The number of first instance decisions issued



The number of appeals filed



The number of appeals processed



* *appeal proceedings terminated because of redundancy, autoremedy or withdrawal of an appeal*

Most Common Misconduct

The cases investigated by the Office most commonly involve public contracts in the areas of information technology and health care (according to the scope of supply, services and construction work). Essentially, these are the areas in which most public contracts are awarded, and the Office's reviewing activities merely copy the sector distribution.

The Office also identifies several of the most common types of misconduct committed by the contracting authorities. Above all, it is the setting of non-transparent and discriminatory tender criteria defining the subject of a public contract, including technical terms. In such cases the tender documentations favour some candidates, or conversely they completely exclude other potential suppliers from competition. In other cases, the specifications in tender criteria are such that only a certain product or service will correspond to them, and suppliers of comparable or similar solutions have no chance of winning the contract.

Another frequent form of misconduct is ambiguous and therefore non-transparent specifications for the evaluation of bids. In these cases, the contractor insufficiently or inaccurately describes what they expect from the bidders. Due to the inadequate tender documentation, potential suppliers are not able to put together mutually comparable bids. Another common type of misconduct is setting of disproportionate qualification requirements in relation to the complexity, type and scope of the contract. In the case of disproportionately set technical qualification requirements, contracting authorities most frequently err in requiring too large number of evidenced reference contracts not corresponding with the scope of performance.

Other kinds of misconduct are also connected to qualifications, in particular the requirement to submit other certificates of quality management and environmental protection than those allowed by law. This problem has already been solved by the new wording of legislation, as the regular contracting authorities must not require these types of certificate at all.

Frequent deficiencies also occur in assessing and evaluating bids. Commonly, it is the lack of transparency in reports on the assessment and evaluation of bids, caused mostly by an insufficient description of the assessment and the evaluation, particularly concerning

the individual evaluation criteria that cannot be expressed in purely numerical form. Many errors occur while assessing bid prices that are abnormally low in relation to the subject of a public contract. Here, the evaluation committee should require a written justification for those parts of the bid that are substantial to the bid price, and if an insufficient justification is provided they are obliged to disqualify such a bid.

An incorrect determination of the estimated value of a public contract is an error due to which the Office may cancel the entire award procedure. The estimated value of a public contract determines the type of procedure that is necessary for awarding each public contract. An error may also occur due to insufficiently developed projects, the wrong evaluation of contracts of indefinite duration or concluding subsequent amendments. Subsequently, a contracting authority then proceeds contrary to the law, as they believe that they are dealing with a small-scale public contract and use a simplified below-threshold proceeding for an above-threshold public contract, which is a breach of the principle of transparency.

A type of misconduct by contracting authorities that is often dealt with is the use of simplified negotiated procedure without fulfilling all conditions necessary for using it. Contracting authorities may use negotiated procedure only in exceptional circumstances, as it significantly limits competition. A frequent argument in such cases is the need to award a contract for reasons of extreme urgency, despite the fact that the contracting authority was informed about, for example, the state of disrepair of the building in advance. Similarly, authorities wrongly apply the negotiated procedure for public contracts in the area of information technology, with reference to technical and artistic reasons or for reasons of the protection of exclusive rights, often referring to the concluded license agreement with the justification that all related contracts must be awarded to the original supplier who provided the licences. Nevertheless, the contractor caused the situation themselves by concluding unsuitable license agreements, which is not a justification for using negotiated procedure.

Brno - Špilberk Castle (photo Igor Šefr)

Contracting authorities often want to deal with the unlawful practice in the award procedure or the "dissatisfaction" with the selected bidder by cancelling the entire award procedure. Nevertheless, this process, too, must be adequately justified in accordance with the law and the contractor may (and in some cases must) revoke the award procedure only under the conditions specified by law. For example, in its administrative proceedings the Office requires the contracting authorities to demonstrate clearly that, unexpectedly, reasons for the continuation of the award procedure have ceased to exist, or that factors requiring special consideration have arisen, and therefore the contracting authority is not obliged to continue in the award procedure. Otherwise, the Office invalidates the contractor's decision on termination of the award procedure and the contractor is obliged to continue it.

