



# **Annual Report**

## **2005**

**Financial Arbiter of the Czech Republic**





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# Introductory Word by the Financial Arbiter of the CR

Another year in office of the Financial Arbiter elapsed and therefore this is the right time to inform you about the results of activities which me and my colleagues were performing throughout the year 2005.

Within the meaning of S. 21(1) of the Financial Arbiter Act (No. 229/2002 Coll.), as amended by later regulations, I present this, already third, Annual Report.

The year 2005 was the year in which the largest number of complaints so far were delivered in the 3 years in office of the Financial Arbiter. It was also a year which brought about several significant facts. And it is them, that I would like to mention in the introduction to this document.



Already in last year's annual report, it was stated that institutions falling under the authority of the Financial Arbiter which are especially banks, investment companies, loan and building societies, savings cooperatives, exchange offices or issuers of electronic payment instruments, started to take the establishment and the working of this body seriously. Last year, in even a larger scale than in the year 2004, I encountered a very positive feature which is that some of the above institutions satisfied the client in his demands even earlier than I issued a decision concerning the matter in the form of a finding. I am very glad that this trend continued even though I think that if the institution acted in the matter of the client's complaint with all its responsibility and seriousness before, certain cases would not have to appear as an item on the Financial Arbiter's agenda.

Again, I must underline that it is very significant that there is a body for out-of-court settlement of disputes and that the very existence of „someone“ or „something“ has a very educative effect on the institutions even though, so far, only in selected areas of financial services. Also the so-called preventive function works fully, i.e. the function of the indirect pressure on the institutions to act and behave to the client in such a way that the institution resolves a justified complaint filed by a client for his benefit even before the matter is decided by the Financial Arbiter. The clients of institutions thus have a good feeling that their banks or companies pay attention to them in case of an issue. The other party then „scores“ with the clients by maintaining an obliging approach to them about which the clients then like to inform their environment, especially their families and friends. Everybody should like such publicity, don't you think?

The other fact which started to appear in the year 2005 concerns the fact that an institution, after the ruling is made concerning the matter in a form of a finding and after its becoming effective, does compensate its client but later files a petition at a court by which it demands that the Financial Arbiter's finding is cancelled. However, institutions very often sue even their clients from whom they demand the funds to be returned for reasons of unsubstantiated enrichment. For the time being, it is not a frequent phenomenon, but it does exist.

Of course, in order to maintain the law in our country, it is certainly correct to have another, independent authority to assess the approach and the decision of the Financial Arbiter. However, if this phenomenon appeared more and more frequently, this might have a very adverse effect on the clients of the banks which then will prefer not to complain at the Financial Arbiter since they will fear further administrative acts in addition to how time consuming the whole dispute will be. Also the feelings of such a client are certainly not unimportant since he becomes the sued party for „committing something wrong“.

The Financial Arbiter has been appointed exactly to protect the rights and the interests protected by the law of a consumer of selected financial services against those who, from his point of view, violate these rights and interests. The Financial Arbiter is elected from persons who must have high expertise especially in the factual part, i.e. they have to know in much detail not only the legislation governing the given financial services but also how they are realized, how they work in real life. And this cannot be found not even in laws or other generally binding legal standards. Even the best creator of such legal regulations cannot go into such details because then the legislation would lose its meaning.

If the institution stipulates contractual conditions in respect of a client in such a way that the institution is basically legally covered against any potential act even if this is to the detriment of the consumer and he accepts the contract because he trusts „his bank“ then we cannot, in any way, speak about an ethic behaviour of the institution even though the right is on its side. It is because the clients of institutions are a contractual party even though they know precious little about the financial service. In short, the clients trust their banks and other institutions providing financial services. Therefore I think that institutions should, in case of a collision with their clients, approach their problems in a professional way. Personally, I still believe that the time will come when this be the case.

Another important fact was the development of an amendment of the Financial Arbiter Act which was prepared in order to remove some other unclear points in the interpretation of the act, namely in the area concerning the possibility to inform the public about which specific institutions violated, in the Financial Arbiter's opinion, their obligations ensuing from generally binding legal regulations or private law regulations governing the relations between an institution and its client. It is basically a breakthrough into the area of the Financial Arbiter's confidentiality. However, the parliament did not manage to pass the amendment by the end of the year 2005.

I would like to conclude by mentioning, very briefly, that in the year 2005, the cooperation of the Financial Arbiter with the members of the so-called FIN-NET (Cross-Border Out-of-Court Complaints Network for Financial Services) continued. In June 2005, we managed to organize, with the support of the European Commission members, a meeting of the FIN-NET countries in Prague. I personally value this very much and, from the international point of view, consider the fact that this meeting took place very important. In the course of the year 2005, all steps were concluded in order for the body operating in the area of the out-of-court settlement of disputes in the Czech Republic, i.e. the Financial Arbiter, to become a regular member of this international forum. But this is already the matter of the year 2006 when this happened.

I believe that before long also the citizens of the Czech Republic, as well as other clients of banks and other financial institutions on the territory of the Czech Republic, will have the opportunity to enjoy the extended protection of their rights and the interests protected by the law even in other areas of financial services as is the case in other member countries of the FIN-NET group.

May, 2006

***JUDr. Ing. Otakar Schlossberger***  
***Financial Arbiter***



# Introduction

The Financial Arbiter's Annual Report for the year 2005 is already the third report in the period of the existence of the still unique institute of consumer protection in the Czech Republic. The Financial Arbiter works as a special body responsible for the so-called out-of-court settlement of disputes that may arise between the providers of payment services and their clients or between the issuers and users of electronic payment instruments.

In accordance with the Financial Arbiter Act (No. 229/2002 Coll.) as amended (hereinafter referred to as the "FA Act") the Arbiter settled disputes that have arisen as of 1 January 2003, namely in the following areas:

- between entities that execute transfers of funds (hereinafter referred to as "Transfer Institutions") and their clients when executing the following :
  - transfers of funds pursuant to a special legal regulation<sup>1</sup>;
  - corrective settlement pursuant to a special legal regulation governing banks' activities<sup>2</sup>;
  - collection form of making payments on the territory of the Czech Republic,

if the amount which is the subject of dispute expressed in Euros does not exceed, as at the date when the petition is filed, the amount of CZK 50,000;

- between entities that issue electronic payment instruments (hereinafter referred to as the "Issuers of Electronic Payment Instruments") and the holder of electronic payment instruments when issuing and using electronic payment instruments pursuant to special legal regulation<sup>2</sup>.

The Financial Arbiter of the Czech Republic started the third year of his activities on 1 January 2005. In this year, of the existing operation of the Financial Arbiter's office further improved.

The Financial Arbiter's activities are fully in compliance not only with the law of the Czech Republic but with the law of the European Union as well<sup>3</sup>.

As of the date of the accession of the Czech Republic into the European Union, the Financial Arbiter's powers were extended to include settlement of disputes in the field of cross-border transfers in accordance with the Payment System Act (a cross-border transfer means a transfer of funds from one EU member state or a state that is part of the European Economic Area: i.e. EU member states together with Liechtenstein, Norway and Iceland into another member state in the domestic currency of any EU member state or a state that is part of the European Economic Area (hereinafter referred to as the "EEA") up to the amount of consideration amounting to EUR 50,000.

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<sup>1</sup> Act No. 124/2002 Coll., on transfers of funds, electronic payment instruments and payment systems (the Payment System Act);

<sup>2</sup> S. 20c of Act No. 21/1992 Coll., on banks, as amended by act No. 126/2002 Coll.;

<sup>3</sup> E.g. Directive of the European Communities No. 97/5/EC, on cross-border credit transfers, sets forth a speedy and effective out-of-court settlement of clients' disputes with institutions executing transfers."



# 1. Activities of the Arbiter's Office

In the year 2005, within the meaning of the FA Act, the position of the first Financial Arbiter of the Czech Republic continued to be held by JUDr. Ing. Otakar Schlossberger and his Deputy, JUDr. Petr Scholz.



JUDr. Ing. Otakar Schlossberger



JUDr. Petr Scholz

As in the previous years, all the material requirements, regular review and updating of IT technologies, the extending of the lease agreement with the firm providing the office premises for the performance of the position of the arbiter were provided by the Czech National Bank (hereinafter referred to only as CNB).

Address of the Arbiter's registered office: Washingtonova 25  
110 00 Prague 1

Contact: Tel.: 221 674 600  
Fax: 221 674 666  
e-mail: [arbitr@finarbitr.cz](mailto:arbitr@finarbitr.cz)  
<http://www.finarbitr.cz>

The authorized persons always tried, together with the Arbiter and his deputy, to meet as much as possible the petitioners' requests and to adjust the meeting time at the FA's office to the petitioners' satisfaction. Approximately one third of visits in person to the Arbiter's registered office took place outside the office hours, namely based on a prior arrangement with the petitioner. Not even this indicator has seen significant changes when compared with the previous year.

Set contact hours for the public were found compliant also in the year 2005.



## **2. Staffing and Administrative Provision of the Performance of the Arbiter's Work**

In the course of the year 2005, the number of employees of the Financial Arbiter's office remained the same as in the previous year.

In the year 2005, the fulfilment of the FA Act was ensured by the Arbiter, his Deputy and five CNB employees of whom three are specialists who were directly involved in investigation and settlement of disputes on the basis of filed petitions and two employees provide the administrative support.

In addition, in the course of the year 2005, the Financial Arbiter authorized in writing 10 other individuals who are not employees of the CNB to carry out investigations in accordance with the FA Act.

These authorized persons included three judicial experts in the field of graphology, a judicial expert in the field of economics, namely banking and insurance sectors, specialized in direct debit (domestic and foreign payment cards and cheques, international payment systems, computer processing, settlement and security and protective elements in payment card systems), two experts in the field of issuance and use of electronic payment instruments, four authorized persons specialized in the area of the system of payment and an attorney.

The Arbiter regularly checked petitions filed by petitioners that were in process and consulted them and the authorized persons regularly informed the Arbiter about the stage of the processing of individual cases.



### 3. Budget

The agreement on the administrative securing of the Arbiter's work, including the reimbursement of costs relating to his activities concluded in the year 2003 between the Financial Arbiter and the CNB, was complied with also in the year 2005.

The Financial Arbiter may assess the way this agreement was complied with in a positive way also in respect of the year 2005. On the part of the CNB, the financial support was extended to create a supporting record programme required for the monitoring of both procedural time limits and the whole chronology of individual disputes.

During the period under review, there continued to be a very narrow communication between the Financial Arbiter and the CNB through the previously appointed administrator and through an appointed CNB employee who provided information about the drawing on the items from the FA's budget for the year 2005 on a monthly basis.

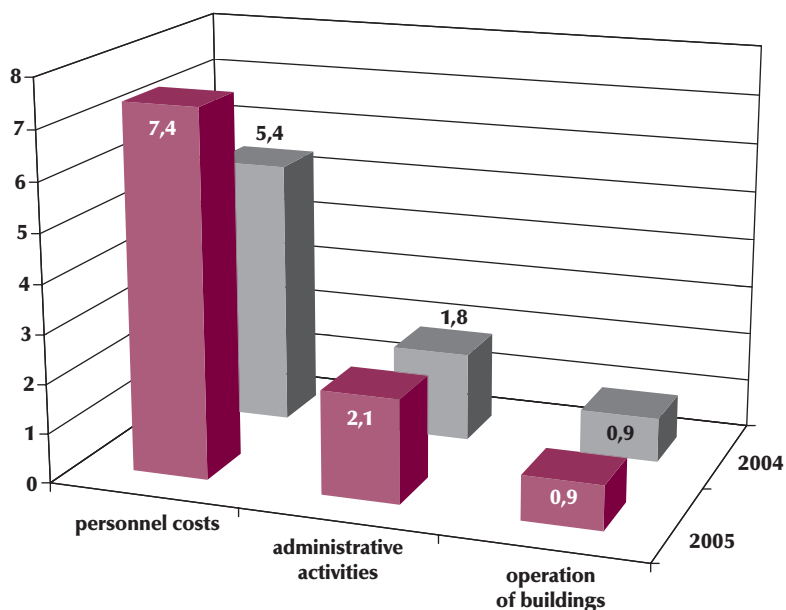
The overview of costs of the performance of the Financial Arbiter's activities in the year 2005, presented in the below diagram and in Appendix No. 1, is tied with the CNB's budget. Costs of the performance of the Financial Arbiter's activities thus are not a separate state budget category and thus the survey does not have its usual structure.

Costs of the activities of the Arbiter's office in the period from January to December 2005 represented the total amount of CZK 10.4 million. It follows from the aforementioned overview of costs that out of the overall costs, wages, salaries and other social security costs accounted for the total of CZK 7.4 million, administrative costs for CZK 2.1 million and the operation of buildings and equipment for CZK 0.9 million.

Compared with the previous period, the overall costs increased by CZK 2.3 million, of which personnel costs accounted for an increase by CZK 2.0 million due to the percentage increase in wages of the CNB's employees and also due to the adjustment of salaries of elected persons. Costs of administrative activities increased by CZK 0.3 million due to a larger number of processed cases. The costs of the operation of buildings and equipment remained on the same level as in the previous year.

CNB's income generated from the performance of the Arbiter's work consisted, as in the previous period, only of the income from imposed penalties (see below). During the period under review, penalties in the amount of approx. CZK 0.9 million were imposed.

**Diagram No. 1**  
**Comparison of the drawn funds in the period 2004-2005**





## 4. The Arbiter's Notification Activities and the Duty of Institutions to Notify

In the year 2005, the Financial Arbiter carried out the duty to notify, as per S. 21 of the FA Act and, newly, also as per the provisions of S. 5 of the FA Act.

In January 2005, the Financial Arbiter held another press conference at which representatives of approached media were present. The press conference was co-organized by the CNB, its cooperation consisted namely in the leasing of the premises including the securing of the required technical equipment.

In March 2005, the Arbiter presented newly the report on his activities in the year 2004 to the lower House of the Parliament, in compliance with provisions of S. 5 of the Financial Arbiter Act. This report was discussed in the Standing Commission for Banking of the lower House of the Parliament. In the month of April, the Arbiter personally defended this report in the lower House of the Parliament of the Czech Republic.

In compliance with the FA Act<sup>4</sup>, the Arbiter presented, in June 2005, the annual report on his activities in the year 2004. This annual report was available both in the printed form and on a CD. At the same time, it was publicly available on the Financial Arbiter's web pages ([www.finarbitr.cz](http://www.finarbitr.cz)).

The Financial Arbiter's web pages were regularly updated and amended in the course of the year 2005. These pages provide basic information about the Arbiter's and his Deputy's roles and powers together with conditions for opening proceedings designed especially for the petitioners. In addition to other information, there is also available a form for filing a petition in the PDF format and a form to file a petition to open proceedings before the Financial Arbiter in an electronic form. Also the examples of disputes that are/are not within the Arbiter's powers are being updated. The Arbiter also discloses on his web pages some specific findings and decisions, however, without providing the identification data of both the petitioners and the institutions.

Also the actual legal standards related to the Arbiter's activities are made public on the web pages. At the same time, there are references to web pages of central banks of the EU member states and countries that are part of the EEA and similar institutes in the EU member states (see below).

In the course of the year 2005, the Arbiter was also asked by media representatives to provide information and expert consultations and opinions concerning his powers and activities in the form of press interviews, TV and radio appearances. His opinions were several times published in expert and daily press. It must be said that, when compared with the previous period, these reports were objective and unbiased. The Arbiter answered questions also through on-line discussions. An employee, authorized by the Arbiter, regularly monitors and archives the above reports and information.

During the period under review, the Arbiter was invited to a number of conferences and workshops organized especially by the Consumer Protection Association of the CR, the Association for Banking Cards, renowned education agencies or directly by institutions upon their own requests. The Arbiter presented his activities several times in a form of lectures at various conferences.

With regard to the agreement from the previous period, the Arbiter performed, in the year 2005, the training for the employees of civic consultants (members of the Civic Consultants Association) which received a very favourable response. The number of queries posed by these civic consultation centres significantly increased after the training.

During the period under review, the Arbiter notified bodies that perform supervision over the institutions about ascertained facts which he learned when performing his work. The representatives of the CNB and the Financial and Analytical Section of the Ministry of Finance of the CR were informed. In justified cases, the Financial Arbiter also notified directly the relevant institution.