5 State Aid

One of the tools of competition policy is the control of state aid. The current legislation applicable to this area is Act No. 215/2004 Coll., on the Regulation of Relations in the Area of State Aid and on the Amendment to the Act on the Support of Research and Development, as amended.

Until 2000, the Office for the Protection of Competition had the power to decide on granting exceptions from the prohibition of state aid provided in all areas except agriculture and fisheries. After the Czech Republic joined the European Union in May 2004, decision-making power in the area of state aid was transferred to the European Commission. Currently, the Office cooperates mostly with aid providers in the preparation of notices of state aid measures to the European Commission; it cooperates with the Commission and the provider in the proceedings before the Commission, both in proceedings relating to the notice of state aid and in proceedings for unlawful state aid, the misuse of state aid, existing public support schemes, and in cases when the Commission carries out a dawn raid in the territory of the Czech Republic. Within the performance of consulting and advisory activities, the Office issues a non-binding advisory opinion on individual measures, in particular for providers of state aid. In accordance with the relevant European Union regulations, the Office submits an annual report on state aid provided in the Czech Republic in the previous calendar year to the Commission. In the area of legislation, the Office represents the Czech Republic in the negotiation and preparation of European Union legislation in the field of state aid. Lastly, the Office is the administrator of the central small-scale state aid register.

Conference on State Aid – Hynek Brom

The application of state aid rules is also crucial in providing finance and investment from the Structural Funds; it facilitates more efficient and effective use of public resources. The primary purpose of the assessment of measures in the area of state aid provided by the European Commission is a thorough evaluation of the effectiveness of aid programmes and their impact on the relevant markets and the competition.

As part of its advisory role, the Office has published a number of methodological documents on its website. On the basis of cooperation with the Ministry for Regional Development, the Office has published a Manual of services of general economic interest, a guide to the proper application of state aid rules in public funding of this category of services.

What is State Aid?

State aid is any aid granted in any form by the state or from state resources; it distorts or may distort competition by favouring certain companies or production sectors or affecting the trade among the Member States.

The most common forms of public support are direct subsidies, government guarantees, tax relief, privatization at a discounted price, nominal capital increase, credit, loans, waiving payment of social security and health insurance, and others.

Under Article 107, Section 1 of the Treaty on the Functioning of the European Union, this aid is incompatible with the internal market and is therefore generally prohibited. Exemption from the prohibition may be granted on the basis of block exemptions or the decision of the European Commission. Block exemptions are regulated by the General Block Exemption Regulation, which prescribes aid categories and the conditions under which aid may be granted without the need of assessment by the European Commission. Under the General Block Exemption Regulation, aid may be granted as regional aid, aid to small and medium-sized enterprises, aid for environmental protection and support for research, development and innovation.

In connection with the modernization of state aid rules, the inclusion of new categories of state aid is expected in 2014; for example:

- Repairing damages caused by natural disasters
- broadband infrastructure,
- transportation of inhabitants of remote regions,
- culture and cultural heritage conservation
- sports and multifunctional recreational infrastructure.

State aid is strictly regulated in the European Union to ensure that its provision is in accordance with state aid rules and to prevent distortion of competition to an extent that would be contrary to the common interests of the European Union.