Pursuant to the FA Act, an authorized person continued to monitor whether the duty of institutions to notify was fulfilled<sup>5</sup>.

In compliance with the FA Act, all Transfer Institutions and Issuers of Electronic Payment Instruments are obliged to notify the Arbiter, as of the date when they commence their activities, of their business name, as well as to identify a person au-

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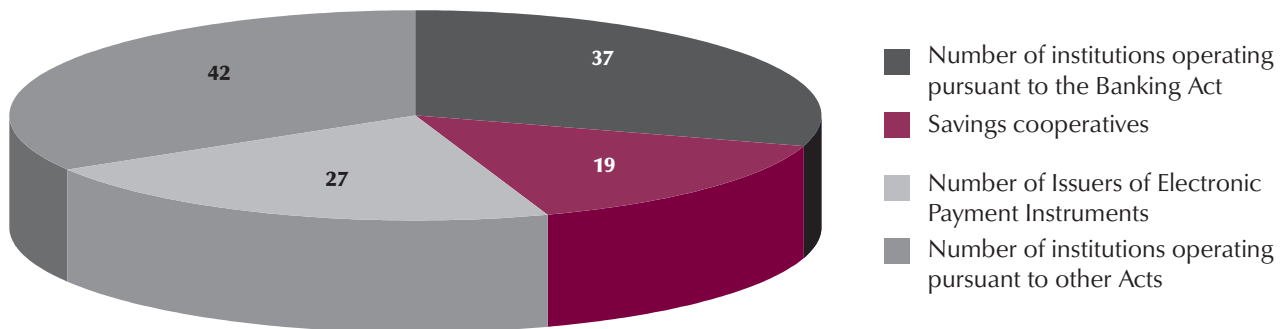
<sup>4</sup>S. 21 of Act No. 229/2002 Coll. on the financial arbiter

<sup>5</sup>S. 19 of Act No. 229/2002 Coll. on the financial arbiter

thorized to communicate with the Financial Arbiter or to provide other statutory data. A list of these institutions, updated on a regular basis, is presented on the Arbiter's web pages (see diagram No. 2). The pages also contain a model form for the fulfilment of the duty of institutions to notify and also the information for the institutions about how to meet their duty to notify.

**Diagram No. 2**

**Structure and number of institutions that operate in the CR and have the duty to notify as at 31 December 2005**



A total number of 7 penalties were imposed by the Arbiter in 2005 for a failure to fulfil the duty to notify amounting to the total amount of CZK 650,000. Further information about the imposed penalties is presented in Section 5.1 of this Report. The penalties were collected and exacted by the CNB upon the Arbiter's decision to impose a penalty <sup>6</sup>.

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<sup>6</sup> S. 23 of Act No. 229/2002 Coll. on the financial arbiter



## 5. Material Activities

### 5.1. Principles of Proceedings before the Financial Arbiter

Proceedings before the Arbiter are governed not only by the FA Act but also by the Rules of Administrative Procedure (Act No. 71/1967 Coll.).

Proceedings before the Financial Arbiter did not have to be changed as a result of legislative changes during the period under review. The principles of solutions of disputes before the Financial Arbiter thus remained almost unchanged.

The basic principle of proceedings before the Financial Arbiter was already described in the previous report, therefore the attention will be paid in this report only to new facts which are related to the described issues.

#### **Opening of proceedings**

Proceedings are opened on the day when the petition to open proceedings is delivered to the Financial Arbiter whether by post or electronically.

In case that the petition does not include obligatory requirements, the Arbiter opens the dispute, but at the same time asks the petitioner to provide the necessary additional information or documents.

The ratio of petitions sent by post, electronically or delivered in person remained the same when compared with the previous period.

In the year 2005, the deadline for the institution to provide its comments was, in compliance with the amendment of the FA Act (Act 558/2004 Coll.), shortened from 30 to 15 days. However, at an institution's request, even this deadline could have been extended by the Arbiter in justified cases.

#### **Course of proceedings**

The same as in the previous period, the Arbiter asked institutions even in the year 2005 to cooperate and provide further information in certain justified cases. In compliance with the FA Act, several petitioners were also asked to come to the Arbiter's office to provide oral explanation in order to clarify facts required for a finding to be issued.

In this period under review, the Arbiter asked, in justified cases, the petitioners and institutions to submit other evidence (e.g. an original of a document, an original of a payment card or a video recording).

In compliance with the act<sup>7</sup> the Arbiter ensured, in part of the disputes, an expert opinion to be prepared (based on an authorization) by judicial experts in the field of graphology or an opinion to be provided by an expert in the area of issuance and use of an electronic payment instrument.

#### **Discontinuance of proceedings**

In the year 2005, the Financial Arbiter stopped a larger number of proceedings (when compared with the previous period), namely based on an application for a withdrawal sent by the petitioner. The petitioners usually took their petition back since the given institution provided the settlement (for details see part 5.2).

In the period under review, the Arbiter was forced to discontinue the proceedings due to the petitioner's failure to cooperate only in one instance.

#### **Issuance of a finding**

The Financial Arbiter makes decisions on the merits, i.e. issues a finding which must contain a statement, reasoning and advice on objections. Provided that the finding was issued in favour of the petitioner, the statement also included a deadline by which actions leading to a financial settlement with the petitioner were to be made or damages were to be granted by the institution to the petitioner for a damage caused by the institution.

Even in this period under review, the Arbiter, when issuing the finding, cooperated very closely directly with an authorized CNB employee or another person authorized to settle the case. More details about the issued findings are set out in section 5.2.

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<sup>7</sup> provisions of S. 12 (7) of Act No. 229/2002 Coll. on the financial arbiter

## Objections

After the issuance of the finding, the institution or the petitioner may file objections which have a dilatory effect within the statutory deadline.

The Arbiter always reviewed the contested findings and subsequently issued a decision on the objections or rather the decision to stop the proceedings. Details about the number and subject matter of the objections received in the year 2005 are listed under section 5.2.

## Deadline for the issuance of legal decision

The average period required to issue the finding was, in the year 2005, identical with the previous period: i.e. almost 100 days. However, this period also includes the total period from the opening of the proceedings until the issuance of the finding and then also the potential issuance of objections against the finding. This period also includes the statutory deadlines for appropriate decisions to become legally effective.

## Penalties

In the year 2005, the Arbiter imposed the total number of 26 penalties concerning disputes in accordance with the FA Act (S. 23(2)) in the aggregate amount of CZK 293,457.

The Arbiter must impose a penalty to the institution if it breached, according to a legal finding, its duties pursuant to a special legal regulation. The amount of the imposed penalty is stipulated by the law. The Arbiter shall impose a penalty amounting to 10% of the disputed amount, however, at least to CZK 10,000.

In the year 2005, unlike the previous year, the Arbiter did not impose any penalty for an institution's failure to fulfil its duty in conjunction with a dispute.

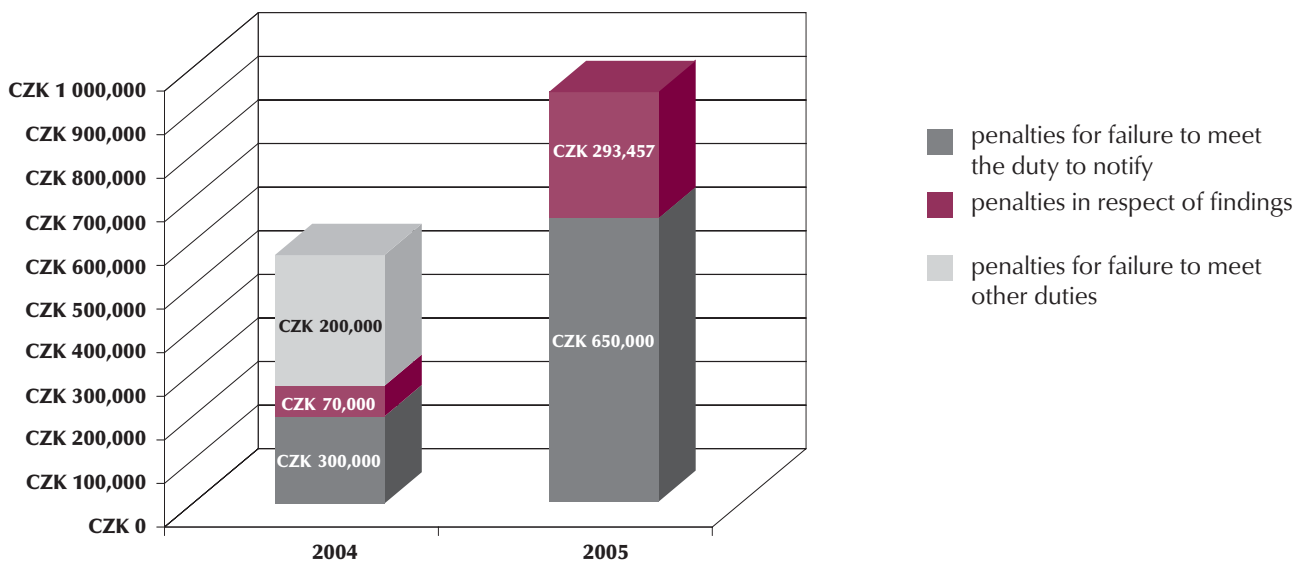
The Financial Arbiter imposed seven penalties in the aggregate amount of CZK 650,000 related to a failure to fulfil the duty of an institution to notify pursuant to S. 19 of the FA Act (see section 4).

When compared with the year 2004, by 21 penalties more were issued in the year 2005, which represents an increase by CZK 373,457.

The following diagrams represent the composition of the penalties and their amounts in the years 2004 and 2005.

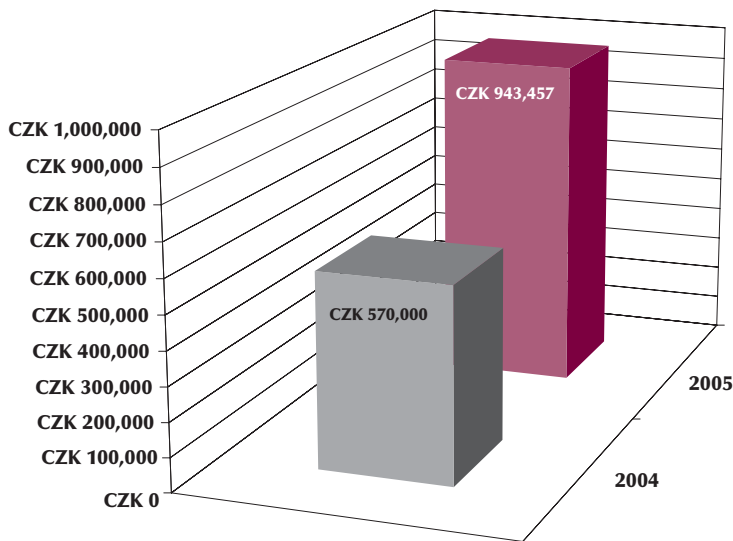
### **Diagram No. 3**

#### **Comparison of composition of penalties in the years 2004 and 2005**



**Diagram No. 4**

Comparison of the amount of penalties in the years 2004 and 2005



The Arbiter also monitors, within its files, the structure of institutions, which the petitioner's petition to open proceedings concerned.

## 5.2. General Information about Settled Cases

During the period under review, i.e. January – December 2005, the Arbiter settled 160 cases out of the overall 310 sent suggestions and petitions.

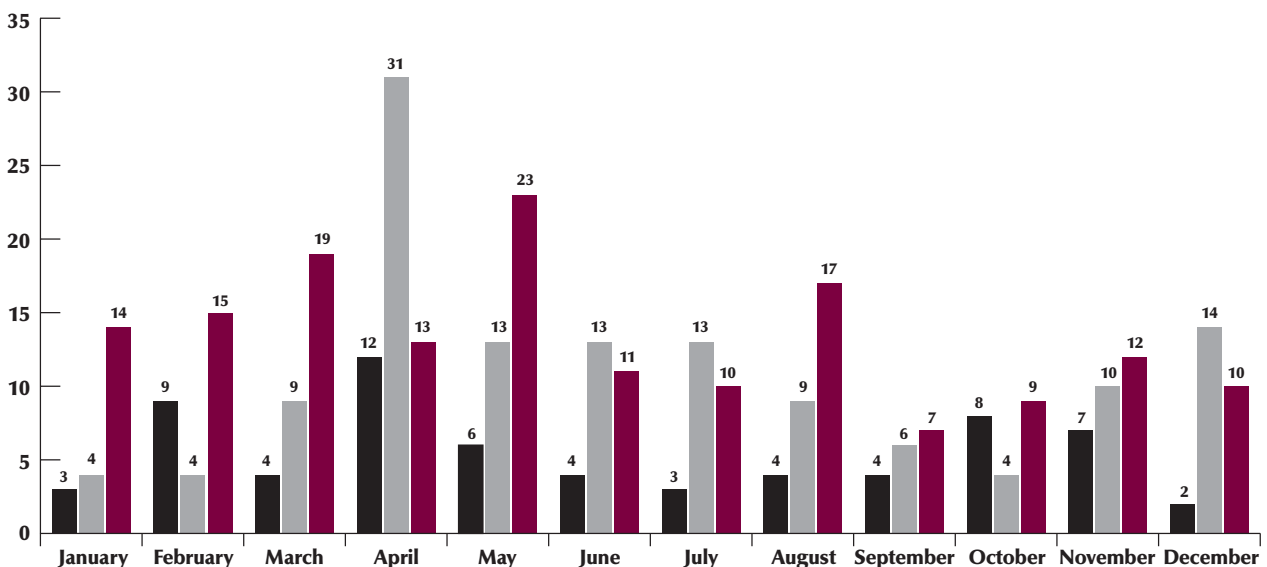
During this period under review, also more than 261 telephone questions were answered as well as more than three hundred queries sent by e-mail.

The number of clients' visits in person almost doubled when compared with the previous period: approximately 25 clients a month visited the Financial Arbiter's registered office.

Roughly two thirds of the clients requested advice concerning the potential opening of proceedings before the Arbiter. In visits which concerned disputes within the authority of the Financial Arbiter, there was a significant increase when compared with the previous year. The visitors, whose cases were not within the Financial Arbiter's authority, were always provided with the basic guidance or opinions of the expert staff of the office.

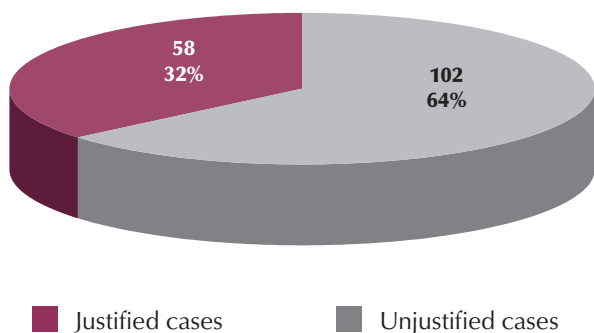
**Diagram No. 5**

Number of received petitions to open proceedings by months in the period of 2003-2005



From the above diagram, the trend in the increase in the filed petitions to commence the proceedings is clear in the course of the first half-year followed by a decrease in the second half of the year 2005. A higher number of received petitions may be explained by a continuously larger circle of people who were informed about the Arbiter's activities in the field of the consumer protection.

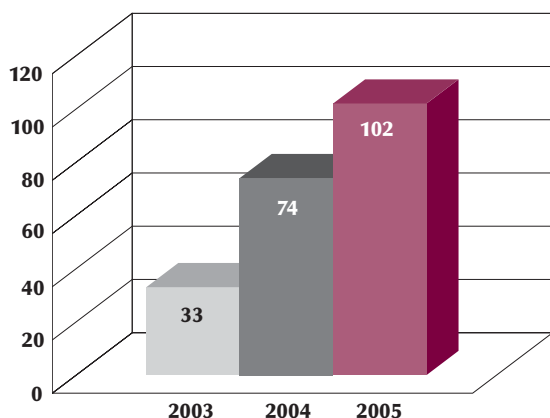
**Diagram No. 6**  
Number of settled cases in 2005



It is clear from Diagram No. 6 that out of 160 opened disputes (in the year 2004 there were 130 of them) the total number of 102 cases were justified and 58 unjustified. Given in per cent, this is a witness to the fact that 64 % (in the year 2004 there were 57%) of cases opened by the Financial Arbiter were justified and 36 % (43% in the year 2004) of petitions were found to be unjustified.

In the year 2005, 30 petitions more were filed than in the year 2004. Expressed in per cent, the number of cases increased by 23%. From this increase, we may arrive at a conclusion that consumers are more and more aware of the existence of the Financial Arbiter.

**Diagram No. 7**  
Comparison of the number of justified cases in 2003-2005



The above diagram states that the number of justified cases has, from the commencement of the Arbiter's activities in the year 2003 to the end of the period under review, an increasing tendency. Expressed in per cent, the number of cases in the year 2005 increased, when compared with the year 2003, by 200%.

**Diagram No. 8**  
Comparison of the number of justified cases by year quarters in the period of 2003-2005

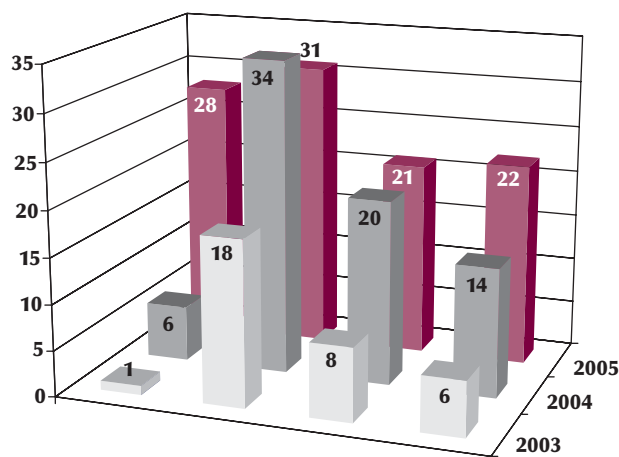


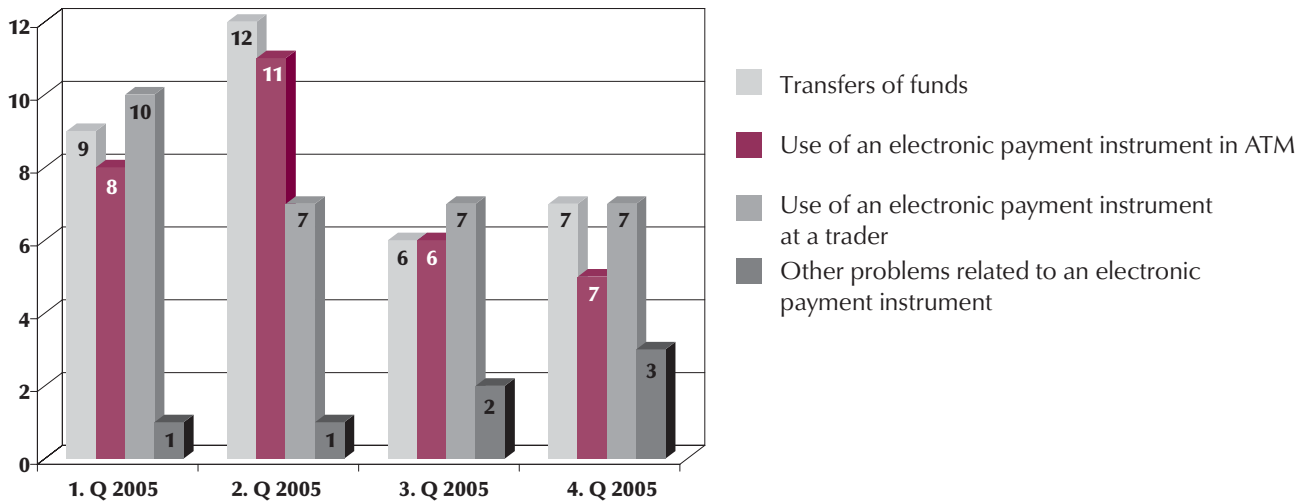
Diagram No. 8 illustrates the distribution of received justified cases by individual year quarters in the period of 2003 through 2005.

The following graphic depiction then shows in what fields and with what frequency petitioners filed their petitions to open proceedings in the year 2005.

The problems involved mostly the use of an electronic payment instrument in an automated teller machine (ATM) (i.e. use of a payment card in an automated teller machine for money withdrawal), use of this instrument at a trader when purchasing goods or services and problems related to making transfers pursuant to a special legal regulation. Other defects related to the use of an electronic payment instrument concerned e.g. the quality of this instrument, use of the Internet, etc.

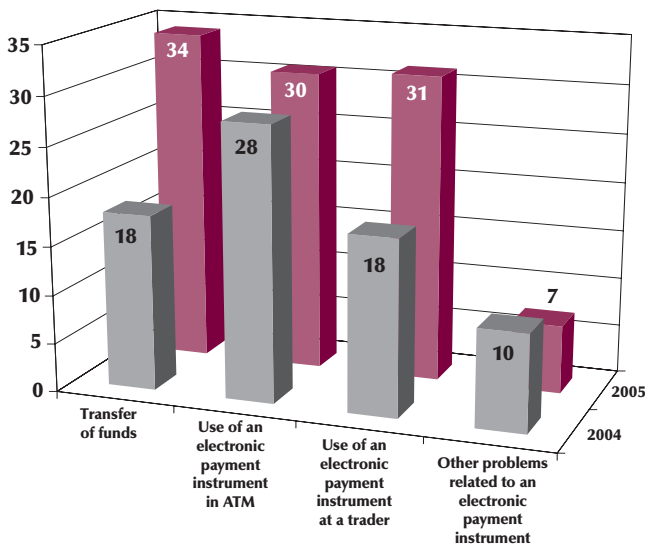
**Diagram No. 9**

Number of settled justified cases in 2005 according to the fields of dispute



**Diagram No. 10**

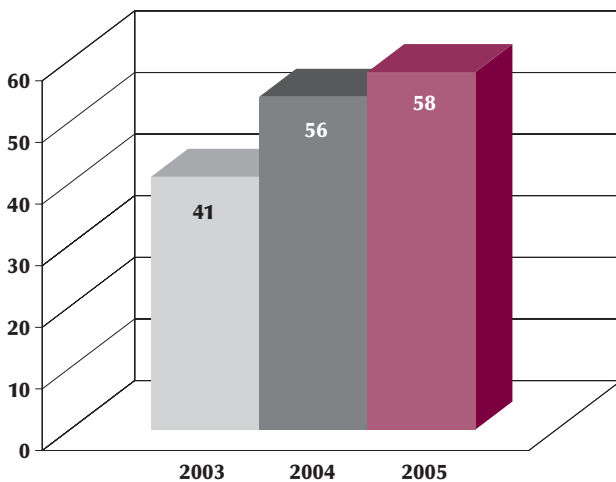
Comparison of the number of justified cases in 2004 and 2005 according to the fields of dispute



Also this diagram No. 10 illustrates the distribution of received justified cases by individual fields of dispute according to year quarters in the period of 2003 through 2005.

**Diagram No. 11**

Comparison of the number of unjustified cases in 2003-2005

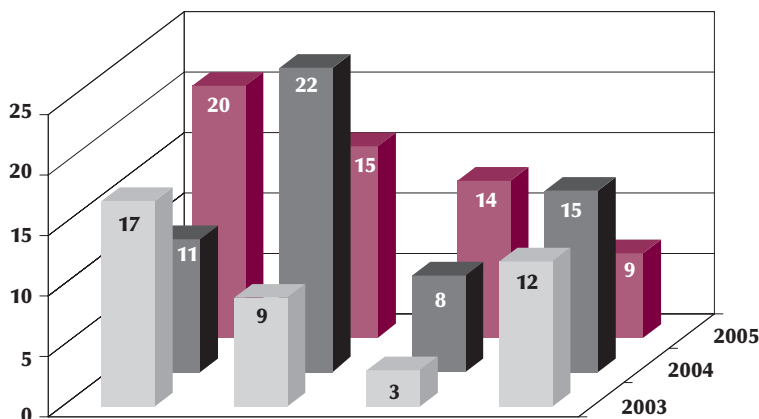


Based on Diagram No. 11 it may be said that the number of unjustified petitions in 2005 was higher when compared with the previous period by only 2 petitions which represents approximately an increase of 5%.

Another, below diagram provides a quarterly comparison of received unjustified cases in the period 2003-2005.

**Diagram No. 12**

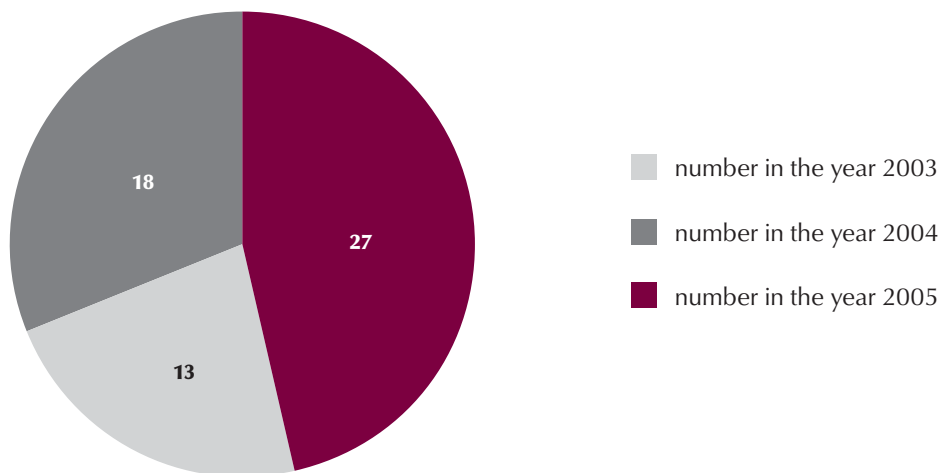
**Comparison of the number of unjustified cases by year quarters in the period of 2003-2005**



During the period under review, out of the total number of 102 justified and opened disputes, 27 disputes were discontinued on the basis of the petitioner's request to withdraw the petition.

**Diagram No. 13**

**Comparison of the number of withdrawn petitions in 2003-2004**



As already mentioned in the annual report for the year 2004, from the above data it is clear that the existence of the Financial Arbiter in the Czech Republic fulfilled, in the year 2005, the preventive function even more significantly than in the previous years. The result of this was the fact that the institution compensated the client even earlier than the Financial Arbiter issued a decision concerning the matter in the form of a finding.

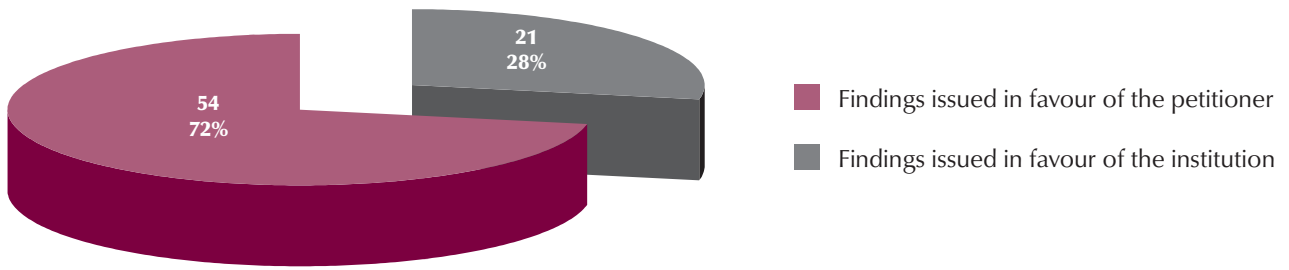
Based on the information which the Arbiter received in the previous period, he must reiterate that there still are institutions that are not interested in a friendly settlement of a dispute with their clients.

The increasing number of court disputes (about which the Arbiter was informed) whereby the institutions require the funds to be returned by their clients/petitioners in the court including the requirement that the costs of the court proceedings are compensated to them, are indisputable evidence of this. The Arbiter continues to hold the opinion which he publicly presents that this fact may be considered a form of pressure exerted by some institutions on the petitioner not to file petitions for proceedings before the Financial Arbiter to be opened.

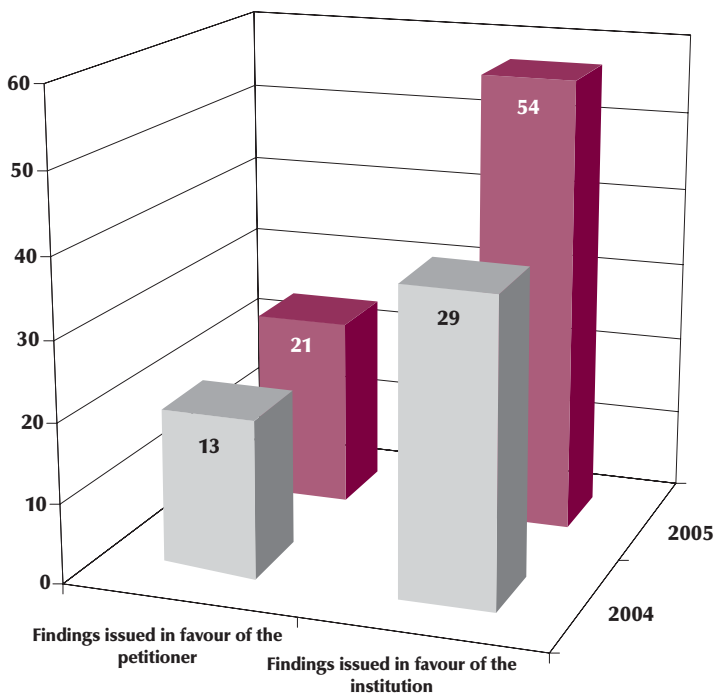
In the year 2005, proportionately to the increasing number of discussed cases, also the number of issued findings increased which is, when split into findings issued in favour of the institution or in favour of the petitioner, set out in the following diagram No. 14.

In the following diagram No. 15, the comparison of the number of legally effective issued findings is provided during the period under review: 2004 – 2005.

**Diagram No. 14**  
**Number of issued findings legally effective in 2005**



**Diagram No. 15**  
**Comparison of the number of issued findings legally effective in the period of 2004/5**

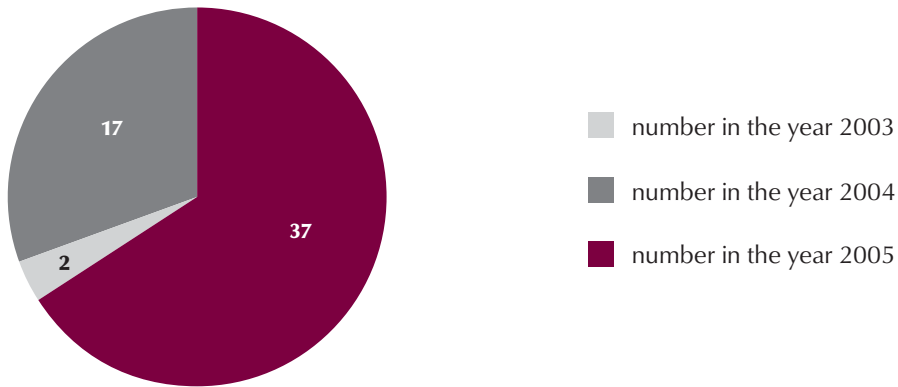


During the period under review, together with the increased number of issued findings the number of received objections against the Arbiter’s findings rose as well. The below diagram shows the increasing trend in the received objections in the period of years 2003 – 2005.

The comparison of the number of received objections with the number of issued findings in the year 2005 (75 issued findings) shows that in this period almost every other finding was contested using a regular remedial measure. The same situation existed in the year 2004.