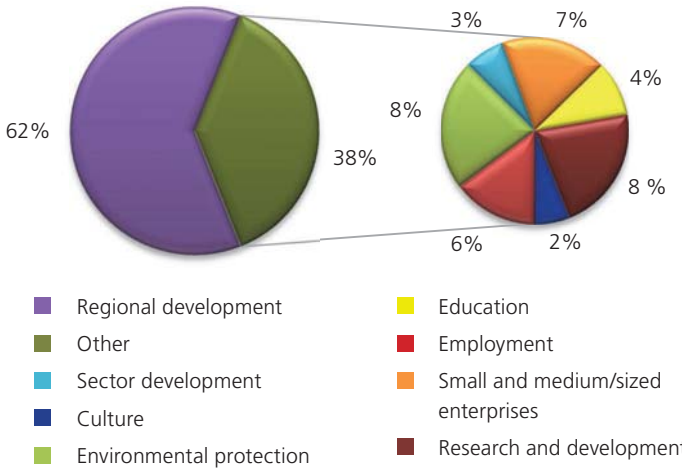
Small-Scale Financial Aid (de minimis)

De minimis aid is widely used in the Czech Republic, mostly for reasons of its ease of use, without the need to request approval from the European Commission, as its scope does not threaten the internal market of the European Union. The amount of small-scale aid must not exceed 200 thousand EUR within three years per one recipient. In accordance with the Commission's requirement for transparency in the granting of aid, to monitor de minimis aid granted to undertakings in the Czech Republic, a central register of de minimis aid was established on 1 January 2010, towards the end of 2013 recording the small-scale state aid granted to the amount of 31.4 billion CZK.

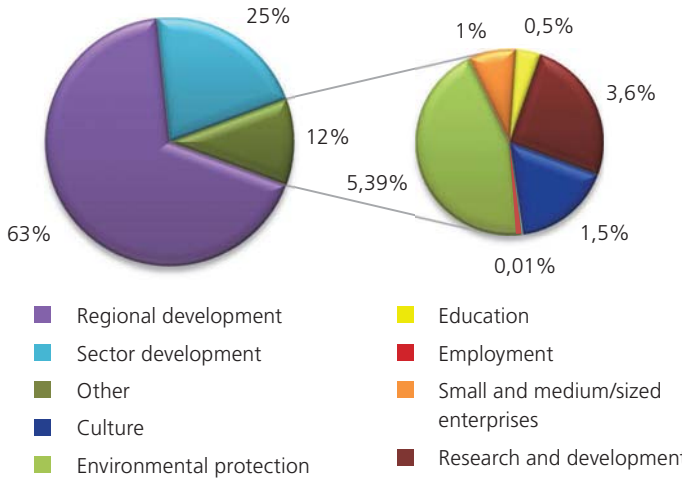
The Office acts as a coordinating body for small-scale aid granted outside the area of primary production agriculture and the fishing industry. Each year the Office initiates over thirty administrative proceedings with the providers for breach of the provision on recording small-scale aid in the Central Register of de minimis aid.

Statistics

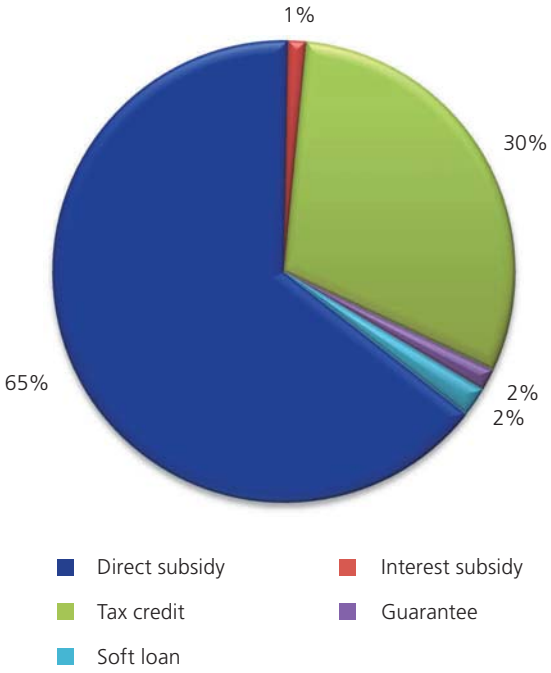
State aid in the Czech Republic according to the main objectives in 2012