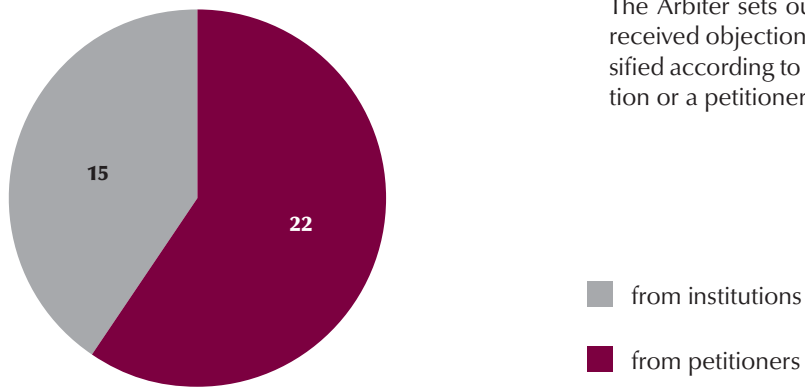
**Diagram No. 16**

Comparison of the number of objections against issued findings in 2003–2005



**Diagram No. 17**

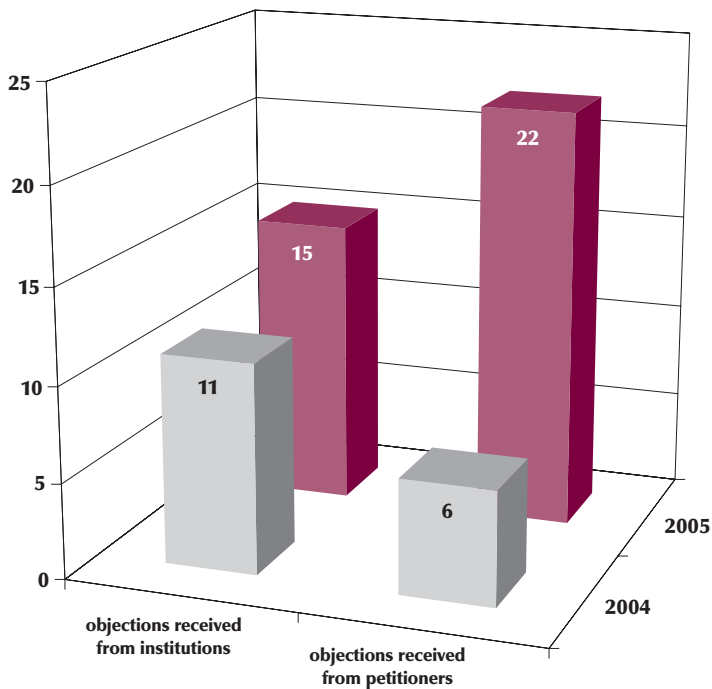
Composition of objections received in respect of issued findings in 2005



The Arbiter sets out, in diagram No. 17, the composition of the received objections during the period under review, namely classified according to whether the objections were filed by an institution or a petitioner.

**Diagram No. 18**

Comparison of the number of received objections in the years 2004 through 2005



In the below diagram, the comparison of the number of received objections is set out from the point of view of the entity which filed the objections – whether it was an institution or a petitioner.

## 5.3. Description of Selected Heard Cases

In compliance with the Act<sup>8</sup>, even in this annual report, the Financial Arbiter provides a description of selected heard disputes which are divided into individual areas:

A. Area of transfers of funds pursuant to S. 1(1)(a) of the FA Act

B. Area of use of electronic payment instruments pursuant to S. 1(1b) of the FA Act.

### A. Examples of disputes in the area of Transfers of Funds

#### Finding

The Financial Arbiter of the Czech Republic decided, in compliance with the provisions of S. 15 of Act No. 229/2002 Coll. on the Financial Arbiter as amended, in the dispute of petitioner N., with the registered office at ..... against institution Q. with the registered office at ...., about the returning of the amount of the difference between the fee of CZK 225 for a cross-border transfer and a fee for the corresponding transfer in EUR performed inside an EU member state

#### as follows:

N's petition for the amount of the difference between the fee of CZK 225 for a cross-border transfer and a fee for the corresponding transfer in EUR performed inside an EU member state is dismissed.

#### Reasoning:

By her petition of 29 September 2005, the petitioner claimed from the institution the returning of the difference between the fee of CZK 225 for a cross-border transfer which was charged to the debit of the petitioner's account No. 123456789/111 denominated in CZK and a fee for the corresponding transfer in EUR performed inside an EU member state. The petitioner justified her petition by the fact that the institution, even after the Czech Republic joined the European Union, with which, as from 1 May 2004, a direct effect of the regulation of the European Parliament and of the Council (EC) No. 2560/2001 on cross-border transfers in EUR (hereinafter referred to only as the „Regulation“) is related, subjects the payments coming to the account of the petitioner in EUR to a higher amount of fee than in case of normal transfers, specifically to the amount of CZK 225 for the received payment although the requirements determined by the above regulation are met, especially the setting out of the so-called IBAN (international bank account number). The petitioner is of the opinion that this approach of the institution is contrary to S. 3 (2) of the above regulation since it deducted from her account the amount of CZK 225 as a fee for the received cross-border payment in EUR on 3 May 2005 (consideration in the amount of CZK 33,210.01). The petitioner's claim in respect of the amount of the fee was dismissed by the institution.

The institution in its comment suggests to dismiss the petitioner's move since the regulation which became part of the Czech legislation stipulates rules concerning the cross-border transfers in EUR in order to ensure that the fees for cross-border payments are the same as the fees for the payments in EUR inside EU member states. The institution further sets out that the cross-border transfer is understood to mean a transfer of funds from one EU member state or a state that is part of the European Economic Area into another European Union member state or a state that is part of the European Economic Area in the domestic currency of any EU member state or a state that is part of the European Economic Area up to the amount of consideration of EUR 50,000 (or rather EUR 12,500 until 1 January 2006).

From the evidence presented by the institution it ensues that the Czech National Bank in its viewpoint Ref. No. 2004/1356/320 of 18 February 2004 points out that the fees which are the subject matter of the above regulation have no relation to the fees within the domestic crown system of payment.

Further, it ensued from the comments provided by the institution, that the institution charges for payments in EUR to the EU countries and to the countries of the European Economic Area the same fees as for the payments in EUR to other banks in the CR (payments among banks in the CR in EUR are carried out as foreign payments).

Based on the evidencing, the Financial Arbiter arrived at a conclusion that the petition is unsubstantiated since it failed to be proved that the institution breached the provisions of S. 3 (2) of the regulation of the European Parliament and the Council (EC) No. 2560/2001, on cross-border payments in EUR.

Therefore, the Financial Arbiter decided as mentioned within the wording of this finding.

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<sup>8</sup> provisions of S. 21 (1) of Act No. 229/2002 Coll. on the financial arbiter

**Advice:**

Justified objections against this finding made in writing may be filed within 15 days of its delivery to the Financial Arbiter of the CR.

It is possible to give up the right to raise objections.

Submitted objections have a suspensive effect.

Prague, 17 October 2005

*JUDr. Ing. Otakar Schlossberger, signed  
Financial Arbiter*

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**Decision**

The Financial Arbiter of the Czech Republic decided, in compliance with the provisions of S. 16 of Act No. 229/2002 Coll. on the Financial Arbiter as amended by later regulations, in the matter consisting in the objections of the petitioner N., with the registered office at ..... against the finding of the Financial Arbiter issued on 17 October 2005 under the registration number X/2005 by which the petition against institution Q. with the registered office at ...., about the returning of the amount of the difference between the fee of CZK 225 for a cross-border transfer and a fee for the corresponding transfer in EUR performed inside an EU member state, was dismissed

**as follows:**

The finding of the Financial Arbiter of the Czech Republic of 17 October 2005, registration number X/2005 is hereby confirmed.

**Reasoning:**

By the above finding, petitioner N's petition against institution Q for the returning of the amount of the difference between the fee of CZK 225 for a cross-border transfer and a fee for the corresponding transfer in EUR performed inside an EU member state was dismissed.

The petitioner filed objections against this finding within the statutory time limit.

In her objections, the petitioner states that she does not know why the fees charged for domestic transfers in EUR should not be the identical item on the tariff of fees of the institution as domestic transfers in crowns. In the tariff of fees of the institution, an item representing a fee for domestic transfers in EUR is not included. The petitioner refuses the proposition that the payments among banks in the CR in EUR should be made as so-called foreign payments since from the conceptual point of view they are domestic payments.

Further, the petitioner, in her objections, deems that the institution would be entitled to subject the payment to fees only in the amount which is equal to the fee for the domestic payment in EUR. The fee for „domestic payments in EUR“, however, is not included in the institution's tariff of fees and the institution thus does not have a right to charge it. The same then must apply to the so-called cross-border transfers within the meaning of S. 3 (2) of the regulation of the European Parliament and the Council (EC) No. 2560/2001 since it is not permissible for the institution to charge a non-existing fee.

The Financial Arbiter assessed the challenged finding to its full extent based on the filed objections and he did not identify himself with the petitioner's objections for the following reasons:

Payments made between banks on the territory of the Czech Republic are governed by decree No. 62/2004 Coll. by which the manner of performing the system of payment between banks, settlement on accounts in banks and technical procedures of banks when making corrective settlement are stipulated. Under S. 1 of this decree it is stipulated that this decree governs the manner of performing the system of payment on the territory of the Czech Republic in the Czech currency. Payments in a foreign currency, i.e. in EUR, on the territory of the Czech Republic are made through correspondent banks, i.e. within the framework of the foreign system of payment. Therefore, the Financial Arbiter cannot agree with the view of the petitioner that the payments in EUR on the territory of the Czech Republic are conceptually the same as domestic payments.

The Financial Arbiter states that the above facts are not clear to the clients of the institution from its tariff of fees where the comment is missing that fees included for foreign payments are related also to the payments in EUR within the Czech Republic. However, this does not change anything in respect of the fact that the institution, by its act, did not breach the provisions of S. 3 (2) of the regulation of the European Parliament and the Council (EC) No. 2560/2001 on cross-border payments in EUR.

Any facts set out in this decision, including those mentioned in the contested finding, led the Financial Arbiter to confirming the finding of 17 October 2005, registration number X/2005 contested by the petitioner.

Therefore, the Financial Arbiter decided as mentioned within the wording of this decision.

The decision concerning the objections is final.

Prague, 2 December 2005

*JUDr. Ing. Otakar Schlossberger, signed  
Financial Arbiter*

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#### **Finding**

The Financial Arbiter of the Czech Republic decided, in compliance with the provisions of S. 15 of Act No. 229/2002 Coll. on the Financial Arbiter, in the dispute of the petitioner, Mr. Norbert, with the permanent residence at K. against institution B., about the returning of withdrawn funds amounting to CZK 743,000.

#### **as follows:**

Institution B. is obliged to return to the petitioner withdrawn funds in the amount of CZK 300,000 with 2% interest on late payment p.a. commencing on 14 November 2003 until payment and in the amount of CZK 443,000 with 2% interest on late payment p.a. commencing on 20 November 2003 until payment, all that within 15 days after this finding becomes legally effective.

#### **Reasoning:**

The petitioner, Mr. Norbert, in his petition of 26 May 2005, claimed from the institution to return the withdrawn funds amounting to the total of CZK 743,000 in conjunction with unauthorized transfers of funds accounted for by the institution.

The petitioner is the holder of account No. 111111111/XXXX maintained by the institution or rather its branch in K. and he justifies his petition by stating that, while he was hospitalized in the Hospital and polyclinics in K., the institution performed two transfers of funds from his account based on payment orders submitted in two days, namely on 13 November 2003 amounting to CZK 300,000 and on 19 November 2003 amounting to CZK 443,000, which payment orders he did not initiate. The evidence, account statement in respect of account No. 111111111/XXXX for the period from 1 November to 30 November 2003 was presented by the petitioner in an appendix to the petition.

In his petition, the petitioner provides details of his health condition, in the appendix to the petition he provided medical reports, in the text of the petition, in conjunction with this, he states that he was accepted at the hospital on 8 October 2003, on 11 October of the same year he was operated and 3 days afterwards he became completely paralyzed. This situation lasted until May 2004 and only after that his health condition started to gradually improve. The petitioner states to have been released from the hospital on 10 May 2005.

The petitioner states that due to the above described health condition he could not sign payment orders presented to the institution on 13 November 2003 and on 19 November 2003 and states that these were, without him knowing about it, presented by his former business partner, Mr. Martin. The petitioner notes that Mr. Martin is currently subject to criminal prosecution because of a number of frauds.

The petitioner states in his petition that in the period from October 2004, during the permitted outings, he several times had meetings at the institution's branch claiming the accounted for transfers of financial amounts in the total amount of CZK 743,000 with a result whereby the institution considered the transfers accounted for the benefit of the third party who presented the payments orders authorized, as the bank communicated to the petitioner, with the signature being absolutely different from the signature specimen. The bank communicated to the petitioner that it performed the verification of the order by the means of a mobile phone. The petitioner presented, as evidence, the minutes of the communication of 20 April 2005.

The petitioner denies in his petition both his signatures on the payment orders presented to the bank on 13 November 2003 and on 19 November 2003 and the telephone consent with the transfers of amounts of CZK 300,000 and CZK 443,000. The petitioner repeatedly substantiates his petition by stating that neither his then health condition nor the doctors could not make such a procedure possible.

The petitioner demurs at the bank's saying that the procedure described by him is considered by the institution legal and in compliance with the concluded contract on maintenance of the current account.

The Financial Arbiter asked the institution to provide its comments by a separate letter sent on 26 May 2005. The institution in its comments stated and confirmed that the petitioner is a client of its branch at K., he is the holder of account No. 1111111111/XXXX, namely based on a contract concluded in respect of the given account of 3 March 2003. The institution stated that the inseparable part of this contract are General Business Conditions of institution B. of 1 June 2001, Conditions governing the maintenance of the current account of 1 November 2002 and Conditions governing the payment cards of the clients of 1 July 2001. The institution provided all of the above documents as an appendix to its comments as evidence.

In its comments, the institution expresses its conviction that the payment orders were performed in compliance with the internal regulations and as instructed by the client, Mr. Norbert. It justifies its statement by the fact that the settled payments orders were not claimed by the client within the deadline as per point 55 of the General Business Conditions and further by the fact that the balances on accounts for the years 2003 and 2004 were approved by the client.

The institution commented on the manner of submitting and delivery of payment orders saying that, on 13 November 2003, Mr. Martin presented in person the payment order in respect of the amount of CZK 300,000 to the branch of the institution. The institution adds that, in compliance with the generally binding regulations and its internal regulations, the identity of the person who presented the payment order was verified, which was marked on the reverse side of the payment order. The institution also states that on 19 November 2003, in the same way, i.e. in person by Mr. Martin, the same branch at K. was presented with the payment order in respect of the amount of CZK 443,000.

Concerning this, the institution provides detailed information saying that in November 2003, the petitioner, Mr. Norbert, informed the employees of the branch by telephone saying that he has health problems, is hospitalized and urgently needs to transfer funds from his current account in order to ensure the operation of his firm. For this reason, he was ascertaining repeatedly what opportunities there were to transfer the funds and he talked over the phone with various employees of the branch. The institution sets out specifically the following employees: Mrs. L. P. and V. K., Mr. S. R., Mrs. S. L. and, at the same time, it adds that none of these employees has ever doubted that, judging from the voice in the phone, they were talking with Mr. Norbert. The institution, in conjunction with this, further states that the reason for the certainty of the given employees that they were really talking with Mr. Norbert was also the fact that Mr. Norbert was personally known to the employees of the branch, he often (i.e. twice or three times in a week) visited the branch, called to the bank to ascertain and check the balance on his account and to withdraw cash. The institution states that Mr. Norbert was often accompanied by Mr. Martin.

The institution commented on the health problems of the petitioner saying that the subject matter of his health problems were supposed to be, according to what he said, his paralyzed hand. According to what the institution said, the branch employees agreed with the petitioner that they would tolerate his signature on the given two orders for the amounts of CZK 300,000 and CZK 443,000. The originals of these payment orders were presented by the institution as evidence. The institution justifies its approach to the realization of the presented and accepted payment orders by the fact that the petitioner was for it a solvent client with whom it had very good relations and therefore it transferred the payment orders, presented in person by Mr. Martin, for the benefit of his account. At the same time, the institution adds that from the history of the personal account of Mr. Martin it has been found out that similar amounts from the account of the petitioner were realized on a standard basis already from the time when the account of the petitioner was established.

The institution commented also on the period after the return of Mr. Norbert from the hospital, namely saying that in November 2004, the petitioner came to the branch and discussed the whole matter with its employees. The institution sets out that during the meeting the petitioner did not question the signatures on the payment orders and told the branch that he would discuss the whole matter with Mr. Martin. The institution points out that the matter was considered settled as far as the institution was concerned by both of the parties. For the institution, what is according to its comments significant is, that the balances on the account were approved by the petitioner during the final settlement for both the year 2003 and 2004 and the petitioner presented no claim in respect of the given two payment orders in respect of the amounts of CZK 300,000 and CZK 443,000.

In its comments, the institution enlarges on the relation to the General Business Conditions and points out that, according to the wording of point 55, it is in the own interest of the client to check the relations between the settlement, correctness of the balance of funds on the account and the correctness of the executed payments. If the client finds out discrepancies in the settlement, or the failure to settle the executable payment orders, he is obliged to announce the defects and to claim requirements in respect of their being removed at the branch and the bank that maintains his account within 3 months of the emergence of the defect. In its statement, the institution infers, based on a detailed quotation of point 55 of the General Conditions, that it is not responsible for a loss if a client fails to file a claim within the period stipulated by the General Business Conditions.

The institution, in the final part of its statement, comments on the status of the case in the year 2005. It states that on 20 April 2005, and it points out that this was 14 months after the elapse of the stipulated deadline for filing a claim as per the Gen-

eral Business Conditions, the petitioner filed, through his legal representative, JUDr. Pavel, an oral claim in respect of the execution of the payment order of 14 November 2003 in respect of the amount of CZK 300,000 and the payment order of 19 November 2003 in respect of the amount of CZK 443,000. The bank commented on this claim saying that, after having investigated the realization of the above payment orders, it found out that these payment orders were executed in conformity with the instructions of the client, the petitioner, Mr. Norbert.

The Financial Arbiter dealt with the facts presented by both parties on a very detailed basis in mutual relations and a wider context. In order to clarify some of the facts mentioned by the petitioner and the institution within the evidentiary investigation, he asked the petitioner to provide an oral explanation of the facts decisive for the assessment of the whole case. The negotiation concerning the provision of an oral explanation was in the presence of the petitioner's representative, JUDr. Pavel. The provision of an oral explanation which took place on 2 August 2005 was recorded in the Minutes of Provision of the Oral Explanation which forms part of the file. The person authorized by the Financial Arbiter also realized a local investigation at the headquarters of the institution on 28 July 2005. The authorized person prepared, in respect of this investigation, a document called Record of the local investigation which also forms part of the file.

The Financial Arbiter paid attention to the period of hospitalization of the petitioner since it ensues from the presented documentation that the hospital released him on 7 November 2003 and not on 10 May 2004 as he sets out in the petition. Concerning this, the representative of the petitioner communicated that within his hospitalization, the petitioner was transferred from the hospital at K. to V. and then back to K. He explained that the report presented by the petitioner was to document the bad health condition and it is a report from the time when he was transferred to another medical establishment. Within the hospitalization at K., the petitioner was transferred to various wards with regard to the fact that he was infected by a virus which caused the inflammation of the whole organism.

The Financial Arbiter, within the evidentiary investigation, dealt with the role played by Mr. Martin in the business activities of the petitioner. Concerning this, the representative of the petitioner provided an explanation saying that the petitioner only did business with Mr. Martin. It was communicated that the petitioner himself was a sole trader and had no employees. From the documentation presented by the petitioner and the institution within the local investigation performed at its headquarters on 28 July 2005, the authorized person found out that the petitioner did not grant any authorization to Mr. Martin or to any other person to deal with his account, namely until 26 May 2005 when he provided a power of attorney to Mr. Jan to deal with his account.

Within the evidentiary investigation, the representative of the petitioner explained, when asked by the Financial Arbiter, the manner of acceptance of bank statements, namely during the period when he was ill. The statements should have been accepted in person by himself and he did not make any change even in the period when he was ill.

The Financial Arbiter further examined whether the petitioner had agreed a so-called tolerance with the bank when signing payment orders. The representative of the petitioner provided an explanation saying that he had no such approach agreed with the bank and, at the same time, he declared that he never granted any power of attorney to Mr. Martin in respect of acting in the bank. The Financial Arbiter further examined whether the petitioner had agreed the verification of payment orders by phone. From the oral explanation of the representative of the petitioner and from the examination of the original documentation it ensued that it was not the case.

When examining the original documentation of the whole file maintained by the branch at K. in conjunction with the maintenance of account No. 111111111/XXXX and requested by the Financial Arbiter to be presented at the headquarters of the institution, the person authorized by the Financial Arbiter found out that the file contained only the contract on the maintenance of the account, copies of specimen signatures of 2 April 2003, of 29 June 2005, the verification of the identity of the copy as per the identity card and a driving licence, the announcement about the delivery of the card on 26 May 2003 and the minutes of a meeting with the client or rather the petitioner and then a note that together with the documentation what is not handed over are reminders about the account holder's failure to collect his post. The institution sufficiently clarified that this represents uncollected account statements.

The Financial Arbiter, by examining the presented original documents found out that in the file there are no continuous records, notes concerning the petitioner's telephone calls, information communicated by himself about his health condition, notes on the measures throughout the period of his illness, records about who negotiated with the client about the realization and verification of payment orders of 13 and 19 November 2003. In its statement, the institution set out that these meetings took place and mentioned the names of the employees who were involved in such meetings and individually received the information. The question remains why, even in the interest of the client whom they deemed important for their branch, they failed to make a continuous record of such a material situation which is understandably related to a prudent and professional approach of the institution to financial assets of the account holder since the utmost obligation of the institution is to ensure properly the protection and administration of financial assets entrusted to it.

The Financial Arbiter, by assessing, on a detailed basis, the evidentiary materials, found out that the payment orders delivered to the branch in person by Mr. Martin on 13 November 2003, in respect of the amount of CZK 300,000 and on 19 November 2003 in respect of the amount of CZK 443,000 were accepted by the branch to be settled based on the verification of the identity of the person who presented the payment order, Mr. Martin (the verification stamp is set out on the reverse side of the original of the payment order) and by confirming the identity of the signature with the specimen signature of the account holder, i.e. the petitioner. In witness of this verification, the employee performing the check of the order equipped the original of the order with a stamp saying: the signature agrees. In order to clarify the whole process of verification of client signatures on payment orders, the Financial Arbiter asked the institution to present, as a further evidentiary material, the internal regulations for the execution of domestic payment operations.

By comparing the given procedure described by the institution in its statement in writing with its methodological procedures for processing domestic payments in force in November 2003, it is clear that the internal procedures of the institution were significantly breached, namely in activity No. 1.6. where the internal procedure for the verification of the authorization of the payment order, namely with regards to the fact that the transaction does not correspond to standard transactions performed by the client. The internal procedure requires the employee to contact the client and to include in the client documentation an entry stating the date, time and matter about which they talked, the name of the client employee. At the same time, the internal procedure stipulates the obligation to inform the appropriate manager about this matter.

The internal procedure was clearly not adhered to even in case of activity No. 1.9. which stipulates that the employee checks the signature comparing it with the specimen signature in the optical archive, confirms the agreement of the signature with the specimen signature applying the stamp which includes words „Signature Agrees“ to the payment order. The employees were aware, when accepting the order, of the fact that the signatures did not agree and did not have the authority to state and confirm the agreement of the signatures with the specimen signature without stating non-standard facts which led them to such an approach.

From the above, the Financial Arbiter infers that the institution, or rather the employees of the K. branch, were aware of the disagreement of the signatures on the payment orders with the specimen signature of the account holder and certain non-standard aspects of this situation since, as the institution mentions in its statement, its employees agreed orally a tolerance when signing these payment orders and, in addition, they verified the agreement by phone, however, without any record of such a fact whatsoever on the day when they performed these acts.

In provision concerning activity No. 1.10., the Financial Arbiter notes that the institution directly in its internal procedures stipulated that the verification of the justification of the payment orders by phone is an above-the-standard service which may be carried out based on a concluded amendment to the contract on the current account. The breach of this provision is twofold since the institution, during the verification by phone, failed to proceed in compliance with the wording of activity No. 1.10. by not marking the original of the payment order with the clause „Verified by Phone“ and performed the verification without a written agreement with the client.

The Financial Arbiter states that provisions Nos. 1.6., 1.9. and 1.10. of internal procedures “Bulletin of Institution B, instalment 18/2003 Domestic CZK System of Payment When Processing the Payment Order“ failed to be adhered to. This fact led to the situation whereby payment orders were handed over to be settled in an unauthorized way in respect of the amounts of CZK 300,000 and CZK 443,000 without the account holder’s consent. Unfortunately, the institution did not present any evidence of the negotiations with the client, failed to perform any record of the negotiations with the client by phone which, as it states, reportedly took place repeatedly and it failed to prove that the petitioner had an agreement about the so-called tolerance when signing the payment orders or that it agreed with the petitioner the verification of payment orders by phone. The petitioner, in his oral explanation also excludes the existence of such arrangements, he never agreed with the bank the so-called tolerance of signatures when signing payment orders and he did not agree the verification of payment orders by phone either.

The Financial Arbiter handed over the signatures on the originals of the payment orders to be examined by experts. The expert opinion was prepared by an authorized expert in the field of graphology, specialized in hand-writing. On the basis of an expert report of 28 July 2005, the Financial Arbiter found out that the disputed signatures on the payment order of institution B., branch K. of 13 November 2003 in respect of the amount of CZK 300,000 and on the payment order in respect of the amount of CZK 443,000 of 19 November 2003 were not the rightful signatures of Mr. Norbert with the permanent residence at K.

In the course of the evidentiary investigation, the Financial Arbiter found out that, according to the statement of the institution, the petitioner visited its branch in K. in November 2004 and negotiated with it the unauthorized transfers in the total amount of CZK 743,000. The institution, in its statement, briefly mentioned especially the facts concerning the fact that the petitioner would negotiate the whole matter with Mr. Martin personally and that he considered the whole matter concluded from the point of view of the bank. However, the Financial Arbiter did not receive the minutes of this meeting within

the evidentiary materials presented by the institution. He requested the minutes as further evidentiary material on 28 July 2005 during the local investigation at the headquarters of the institution and during the study of the original documentation maintained by the branch at K. The Financial Arbiter asks the question why the institution failed to present the given material immediately in the appendix with the statement in writing since such a deed may be considered very important. From the minutes of the meeting with the client which were made at the branch in K. on 10 November 2004 and were signed only by an employee, Mr. R., the client employee of the branch, it is clear that the branch clarified to the petitioner that the transfers were arranged by Mr. Martin and the client employees of the branch consulted both of the transfers with the petitioner by phone. According to the information of the branch, Mr. Martin was to leave the bank to meet the petitioner in the hospital and he let the transfer orders be signed by the petitioner in his own hand. In the minutes, the branch states that the transfers had to be made in favour of Mr. Martin in order for Mr. Norbert's firm to be able to continue to operate in his absence. The branch mentioned in the minutes that even Mr. Jan took part in the meeting with whose strong support the petitioner questioned but did not disprove that he was in such a serious state that in some way Mr. Martin was able to make him sign.

From the oral explanation of the representative of the petitioner it ensued that he was, until May 2004, in a bad health condition. Then, although he moved using crutches, he visited the bank and started to take care of his own matters. Since April 2005 he co-operates in this matter with JUDr. Pavel to whom he gave the authorization to represent him. Specifically, on 20 April 2005, the petitioner filed, through JUDr. Pavel an oral claim concerning the performance of unauthorized payment orders. The institution expresses its conviction, which it communicated in writing to the petitioner, that the payment orders were executed in compliance with the instructions of the client. The Financial Arbiter notes that the letter is written apparently at the branch in K., unfortunately without a date stated, the employees who signed it are: Ing. Š., Mr. R.

The institution states in the letter that it arrived at the conclusion after having thoroughly examined the matter. The Financial Arbiter regrets to state that with the lapse of time, material facts were neglected, especially the adherence to the methodological procedure, internal binding regulations, generally binding legal standards, a written evidence of the agreement between the petitioner and the employees of the branch, the evidence proving in what way the employees of the branch informed themselves about the client's instructions when it is clear from their behaviour that the signatures showed disagreement with specimen signatures.

The Financial Arbiter states that the institution justifies the correctness of its procedure by the fact that the petitioner failed to claim the settled amounts within 3 months according to its General Business Conditions and further that he approved the balance on the accounts at 31 December 2003 and based on this it infers in the retrograde manner that the transactions were performed in compliance with the client's instructions. The Financial Arbiter comments on this saying that the generally binding legal standard is the commercial code which stipulates the limitation period. The arrangements between the client and the bank stipulated by the General Business Conditions as a three-month period for filing a claim cannot deny the generally binding limitation period as per the commercial code. The truth is, however, that the petitioner, because of his health limitations and a serious state of health, could not meet this period for filing a claim. The Financial Arbiter is of the opinion that the bank does not have the right to include among its conditions a provision which says that the client loses his right to claim the damages in respect of a loss which arises, as in this case, by the damage caused by the institution which limits the rights of the client for a later right to claim even though his right did not elapse. This provision of the General Business Conditions may be considered discriminatory to a certain extent on the part of the bank and it puts the client into an uneven position in respect of the bank.

The Financial Arbiter, during the local investigation, also asked the institution to add information in conjunction with a note that it did not present the uncollected correspondence of the petitioner. The branch of the institution additionally confirmed that these are account statements which the petitioner was to collect in person. Even this fact is, in the Financial Arbiter's opinion, an evidence for the institution that for serious personal obstacles the petitioner could not have complete information about his account and thus could not meet the contents of the arrangements as per the General Business Conditions. However, the Financial Arbiter is aware of the provision of S. 712 (1) on the institution's duty to notify the petitioner of the balance on his account as at the end of the calendar year by a bank statement and he acknowledges the applied rule which says that if the bank's client fails to file objections against the final settlement of all transactions as at 31 December of the current year, it is understood that he agrees with the balance stated in the bank statement. However, the Financial Arbiter does not consider the failure to apply this rule on the part of the petitioner as appropriate and on time, as anticipated by the institution, the decisive fact.

Based on the aforementioned facts and the follow-up assessment of the evidence, the Financial Arbiter reached a conclusion that the institution was liable for the damage incurred by the petitioner and will therefore be liable to return to the petitioner the funds withdrawn in an unauthorized way.

The Financial Arbiter was led to the above conclusion by the fact that the institution breached the provisions of the internal regulations and procedures governing the settlement of domestic transactions and transferred on 13 November 2003 and

then on 19 November 2003, in an unauthorized way, the funds in favour of a third party, i.e. the person who presented the payment orders without a consent and instruction of the account holder. The Financial Arbiter was led to the above conclusion also by the fact that the institution, although it admits in its written statement that it was aware of serious health problems suffered by the client, failed to document its communications by documentary evidence about the fact that it offered to and then contractually agreed with the petitioner, in compliance with the General Business Conditions, another verification key for the realization of non-cash transactions instead of the originally agreed specimen signature, namely in the way permitted by point No. 26 of the General Business Conditions. Since the institution knew the facts which did not make it possible to the petitioner to sign according to the specimen signature, the institution breached point No. 16 of the General Business Conditions which stipulates that, in exceptional cases, the account holder may authorize a third party for acts based on a special power of attorney in which acts of a proxy in respect of the dealing with the funds on the account holder's account are expressly stated. The signature of the account holder must be verified by a notary unless it is made in front of the institution's employee. The Financial Arbiter states that the institution breached the prudent approach to the administration of financial assets by not having made it possible to the client to use another key to protect his financial assets although the product assortment made it possible and further by not having changed its behaviour and procedure even when realizing another transaction on 19 November 2003 in the amount of CZK 443,000 when the first one was realized on 13 November 2003 in the amount of CZK 300,000. Further, the Financial Arbiter considered major the evidence of the judicial expert who stated, as mentioned above, that the signatures on both of the payment orders are not the rightful signatures of the petitioner.

On these grounds, the Financial Arbiter infers the institution's responsibility and duty to return to the petitioner funds withdrawn in an unauthorized way.

Therefore, the Financial Arbiter, within the meaning of S. 1(1a) and S. 15 of Act No. 229/2002 Coll. on Financial Arbiter, as amended, decided as is mentioned in the wording of this finding.

**Advice:**

Justified objections against this finding made in writing may be filed within 15 days of its delivery to the Financial Arbiter of the CR.

It is possible to give up the right to raise objections.

Submitted objections have a suspensive effect.

Prague, 25 August 2005

***JUDr. Ing. Otakar Schlossberger, signed  
Financial Arbiter***

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**Decision**

The Financial Arbiter of the Czech Republic decided, in compliance with the provisions of S. 14 of Act No. 229/2002 Coll. on the Financial Arbiter, as amended, and S. 30 of Act No. 71/1967 Coll. on Administrative Procedure (Administrative Code) in the dispute of the petitioner, Mr. Norbert, with the permanent residence at K., represented by JUDr. Pavel, against the institution B., in the matter consisting in the failure to perform the payment out of the account of the petitioner maintained by the institution.