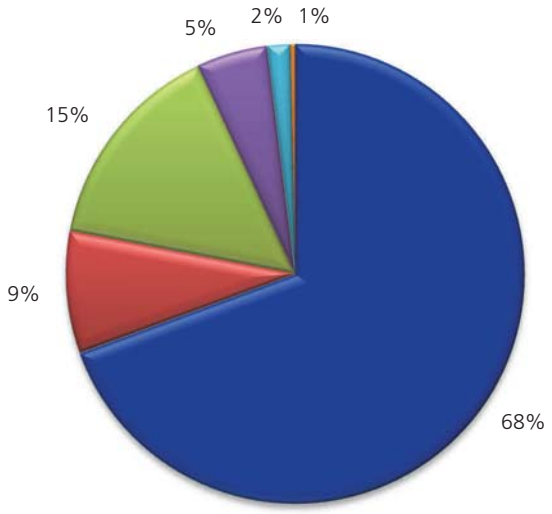
Public funds provided to the individual objectives in 2012



The tools of state aid most commonly used in measures in 2012



Selected state aid statistical data for 2013



Conference "State Aid on the Halfway to Modernization" (October 2013) - (from the left) Hynek Brom, Milan Bumbálek, Václav Hromada

Modernization of State Aid Rules

During 2014, the European Commission will complete a comprehensive reform of state aid rules, which should contribute to the promotion of sustainable growth in the internal market. The main objectives of modernization are:

- To support sustainable and intelligent growth on the competitive internal market,
- to focus the ex-ante supervision conducted by the Commission on cases with the most extensive impact on the internal market, and at the same time to intensify the cooperation of the Member States in the enforcement of staid aid rules, to rationalize and speed up decision-making procedures.

From the Commission's perspective, the modernization of state aid rules should strengthen budgetary discipline and improve economy in public finances The modernization of rules should enable the setting of priorities and a stricter control of state aid, with a significant effect in the market. In contrast, in cases with less impact on trade and competition, the process of granting state aid should be simplified and therefore also speeded up. Thanks to the new rules, compatible state aid should be targeted more at the removal of identified market failures and at the objectives of common interest that will least distort competition. By providing state aid, the aim of modernizing the rules is to stimulate innovation, environmental technologies, the development of human resources, to prevent environmental damage, and ultimately to encourage growth and employment and to strengthen the competitiveness of the European Union. State aid can contribute to economic growth only if used as a complement to private investment. Therefore, it should serve as a motivation for investment, to lead to the realization of other activities of undertakings that could not be realized without the provision of state aid, or which could be realized only to a limited extent.

Modernization also includes defining common principles for assessing the compatibility of state aid, revising instructions and comments on individual state aid categories, a more precise definition of state aid and amendments to procedural regulations.


VIKTORIA

6 Seat of the Office

The Czech Republic

The Czech Republic is situated in Central Europe. It became a subject of international law on 1 January 1993, in connection with the dissolution of Czechoslovakia. On 12 March 1999 the Czech Republic became a member of NATO, and on 1 May 2004 it entered the European Union. The Czech Republic is also a member of the United Nations, the Organization for Economic Cooperation and Development, the World Trade Organization, the International Monetary Fund, the World Bank, the Council of Europe, the Organization for Cooperation and Security in Europe, the EU Customs Union and other international structures.