**as follows:**

The proceedings are discontinued

**Reasoning:**

Based on the petition of the petitioner, the proceedings were commenced on 26 May 2005 in the matter of unauthorized transfers of financial amounts settled by the institution. On 25 August 2005, the Financial Arbiter issued a finding concerning the matter. However, the institution filed on 13 September 2005, within the term of appeal, objections against the finding, therefore, the finding of the Financial Arbiter failed to become legally effective.

On 14 September 2005, the withdrawal of the petition for the commencement of the proceedings was delivered to the Financial Arbiter with the reasoning which explained that a peaceful solution and an agreement between the petitioner and the institution were made.

Therefore, the Financial Arbiter decided as mentioned within the wording of this decision.

**Advice:**

Justified objections against this decision made in writing may be filed within 15 days of its delivery to the Financial Arbiter of the CR.

It is possible to give up the right to raise objections.  
Submitted objections have a suspensive effect.

Prague, 20 September 2005

*JUDr. Ing. Otakar Schlossberger, signed  
Financial Arbiter*

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**Decision**

The Financial Arbiter of the Czech Republic decided, in compliance with the provisions of S. 16 of Act No. 229/2002 Coll. on the Financial Arbiter, as amended, and S. 59 (2) of Act No. 71/1967 Coll. on Administrative Procedure (Administrative Code), as amended, in the matter of objections filed by institution B. which were delivered on 13 September 2005 against the finding of the Financial Arbiter of the Czech Republic of 25 August 2005, filing number 0000/2005, registration number 00/2005 by which the duty was imposed to return to the petitioner, Mr. Norbert, with the permanent residence at K., represented by JUDr. Pavel, the withdrawn funds in the amount of CZK 300,000 with 2% interest on late payment p.a. commencing on 14 November 2003 until payment and in the amount of CZK 443,000 with 2% interest on late payment p.a. commencing on 20 November 2003 until payment, all that within 15 days of the finding becoming legally effective.

**as follows:**

The objections are being accommodated and the issued finding of the Financial Arbiter of the Czech Republic of 25 August 2005, registration number 80/2005 is hereby cancelled.

**Reasoning:**

Based on the petition of the petitioner, the proceedings were commenced on 26 May 2005 in the matter of unauthorized transfers of financial amounts settled by the institution. On 25 August 2005, the Financial Arbiter issued a finding concerning the matter. However, the institution filed on 13 September 2005, within the term of appeal, objections against the finding, therefore, the finding of the Financial Arbiter failed to become legally effective.

On 14 September 2005, the withdrawal of the petition for the opening of the proceedings was delivered to the Financial Arbiter with the reasoning which explained that a peaceful solution and an agreement between the petitioner and the institution were made. Therefore, the Financial Arbiter issued, on 20 September 2005, a decision to stop the proceedings.

Therefore, the Financial Arbiter decided as mentioned within the wording of this decision.

**Advice:**

This decision is final.

Prague, 19 September 2005

*JUDr. Ing. Otakar Schlossberger, signed  
Financial Arbiter*

Final note:

On 30 November 2005, the Financial Arbiter received a request from the Police of the Czech Republic, administration of region XX, criminal police and investigation service, detached department from L, to be sent a complete file on the case under the registration number 80/2005 for reasons of prosecution of Mr. Norbert and Mr. Martin due to a suspicion that a criminal act of fraud was committed as per S. 248 (1.3.c) of the criminal act. The Financial Arbiter met this request and, on 14 December 2005, he sent off a complete copy of the whole file.

## B. Example of a resolved dispute in the area of use of electronic payment instruments

### Finding

The Financial Arbiter of the Czech Republic decided, in compliance with the provisions of S. 15 of Act No. 229/2002 Coll. on the Financial Arbiter as amended by later regulations, in the dispute of Mr. A.B. born. 00.00.0000, with the permanent residence at xxxxxxxxxxxxxxxx, (hereinafter referred to only as the „petitioner“) against institution CCCCCCCCCC, with the registered office at yyyyyyyyyyy, Company ID 01230123, registered in the commercial register maintained by the court at nnnnnnnnn, (hereinafter referred to only as the „institution“) of 17 May 2004 under the registration number 11/1111, for compensation for damages incurred by the withdrawal of funds on 11 September 2003 through direct (Internet) banking in the amount of CZK 28,650 from the personal account of the petitioner No. 1111111, bank code 1111 and CZK 251,460 from account No. 2222222222, bank code 2222.

### as follows:

The institution is obliged to return to the petitioner withdrawn funds in the amount of CZK 28,650 (in words: twenty-eight thousand six hundred and fifty Czech crowns) to the personal account of the petitioner No. 1111111, bank code 1111 and CZK 251,460 (in words: two hundred and fifty-one thousand four hundred and sixty Czech crowns) to account No. 2222222222, bank code 2222, with 2 % interest on late payment p.a. commencing on 11 September 2003 until payment, all that within 15 days after this finding becoming legally effective.

### Reasoning:

The petitioner, by the petition to commence proceedings before the Financial Arbiter of the Czech Republic of 17 May 2004, claimed from the institution the compensation for damages incurred by him by the fact that on 11 September 2003, at 16:23:15, funds were withdrawn by the means of direct (Internet) banking in the amount of CZK 28,650 from the personal account of petitioner No. 1111111/1111 and, on the same day at 16:16:09, from account No. 22222222/2222, whose holder is the Community and in respect of which account the petitioner has, as the chairman of the committee, the Right of Disposal, funds amounting to CZK 251,460.

The total amount withdrawn in this way from both of the accounts amounted to CZK 280,110. The petitioner learned about the transfers on 14 September 2003 (after the failure to execute an order placed by himself of 10 September 2003 for lack of money).

The funds withdrawn by the above payments were transferred to a single account No. 3333333333, bank code 3333, maintained by the institution. The holder of this account is Mr. X.Y., born on 12.34.5678. The petitioner states that he never placed any such payment order to the institution and that he does not know X.Y.

On 15 September 2003, the petitioner sent to the branch of the institution in writing and, at the same time announced by phone to the institution's Call Centre, claims in respect of both of the above payments. Later, he held a number of unsuccessful meetings concerning the matter with the institution. The statement of the institution which dismissed the claim reflected the fact that, on transferring the money, a personal certificate of the petitioner was used.

The institution, in its statement of 22 June 2004, stated that the first claim made by the petitioner by phone to the institution's Call Centre was settled on the day when it was filed (15 September 2003); the petitioner was told by phone that, due to the fact that during the execution of the given transactions, a personal certificate of the petitioner was used, the claim is considered unjustified and the funds cannot be returned to the debited accounts.

On 16 September 2003, the petitioner sent to the branch of the institution a supplement to the claim of 15 September 2003 which was again discussed with the petitioner by phone. On 17 October and 24 November 2003, the petitioner sent to the branch of the institution a reminder, asking them to comment on the claims he filed. The institution agreed to re-open the claim proceedings and, on 12 January 2004, a personal meeting with the petitioner took place at the branch of the institution at .....

By a letter of 23 March 2004, the institution informed the petitioner about the fact that from all investigations performed in both cases claimed by the petitioner it ensues that both transactions took place in compliance with the agreed manner of dealing with the given accounts through „moje banka“ direct banking, i.e. that they were signed by a valid electronic personal certificate of the petitioner. The institution repeatedly communicated to the petitioner that it cannot meet his claims.

On 2 April 2004, the petitioner approached, by an e-mail, directly one of the members of the institution's board of directors. In his message, he made several statements by which he questioned the safety of the use of direct banking. To these statements, the institution then reacted by a letter of 16 April 2004 in which it again communicated to the petitioner that

„While using standard (or rather above-the-standard) safety mechanisms, the certificate cannot be stolen. The use of anti-virus software cannot be considered the above-the-standard means. A standard means may be considered the use of a firewall which ensures that an unauthorized person does not have access to the data on the computer of the holder. The operation of direct banking by the institution is safe while adhering to safety rules stipulated by the Business Conditions, article concerning the Client's Liability. During the history of the operation of the direct banking system by the institution, there was no case of a certificate stolen from the client by penetrating this system.“

In the course of the evidencing, the Financial Arbiter entrusted Mr. K.L., a judicial expert in the field of economy, banking and insurance branch, specialized in direct debit – domestic and international payment cards and cheques, international payment systems, computer processing, settlement and security and protective elements in payment cards systems, with the preparation of an expert report in order to identify the circumstances of a transfer and use of the Internet banking by the petitioner. The expert assessed the contractual conditions under which the use of the application was arranged and the used system of the Internet banking. The expert presented an Expert Opinion of 7 September 2004 and a Supplement to the expert opinion of 10 November 2004 concerning the case (hereinafter referred to only as the „Opinion“).

In his opinion, the expert states that the direct banking application with the procedure of „signing“ the orders is currently considered highly secured and reliable. However, in the area of security, it requires cooperation of the user (the bank's client) in storing sensitive information (i.e. the access password, the private key and the certificate) so that a third party does not have an access to them under any circumstances.

The client is notified of this fact in the „Contract on provision and use of the personal certificate“, point 3.1, namely by referring to the „Institution's Terms and Conditions of the Issuance and Application of the Personal Certificate“. Also in the „Institution's Conditions For Provision And Use Of Direct Banking“, in the section called Client's Liability, the obligation of the client is stipulated to „see to it that no third party learns his security data concerning the use of the direct banking services „.

„Technical Conditions for the Users of Direct Banking Services“ in the Article called Security of the Application stipulate that „the security of the internal network of the client when accessing the Internet is ensured by the client and is independent of the application“. More details concerning the security of the internal network are mentioned under points included in the „Decalogue Of the Safe Internet Banking Use“ (hereinafter referred to only as the „Decalogue“ – which may be downloaded from web pages. However, these pages are not referred to contractually and their written form was not presented to the clients. The client may or may not download the Decalogue from the web pages.

According to point 3.3 „Contracts on Provision and Use of the Personal Certificate“, the institution is not liable for damages caused by a breach of the stipulated obligations by the client. Also according to the „Contract on Provision of the Internet Banking“, point 1.4, the bank does not have any responsibility for damages incurred due to causes outside its control or by the abuse of the service without the fault on the part of its employees. In the institution's „Conditions For Provision And Use Of Direct Banking“, there is, in section VIII. Client's Liability, point 7, again a provision stipulating that „in case of a breach of the above obligations (i.e. to ensure such measures so that no third party may abuse the system) the client shall be obliged to compensate any damages“.

The expert, on 25 August 2004, performed a consultation in the area of the institution with responsible employees operating in the area of direct banking and the complaints department in order to investigate the reactions of the institution to the petitioner's suggestions since in the documentation no solution of his requests was found: (i) any information concerning the claimed transaction, i.e. the time of realization, the IP address of the server from which the order was made and (ii) the ensuring of the monitoring and archiving of all transactions at least as from 11 September 2003, which were performed on the account of the payee in order to ensure evidentiary materials for further investigation.

The institution provided, on 31 August 2004, an explanation in writing whereby it stated concerning point (i) that the requested information was available to the petitioner right from the beginning because all the relevant information was identified by himself already in his claim. It may therefore be justified to anticipate that the client had in mind, when mentioning the „tracing of the transaction“, not its execution and identification on the part of the institution but rather the revealing of the circumstances of any potential unauthorized involvement into his workstation (computer) which could later lead to entering instructions to perform the transaction by a third party. However, such investigation is not within the powers or duties of the institution and the client has no other option but to use the means within the criminal proceedings led by the Police of the Czech Republic or rather by other law enforcement bodies. As far as the IP address of the server from which the orders were executed is concerned, the institution informed the Police of the Czech Republic that it is not possible to identify it. Within the claims proceedings, the institution informed the client by a letter of 16 April 2004 about the fact that „From both the legal and the criminalistic points of view, the IP address is only a support data because the computer which was used for the given operation, does not have to be identified. In addition, even if the computer is found, it still is no evidence that it was used for this operation by its owner.“. The institution stated during the consultations that no legal regulation imposes a duty for it to file the IP address. Even if it registered the IP address, it does not prove which specific user made the connection. Concerning point (ii), the institution stated that the monitoring and archiving of transactions on the bank accounts is a statutory obligation of banks which obligation the institution consistently adheres to.

The expert, based on the appendices included in the file stated that account No. 3333333333/3333 maintained at the branch of the institution in the name of X.Y. who was the payee of the given payments, was established on 5 September 2003, i.e. only 6 days before the given transfers were made.

Later, on 5 October 2004, an oral explanation session with the petitioner took place who described the circumstances under which he uses his computer and its protection. The conclusions are set out in the table below.

<b>Criterion</b>	<b>Petitioner's statement</b>
Information provided by the institution when concluding the contract on „mojebanka“	The petitioner was a user of the MBest system and he was offered to transfer to the electronic banking in respect of the company account. Then, he was informed about the remote control of the account and he accepted contractual documents. The procedure of the electronic banking, keys was explained to him and he generated a personal certificate to his hard disk (on 18 December 2001). The personal certificate then served the petitioner also to operate his natural person's account in the application (established on 18 November 2002). He brought the certificate on a diskette and stored it to the disk. It was explained to the petitioner that he may keep the keys and the certificate on a diskette or have them permanently saved on the hard disk C:\ (in the hard disk folder). The protection is ensured by the means of a password. He was not warned of a potential abuse of the application. He uses the personal certificate to 3 accounts. He was not informed about the firewall or the Decalogue. He knew that it is necessary to use the antivirus software.
Computer, location	A company PC is used, operation system WINDOWS 2000, and at home a notebook, operation system XP.
Internet connection	Through a modem to the Telecom telephone network.
Protection of the access to the computer	The access to both of the computers is secured by the means of a password. At work, the password is shared with his colleague, who is the other partner having access to the account of the Community
Computer protection	AVG antivirus software. After the questioned transfer of the money, he installed the Kerio firewall according to a recommendation provided by a specialist.
Access to the mojebanka application	The access protected by the means of a password. He changed the password several times, usually when renewing the certificate. The petitioner stated that in the application, there is no direct route to change the password, therefore he did not change it more often.
The provided information about the security after the unacknowledged transaction	He was not informed about further steps. Not even at the time when the explanation was provided, he did not know what the matter was. One month after the transaction he received the Decalogue in a written form.

Concerning the circumstance why the order of the petitioner filed through the application on 10 September 2003 was not executed before the given order filed only on 11 September 2003, the petitioner stated that it was a multiple payment order. These orders are executed on a regular basis. The multiple order is prepared by an accountant and the petitioner transfers it to the bank using the batch method. According to the institution's conditions, the multiple order is sent after 9 p.m., is executed on the following day and on-line orders have a precedence to these multiple orders. Therefore, the given on-line orders of 11 September 2003 were executed earlier than the batch order from the previous day.

In the course of the evidencing, the Financial Arbiter assessed the legal analysis of aspects of the internet banking service provided by the institution as prepared by Mr. Z.L., the head consultant, of 19 October 2004. In the legal analysis, the contractual liability of the institution is assessed and its statutory liability and statements of the institution are assessed in respect of a similar case (reg.No. 84/2004) which, at the same time, have a relation to this dispute.

The contractual liability of the institution in respect of the application service is governed by the Contract on Provision of the Internet Banking. In para 9 of this contract, the following is stated: „The bank does not have any responsibility for damages incurred due to causes outside its control or by the abuse of the service without the fault on the part of its employees.“ Also, in the Contract for issuance and use of personal certificate, under para 3.3, the following is stated: „The Bank shall not

be responsible for any damage resulting from the dealing with the Personal Certificate on the part of the Client which is contrary to this Contract and conditions and for any potential abuse of the Personal Certificate based on the disclosure of the data which are known only by the Client and the bank.“ Both of the above contracts are concluded as per the commercial code.

The consultant stated that the part of the provision of para 3.3 of the Contract on provision and use of the personal certificate in the following wording „... and for any potential abuse of the Personal Certificate based on the disclosure of the data which are known only by the Client and the bank“ is invalid since it represents an invalid exclusion of liability as per S. 374 of the commercial code. He also believes that this provision is also contrary to the below S. 13 of act 101/2000 Coll., as amended by later regulations, the act on protection of personal data from which certain obligations ensue for the bank in conjunction with which it is not possible to set out such liberation reasons. The remaining provisions are, in the consultant's opinion, valid unless they are contrary to the principles of honest trading.