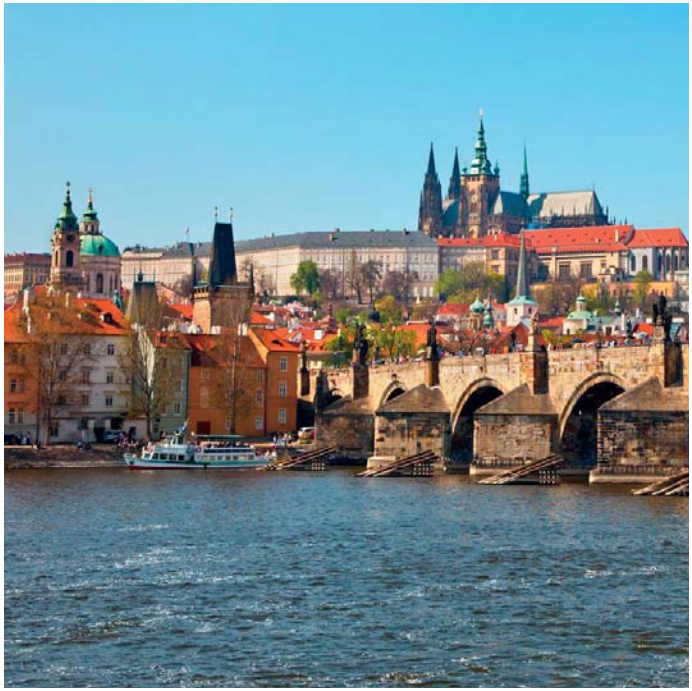
According to the economic, social and political indicators (such as GDP per capita, the human development index, the index of press freedom, the index of internet freedom from censorship) the Czech Republic belongs among the highly rated countries of the world. According to the World Bank, the Czech Republic is economically in the group of the 31 richest countries in the world with the highest financial income.

Today the Czech Republic has an area of 78,867 square kilometres. Administratively, the Czech Republic is divided into 14 autonomous regions. In 2012, about 10.5 million inhabitants were registered in the Czech Republic.

Prague

Prague is the capital of the Czech Republic. It is the seat of the President, the government and some central state authorities. Prague has developed into its current form over eleven centuries. As the historic capital of Bohemia, Prague was a seat of Czech princes and kings and Holy Roman Emperors. At present, it covers an area of almost 500 km^2 and has a population of over 1.2 million. According to Eurostat statistics, it is the sixth richest region in Europe.

Prague is widely considered one of the most beautiful cities in Europe. The historic centre of the town is a UNESCO World Heritage Site. In 2011, Prague ranked as the sixth most visited European city, and the 19th most visited in the world.



Brno

Photo Igor Šefr

By the number of its inhabitants, Brno is the second largest city in the Czech Republic. Within a radius of 120-200 km from Brno, there are important European metropolises: Prague, Vienna and Bratislava. This city of nearly 400 thousand inhabitants is situated at the confluence of the rivers Svratka and Svitava. Brno is the judiciary centre of the Czech Republic. It is the seat of the Constitutional Court, the Supreme Court, the Supreme Administrative Court and the Supreme State Prosecutor's Office. It is also the seat of state authorities with national supervisory powers. Besides the Office for the Protection of Competition, it is also the seat of the Ombudsman and the Czech Agriculture and Food Inspection Authority.

Many historical monuments attest to Brno's rich history. There is the jewel of modern architecture, the world famous functionalist Villa Tugendhat, the work of the German architect Ludwig Mies van der Rohe and a UNESCO World Heritage Site. The extensive exhibition grounds are also an important cultural monument. Since 1928, important international trade fairs and exhibitions have been organized there. The historic town centre has been declared an urban conservation area.

Villa Tugendhat (photo David Židlický)

Villa Tugendhat - interior (photo David Židlický)

Brno in the Photographs of the OPC Staff

Zelný trh Square (photo Lucie Kopřivová)

Capuchin Square (photo Tereza Kolářová)

St. James´ Square (photo Daniel Bartoň)

Veveří Castle (photo Michal Kučera)

Cathedral Petrov from the Capuchin Square (photo Michaela Klenková)

Náměstí Svobody Square (photo Aleš Špidla)

Spilberk Castle (photo Jiří Plachý)

Joštova Street (photo Jaroslav Pecina)

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