The consultant assessed whether, in addition, the legal liability applies to the institution in respect of the potential breach of mandatory statutory obligations. He arrived at a conclusion that the following applied to the institution as at the date of the disputed transaction:

general prevention obligation to prevent a potential damage and obligation when ensuring personal data (S. 13 of the act on protection of personal data No. 101/2000 Coll.).

In relation to the monitored case, what is important is the obligation of the institution in the area of security of personal data. Provision S. 13 of the act on protection of personal data which was in force as at the period when the disputed transaction took place, imposes an obligation to take such measures so that an unjustified or accidentally access to the personal data, their change, destruction or loss, unauthorized transfers, another unauthorized processing as well as other abuse of the personal data could not take place. This obligation shall remain in force even after the processing of the personal data is concluded.

The service provided by the institution seems to be a combined service including both the aspect of a financial service and the aspect of the service of electronic communication (i.e. a service consisting completely or of its major part in the transfer of signals or data). In the given case, it would be a transfer of data from the client to the institution and the other way round taking place by the means of an application. Although in case of the Internet banking this is a single service, from the legal point of view it must be divided into two different components and both should be assessed separately, according to special rules applicable to these services.

This combined nature of its service is provided even by the institution when it expressly states „What matters is not an insufficient security of the communication with the institution or directly a shortcoming in the security of the direct banking system because the communication with the bank is secured sufficiently, what matters is the issue of a sufficient security of the client's, or rather the petitioner's computer...“ (see the institution's communication of 22 June 2004, concerning the reg. No. 84/2004). From the above, it ensues that the institution itself considers part of its service to ensure the data communication with the client. However, it does not acknowledge, at the same time, its potential responsibility for securing the client's computer.

Based on the above, the institution should meet, in respect of its electronic banking service, when protecting the personal data, the requirements posed both on the provider of the financial services and the electronic communication services.

Obligations to protect personal data within the electronic communications sector were developed in more detail within the EU law in Directive No. 2002/58/EC (so-called Directive on Privacy and Electronic Communications) of the year 2002. Directive No. 2002/58/EC stipulates the following liability of electronic communications services providers:

The provider of publicly available electronic communications services must accept appropriate technical and organizational measures to ensure the security of his services, if necessary also in synergy with the operator of the public communications network with regards to the network security. With respect to the technical and cost side of their execution it is necessary for these measures to ensure the level of safety corresponding to the existing risk.

If there is a special risk that the security of the network is violated, the provider of publicly available electronic communications services must inform the participants about such a risk and if such a risk is in excess of the scope of the measures which are to be accepted by the provider of services, he must inform the participants about any measures for remedy including the determination of the likely related costs.

Even though at the moment when the disputed transactions took place the Czech Republic was not a member of the European Union, the consultant infers that the providers of services must inform their clients about the risks which might ensue from their services. Specifically, they must inform about specific risks of breaching the security of electronic communication in relation to the protection of personal data. If these risks are in excess of the scope of the measures taken by the provider, he must inform his customers about the procedure by which they would minimize these risks, i.e. to recommend a corresponding protection (e.g. to recommend to them to use the encrypting software, etc.). However, this was done by the institution in the given case only after the given transaction was executed.

Concerning the issue of whether it is correct to interpret general provisions of the act on protection of personal data by the means of the EU Directive if at the moment of the execution of the disputed transaction the Czech Republic was not yet the member of the EU, it may be said that in the similar way it would not be possible to argue if the matter involved would represent the effort to introduce some new obligations into the Czech legal system. However, if the appropriate obligation already was in force within the Czech legislation, whether generally and not specifically for the area of elec-

tronic communications, in the consultant's opinion it is possible and perhaps even desirable to interpret such an existing obligation by the means of a similar obligation included in the EU legislation for the area of the service under review, or rather its aspect.

The consultant stated that a similar obligation which was pointed out in respect of the above case – that is the obligation to point out imminent risks and to recommend potential measures on the part of the client, are included in the general preventive obligation to prevent the potential damage within the meaning of S. 415 of the civil code. In conjunction with this, it is possible to point out to analogous domestic court decisions although in the Czech law, we do not have the precedent principle. This is e.g. decision R 9/1992: „If the owner of the land, in the specific case, was notified that the condition of vegetation on his land poses a threat of damage, his obligation (even though he gave the land to be used by another person) to at least warn the user of the land about the defective condition and the need to take relevant measures.“; further also see the decision of the high court in Prague, 5 Cmo 347/96 – „The bank providing the loan is obliged, as per S. 415 of the civil code, to warn the client of the circumstances which it is aware of and which may affect its business in respect of which it provides the loan, if the bank knows about such a purpose of the loan“.

From the communication provided by the institution it is clear that it was aware of the fact that (i) it provides a combined service whose one part consists in the securing of the data communication and (ii) what should general regulations be which should be adhered to by the client of the institution when using the electronic banking services. Yet, the institution failed to inform its clients about these rules and it satisfied itself with a contractual arrangement by which the client is obliged to ensure the security of his own personal certificate himself. By failing to do so, the institution failed to meet its statutory obligations concerning prevention.

The petitioner, after having found out that funds were drawn from the above accounts, filed, as at 15 September 2003, an indictment with the Police of the CR for unknown offender and, on 17 September 2003 he provided a supplementary explanation concerning the filed indictment. For this reason, the Financial Arbiter requested, when resolving the case, also the report on the result of the investigations from the Police of the Czech Republic, white-collar crime department. Based on the obtained information, it was ascertained that the person suspicious for unauthorized withdrawal of the funds from both of the above accounts is Mr. X.Y. The above person suspected of committing criminal activities which, however, is not related to computer criminality (e.g. on his name and documents leasing agreements are concluded etc.). The state-wide search has been declared in respect of X.Y., however, so far he has not been detained (the last information is as at 11 January 2005).

The Financial Arbiter evaluated independently each piece of evidence separately and all pieces of evidence in relation to one another, especially with regards to the decisive circumstances of the case. The petitioner was not informed about the so-called Decalogue Of the Safe Internet Banking Use and did not have a firewall installed as an internal part of the operation system. The institution itself marked the recommended Decalogue as an unbinding, informative material which was published on the web pages. In case of the petitioner, the personal certificate was issued under the Contract on provision and use of the personal certificate of 18 December 2001 and used in conformity with the Contract on use of direct banking of 15 November 2002 (in respect of the petitioner's personal account), or rather of 20 March 2003 (in respect of the account of the Community of owners). The Decalogue Of the Safe Internet Banking Use was published on the web pages of the institution on 15 November 2003, i.e. 12 months after the conclusion of the contract on direct banking in respect of the personal account with the petitioner, or rather 8 months after the conclusion of the Contract on direct banking in respect of the account of the Community. The institution in its statement of 22 June 2004 states that if the petitioner really had his computer secured only by the means of an antivirus software, it is not possible to consider his location and protection of security elements sufficient and appropriate within the meaning of the above Business Conditions of the institution. However, in conjunction with this, the institution failed to prove that it provided the petitioner with sufficient information for his required synergy in securing the personal certificate and related keys (saved, according to the recommendations of the institution on a hard disk and with a back-up on a diskette).

This synergy is what the institution refers to in the Contract on provision and use of the personal certificate, referring to the Institution's Terms and Conditions of the Issuance and Application of the Personal Certificate, however, without providing technical instructions on how to proceed when ensuring the security. The institution cannot exclude its liability in the abuse of the personal certificate in case of a disclosure of the data which are known only to the client and the bank. The *mojebanka* service is a combined service (financial and electronic communications) which the institution itself confirms (the communication with the bank was, according to what it claims, secured sufficiently, however, the client's computer was secured insufficiently), and therefore the obligation to protect personal data as per S. 13 of act No. 101/2000 Coll. applies to it. Since this provision is related to the general obligation to prevent damages within the meaning of provisions of S. 415 of the civil code, the bank breached this obligation since it failed to inform about specific risks of the breaching of the security of electronic communication, or rather it informed about them *ex post*. The institution also failed to bear the burden of proof in determining the petitioner the unequivocal mandator of the given transfer for the unavailability of the IP addresses. The institution is aware of the meaning of having this information but referring to the fact that the law does not require it to monitor IP addresses of the communication server, it does not monitor and archive them. However, the fact that the payee's account was opened only 6 days before the given transfers and the amounts of the transfer were immediately withdrawn in cash on the day that followed, indicates that the petitioner's personal certificate was used in an unauthorized way.

The institution, in its letter to the petitioner of 16 April 2004, states that the „personal ownership of the private key and the certificate ensures, according to the law, the identity of the client by the means of the so-called registration activity which means that the information included in the certificate is verified using the valid document of the client’s identity“. The Financial Arbiter, in this respect, holds the view that the use of the personal certificate itself does not make it possible to unconditionally identify the holder of the certificate with the initiator of the transfer as may be normally inferred e.g. in payments made by a payment card using the PIN password. The difference is given by the technological nature of the PIN and the personal certificate whereby the PIN is typed into a (hardware) equipment secured against any undesirable manipulation (Tamper Proof Device), whereas the access password to the personal certificate is typed into a software application, in the optimal case secured again only using software means. The same applies also to the saving of the personal certificate on the hard disk, the procedure recommended by the institution, whereas the existing recommendations prefer portable media.

The fact that the institution does not record the IP address of the established connection did not make it possible to it to document any data for the evaluation of all regularities or irregularities in the given transfers; namely even under the condition that the knowledge of the IP address does not have to prove the knowledge of the specific person, however, due to its contents it may exclude or include a circle of persons (appearing in the location) which may serve (as a direct or indirect) evidence for the needs of the institution itself.

The Financial Arbiter, during the assessment, dealt with the circumstances of the questioned transfers of the amounts of CZK 28,650 (from the petitioner’s personal account) and CZK 251,460 (from the account of the Community). He arrived at a conclusion that the institution is liable for the executed unauthorized transfers especially because it failed to sufficiently inform the petitioner about the risk in using the internet banking application which ensues from the aspect of the provision of a combined service whose one part consists in the securing of the data communication, further, within the meaning of the act on protection of personal data and from the general prevention obligation stipulated by the civil code. The Arbiter did not consider the European Union legislation since at the given period, the CR was not its member yet. The Arbiter mentions it in the given case only complementarily. The institution could not further clearly prove or at least not to question the possibility of a potential participation of the petitioner in the executed transfer.

Based on the evidencing, the Financial Arbiter arrived at a conclusion that the petition of 17 May 2004 was justified and the institution is, in this case, liable for the damage as per S. 415 (or S. 420) of the civil code since the causal relation between the act (or rather the failure to act) on the part of the institution and the occurrence of the damage has been proved. Therefore, the Financial Arbiter decided as mentioned within the wording of this finding.

**Advice:**

Justified objections against this finding made in writing may be filed within 15 days of its delivery to the Financial Arbiter of the CR. It is possible to give up the right to raise objections. Submitted objections have a suspensive effect. The finding is enforceable as per Act No. 99/1963 Coll. as amended by later regulations, the rules of civil procedure.

Prague, 31 January 2005

*JUDr. Ing. Otakar Schlossberger, signed  
Financial Arbiter*

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**Decision**

The Financial Arbiter of the Czech Republic decided, concerning the matter of objections of institution CCCCCCCCCC, with the registered office at yyyyyyyyyy, registered in the commercial register maintained by the court at nnnnnnnn, (hereinafter referred to only as the „institution“), delivered to the Financial Arbiter on 15 February 2005, against the finding of the Financial Arbiter of the CR of 31 January 2005, registration number 55/2004, filing number 120/2005 (hereinafter referred to only as the „finding“), by which the obligation was imposed on the institution to return to the petitioner, Mr. A.B. born. 00.00.0000, with the permanent residence at xxxxxxxxxxxxxx, (hereinafter referred to only as the „petitioner“), the withdrawn funds in the amount of CZK 28,650 (in words: twenty-eight thousand six hundred and fifty Czech crowns) to the personal account of the petitioner No. 11111111, bank code 1111 and CZK 251,460 (in words: two hundred and fifty-one thousand four hundred and sixty Czech crowns) to account No. 22222222, bank code 2222, with 2 % interest on late payment p.a. commencing on 11 September 2003 until payment, all that within 15 days after this finding becoming legally effective.

**as follows:**

in conformity with provisions of S. 16 of act 229/2002 Coll. on the Financial Arbiter, the objections are being rejected and the finding of the Financial Arbiter of the Czech Republic of 31 January 2005, registration number 55/2004, filing number 120/2005 are hereby being confirmed.

### **Reasoning:**

The Financial Arbiter issued on 31 January 2005 a finding by which the obligation was imposed on the institution to return to the petitioner the withdrawn funds from his personal account and the account of the Community to which the petitioner has, as the chairman of the committee, the right of disposal. The institution filed objections against this finding within the statutory time limit in which it suggests that the Financial Arbiter changes his finding.

In the submitted objections, the institution states that the petitioner was not entitled to commence proceedings before the Financial Arbiter on behalf of the Community. Concerning this, the Financial Arbiter communicates, based on an ascertained evidence, that:

for the withdrawal of the funds from the Community's account, the petitioner's personal certificate was abused on 16 September 2003, a meeting of the committee of the Community concerning the unauthorized transfer of funds took place. At this meeting, the chairman of the committee – the petitioner, was authorized to file a claim in respect of this transfer and, at the same time, to file an indictment at the Police of the Czech Republic at the same time, the committee authorized the petitioner in writing to negotiate in order to remedy this situation. The petitioner agreed with the authorization.

By this evidence, the Financial Arbiter considers the institution's objection rebutted.

The institution further objects that in his finding, the Financial Arbiter wrongly marked the entities about whose rights or obligations he decides. It states that the entity with the identification No. 9999999 is not an entity with the name Community with the registered office at Z. but the Community with the registered office at Z.

In the finding, it is stated that:

„The institution is obliged to return to the petitioner the withdrawn funds in the amount of CZK 28,650 (in words: twenty-eight thousand six hundred and fifty Czech crowns) to the personal account of the petitioner No. 1111111, bank code 1111 and CZK 251,460 (in words: two hundred and fifty-one thousand four hundred and sixty Czech crowns) to the account of the Community with the registered office at Z., ID No. 9999999, account No. 2222222, bank code 2222, with 2 % interest on late payment p.a. commencing on 11 September 2003 until payment, all that within 15 days after this finding becoming legally effective.“

In respect of the marking of the obliged and entitled entities of the dispute (institution, petitioner), the institution does not object anything, they are marked clearly. The Financial Arbiter states that in case of the Community, the account is such as to which the institution is obliged to return the withdrawn funds.

From the extract from the Community register maintained by the Regional court it was ascertained that the Community has its registered office stated as follows: Z. the identification number of the entity is: 99999999. What the Financial Arbiter considers material is the correct statement of the identification number of the entity which is the unique number which no other entity has. The Financial Arbiter further underlines that for the fulfilment of the imposed obligation, the facts are decisive that are governed by Act No. 124/2002 Coll., on the transfers of funds, as amended by later regulations, Decree No. 62/2002 Coll. by which the manner of performing the system of payment between banks, settlement on accounts in banks and technical procedures of banks when making corrective settlement and the General Business Conditions of the Czech National Bank.

According to the above legal regulations and conditions, the obligatory requirements of a settlement order are as follows:

- marking showing whether it is an order of payment or a collection order
- bank connection of the payer and the payee
- amount in Czech crowns
- constant symbol, if this is stipulated by a special legal regulation
- signature of the drawer.

Facultative requirements of the settlement order are as follows:

- due date
- variable symbol
- specific symbol
- short message (SMS)
- date of issuing the settlement order

Marking of the obliged and entitled entity in the finding is absolutely clear and evident, both the obliged entity (the institution) and the entitled entity (the petitioner) are determined and the requirements to enable the realization of banking transfers are correctly stated.

Concerning the other objections of the institution, the Financial Arbiter states the following:

The institution provided services of internet banking to Mr. A.B. and the Community (the petitioner) based on a contractual relation. This contractual relation between the institution and the petitioner in relation to the service is governed by

the Contract on use of direct banking of 20 March 2003, the Contract on provision and use of the personal certificate of 18 December 2001 and 30 January 2004 and other contractual documents. The identification and authentication means within the internet banking of the institution is the so-called personal certificate.

The institution offers on its website consultancy for its clients related to the access to the internet banking service and with its use (e.g. in a form of a Guide through the certification process, etc.). On 11 September 2003, a transfer of a larger amount took place from the account of the petitioner (from the personal account of Mr. A.B. and from the account of the Community) at the institution by the means of the internet banking to another account also maintained by the institution. The petitioner claims that he failed to make the order to execute the payments.

The institution refuses the responsibility for the execution of the disputed operation saying that never in the history the certificate was stolen by intrusion into the system of its direct banking and that the operation of the direct banking by the institution, while adhering to the rules stipulated by the business conditions is safe.

Furthermore, the institution says that the disputed transaction was performed using the personal certificate of the petitioner and that the claim is thus unauthorized and the withdrawn funds thus cannot be returned to the petitioner. The institution bases its statement on the provisions of the contractual documents concluded between itself and the petitioner which are as follows:

- article of the institution's Conditions For Provision And Use Of Direct Banking:  
point – „The client must, at his risk and expense, install and maintain in safe and operating condition the workstation according to the technical parameters determined by the Technical Conditions...“  
the point „the client shall be obliged to ensure that no third party has the knowledge of his security data concerning the use of the direct banking services. The client shall protect his security data from being lost, disclosed, stolen and misused. The Client shall ensure such measures so that the system cannot be abused by a third party. In case of a breach of the above obligations, the client shall be obliged to provide the compensation for the damage.“
- article of the Technical Conditions for the Users of Direct Banking Services, point 1.5 stipulates that the „the security of the internal network of the client when accessing the Internet is ensured by the client and is independent of the internet banking application.“
- article of the institution's Terms and Conditions of the Issue and Use of a Personal and Company Certificate, the point:  
„The client shall be obliged to protect his private key for the period of validity of the personal certificate, namely from a loss, disclosure to a third party, modification or abuse. Since the couple of the public/private key is created, the Client shall be responsible for keeping it secret, depositing it safely and not breaching the private key....“

The institution infers that this does not mean an insufficient security for the communication with the institution or directly a shortcoming in the security of the direct banking system it operates but that it means an insufficient security of the petitioner's computer in the general connection to the internet network which is, according to the institution, always and exclusively the matter of the client/petitioner as well as the level of security with the reference to the above contractual provisions.

The institution also argues that the antivirus software cannot definitely be considered standard and appropriate security on the part of the user of the public internet network. A standard means of security may be considered the use of a firewall, an above-the-standard means may be considered the meter of connected time, verification of the visited URL addresses, etc. The institution also refers to the Decalogue of safety in using internet banking which is a publicly available text at the institution's web pages which includes the most basic security principles which should be at least adhered to by everybody who somehow connects to any page on the Internet.

Statement of the institution is confronted with that of the petitioner who states that the reason for the unauthorized withdrawal of the funds is an error in the institution's system, or rather a shortcoming in the security of the client's personal certificate and the password since the institution clearly does not take into consideration hackers. Within the oral explanation, the petitioner communicated that the institution instructed him that it is possible to have the personal certificate on a diskette or permanently saved on the hard disk and to protect it by a password. He was further informed about the need to protect the computer from a virus and therefore the petitioner installed the AVG antivirus software. He was not instructed about any other security or warned of a potential abuse of the application. The petitioner further states that he was not informed about the Decalogue and he failed to receive the Decalogue sent out by the institution in June 2004.

The home computer (notebook) of the petitioner was, before the disputed transaction, secured using Windows XP and the company computer using the operation system Windows 2000. The access to both of the computers were secured by the petitioner by the means of a password also shared by his colleague. He accessed the application using a password which he changed several times when renewing the certificate but not regularly. The ID and the nine-digit password were inserted by the programme. He did not disclose the personal certificate (hereinafter referred to also as „OC“) concerning the institution's service to anybody.

When deciding about the objections of the institution, the Financial Arbiter assessed the contractual liability of the institution and had a legal viewpoint prepared concerning this matter by Mr. Z.L., the lawyer - specialist. The document was presented to the Financial Arbiter on 28 April 2005. From it, it may be stated that the contractual liability of the institution in respect of the service is governed by the Contract on Provision of Direct Banking. In para 1.4 of this contract, the following is stated: „The bank does not have any responsibility for damages incurred due to causes outside its control or by the abuse of the service without the fault on the part of its employees.“ Further, in the Contract for issuance and use of personal certificate, under para 3.3, the following is stated: „The bank shall not be responsible for damages caused by such a treatment of the OC by the client which is contrary to this Contract and the conditions and any potential abuse of the OC based on the disclosure of the data which are known only to the client and the bank.“ Both of the above contracts were concluded as per the commercial code.

The question arises whether the above provisions limiting or excluding the institution's liability are valid. As for the first question, the Financial Arbiter is of the opinion that the part of the provision of the Contract for issuance and use of the personal certificate in the following wording: „... and for the potential abuse of the OC based on the disclosure of the data which are known only to the client and the bank“ is invalid since it represents an invalid exclusion of the liability as per S. 374 of the commercial code. The Financial Arbiter is also of the opinion that this provision is also contrary to the below S. 13 of act No. 101/2000 Coll., as amended by later regulations (the act on protection of personal data), from which certain obligations ensue to the bank in conjunction with which it is not possible to set out such liberation reasons. The remaining provisions are, in the opinion of the Financial Arbiter, valid unless they are contrary to the principles of the honest trading and good morals.

Another question which the Financial Arbiter assessed is whether the liability from the law applies to the institution in respect of a potential breach of the mandatory legal obligations.

The Financial Arbiter deems that especially the following applied to the institution as at the date of the disputed transaction:

general prevention obligation to prevent a potential damage, and  
the obligation on securing the personal data (S. 13 of the act on the protection of personal data).

The provision of S. 13 of the act on protection of personal data which was valid at the time when the disputed transaction took place, stipulates the following: The Administrator and the processor are obliged to take such measures that unauthorized or accidental access to the personal data, their change, destruction or loss, unauthorized transfers, another unauthorized processing or another abuse of the personal data cannot take place. This duty shall remain in force even after the completion of the processing of the personal data. At the same time, S. 21 of the act on the protection of personal data stipulates the following: in questions not governed by this act, the general liability provisions for loss shall be applied.

The Financial Arbiter deems that the internet banking service is a combined service including both the aspect of the financial service and the aspect of the electronic communications service. An electronic communications service is a service consisting completely or partly in the transfer of signals or data. In our case, this would mean the transfer of data from the client to the institution and the other way round taking place by the means of the application.

(Only as an additional information, the Financial Arbiter states that an example of a similar legal issue could be a French court decision made this year. The French court decided that the Yahoo! firm which, among other things, operates on-line auctions available worldwide, provides a combined service. Yahoo! is, according to the French court, the provider of both the hosting services (i.e. services of electronic communications, consisting in the securing of the operation of the Internet portal on which third parties may sell and buy all kinds of goods within the on-line auctions) and publishing services consisting in the preparation and determination of rules of the on-line auctions and the classification of products which are subject of these auctions. Although this is a single service, from the legal point of view it is necessary to divide it into two different components and to assess both of them separately, according to special rules valid for these services. The decision of the French court, however, did not play any role in the issuance of the disputed finding).

This combined nature of its service is confirmed also by the institution when it expressly states that „What matters is not an insufficient security of the communication with the institution or directly a shortcoming in the security of the direct banking system because the communication with the bank is secured sufficiently, what matters is the issue of a sufficient security of the client's, or rather the petitioner's computer....“ (see the institution's communication of 22 April 2004).

From this communication of the institution, the Financial Arbiter infers that the institution itself acknowledges that it considers part of its service to be the securing of the data communication with the client. However, at the same time it does not acknowledge its potential responsibility for the securing of the client's computer.

Based on the above, the Financial Arbiter is of the opinion that the institution should meet, in respect of the electronic banking service, when protecting personal data, the requirements placed on the providers of both the financial services and the electronic communications services.

Obligations to protect personal data within the electronic communications sector were developed in more detail within the EU law in Directive No. 2002/58/EC (so-called Directive on Privacy and Electronic Communications) of the year 2002, however, it was not implemented in the period when the payment transactions were questioned and the Czech Republic was not the member of the European Union yet.

However, to interpret the act on protection of personal data, it is possible to use the directive No. 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data based on which the act on protection of personal data was passed. The directive, in its S. 17 (1) sets out the following responsibility of administrators: Member States shall provide that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.

In other words, having regard to the state of the art and the cost aspects, it is necessary that the security measures ensure the level of security corresponding to the existing risk. It is therefore possible to argue, namely in conjunction with the general obligation to prevent damages, that if there is a special risk that the security of the network is violated, the administrator must inform the participants in the network about such a risk and if such a risk is in excess of the scope of the measures which are to be accepted by the administrator, he must inform the participants about any measures for remedy including the determination of the likely related costs. Specifically, he must inform about specific risks of breaching the security of electronic communication in relation to the protection of personal data, i.e. to recommend him e.g. the use of the encrypting software, etc. However, in the given case, the institution did so only ex post, after the disputed transaction was executed.

A similar obligation which is pointed out in respect of the above case under review, i.e. the obligation to notify of the imminent risks and to recommend potential protective measures to the client, are included in the general preventive obligation to prevent the potential damage within the meaning of S. 415 of the civil code.

From the communication of the institution it is clear that it was aware of the following:

- 1) that it provides a combined service on part of which consists in the securing of the data communication,
- 2) what should be the general rules which the client should adhere to in using the electronic banking services. Yet the institution failed to inform its clients about these rules applicable to the clients and satisfied itself with a contractual arrangement by which the client is obliged to ensure himself the security of his own personal certificate. By failing to do so, the institution failed to meet its statutory obligations concerning prevention.

In addition to the contractual liability of the institution, the Financial Arbiter dealt also with the issue of whether and to what extent the petitioner breached his obligations ensuing from the contract and the law. Concerning this, the Financial Arbiter states the following.

The general obligation to prevent loss is also applicable to the petitioner. From the communication of the institution it ensues that it sees the breach of the petitioner's obligation in the insufficient security of his computer. The petitioner then claims that he only adhered to the instructions provided by the institution. However, the instructions of the institution, at the time when the disputed transaction was executed, did not include more detailed conditions stipulating how the client should secure his computer.

The institution bases its claims that the petitioner breached his obligations to secure his computer on two points: petitioner failed to adhere to generally known, usual and generally adhered to rules of securing the computer when accessing the Internet network which he should know and adhere to under any circumstances and the disputed transaction took place exactly for reasons of insufficient security of the petitioner's computer.

As far as the first point is concerned, the institution completely neglects its obligation to inform the client about any conditions of the secure provision of the service it sells. It lays stress only on its own protection, not on the protection of the client.

If the institution protects by its working procedures especially and above all itself, not the holder of the account from which the funds are drawn, the institution by these stipulated working procedures puts itself above the other contractual entity – the client. By that the institution breached, in the Financial Arbiter's opinion, S. 2(2) of Act No. 40/1964 Coll., the civil code, as amended by later regulations (hereinafter referred to only as „ObčZ“). The Financial Arbiter is aware of the wording of S. 2 (3) of the civil code that the participants in civil/legal relationships may adjust their mutual rights and obligations by an agreement differently, however, here it is necessary to keep in mind the wording of S. 3(1) of the civil code where it is stipulated that the execution of rights and obligations must not be contrary to good morals. If the institution quite deliberately protects by its working procedures its financial interests more than the financial interests of its client, such a procedure is, in the opinion of the Financial Arbiter, contrary to good morals.

S. 11(1) of the „Bill of Basic Rights and Liberties“ which forms part of the constitutional order of the CR (hereinafter referred to only as the „Bill“), stipulates, among other things, that the ownership title of all owners has the same statutory contents and protection. The institution, by its working procedures, protects above all its own ownership title, e.g. so that an unauthorized overdraft of the client's account to form a debit does not take place which would harm the institution. It leaves the protection of the ownership title of the client completely up to him although it sells its service to the client. By its working procedures, the institution provides higher protection to its ownership title than to the ownership title of the petitioner. By doing so, it breaches, in the Financial Arbiter's opinion, also S. 11(1) of the Bill.

As far as the other point included in the institution's communication of 27 August 2004 is concerned, the Financial Arbiter is of the opinion that it is first necessary to answer the question on whom above all there is the burden of proof and whether this burden of proof was performed as appropriate.

The primary burden of proof in the case under review lies on the institution not on the petitioner. The reason is, among

other things, the above obligation to ensure the protection of personal data included in the act on protection of personal data. The institution must prove that the disputed transaction did not take place for reasons on its part, i.e. that it took appropriate security measures due to the risk and with regards to the cost and technical aspects and that it met its obligation to inform the participant-petitioner about specific risks. The institution, in its communication, failed to sufficiently perform this burden of proof. Practically the only proof is a simple claim that its system was not attacked. In its communication, the institution does not mention security audits, certifications, compliance with international security standards, a systematic, long-term log of data related to the transactions of the petitioner without non-standard elements etc.

From the contractual documents, specifically from a section of the Institution's Conditions for Provision and Use of Direct Banking („The client shall be obliged to ensure that no third party has the knowledge of his security data concerning the use of the direct banking services. The client shall protect his security data from being lost, disclosed, stolen and misused. The Client shall ensure such measures so that the system cannot be abused by a third party. In case of a breach of the above obligations, the client shall be obliged to provide the compensation for the damage.“) ensues the general obligation of the client to protect passwords and PINs but apparently also the obligation to secure, in a corresponding way, the Internet access. From the groundwork documentation it ensues that the client acted in compliance with the instructions of the institution. In the opinion of the Financial Arbiter, the institution failed to document the breach of these instructions on the part of the client.

Based on the above facts, the Financial Arbiter states the following:

- a) The institution cannot exclude its liability in the abuse of the personal certificate in case of a disclosure of the data which are known only to the client and the bank.
- b) the institution's service is a combined service (financial and electronic communications) which the institution itself confirms (the communication with the bank was, according to what it claims, secured sufficiently, however, the client's computer was secured insufficiently), and therefore the obligation to protect personal data as per S. 13 of act No. 101/2000 Coll. applies to it; due to this provision, in conjunction with the general obligation to prevent damages, the institution breached this obligation since it failed to inform about specific risks related to the violation of the security of the electronic communications. At the same time, on the part of the institution, there was a breach of S. 11(1) of the Bill.

Based on the presented facts and the performed proceedings, the Financial Arbiter arrived at a conclusion that the institution failed to meet its statutory general obligation to prevent loss, it failed to bear the burden of proof (especially due to its obligation to ensure the protection of personal data as per the act on protection of personal data) and is, in this case, liable for the damage suffered by the petitioner.

Before the Financial Arbiter issued this decision, he obtained all source materials required for its issuance, duly and fully established the facts, performed all investigations necessary to assess the case and when making the decision about the objections filed by the institution, the Financial Arbiter did not discover any facts why the finding issued on 31 January 2005, registration No. 00/2004, filing No. 000/2005, should be changed.

Based on the institution's filed objections, the Financial Arbiter assessed the challenged finding to its full extent; at first, he evaluated each piece of evidence separately and then all pieces of evidence in relation to one another and he did not identify himself with the institution's views for the above reasons.

Therefore, the Financial Arbiter decided as mentioned in the statement section.

**Advice:**

The decision concerning the objections is final.

Prague, 4 May 2005

***JUDr. Ing. Otakar Schlossberger, signed  
Financial Arbiter***



## 6. Selected Information from the Arbiter's Work

### 6.1. Proceedings before the Arbiter

It must be said that the Arbiter, during the period under review, as opposed to the previous years, he mostly did not already encounter a significant lack of synergy on the part of the institutions. Yet, the Arbiter still had to refer to the administrative code and to approach with applications for evidentiary materials also other participants (usually dealers or the Police of the Czech Republic).

By the Czech Republic's joining the EU, the number of queries, both on the part of the clients of institutions and on the part of institutions themselves, concerning the correct accounting for fees in cross-border payments in EUR in connection with the decree of the EP and the Council<sup>9</sup>, which concerns all the cross-border payments denominated in EUR.

### 6.2. Issues Not in the Arbiter's Powers

During the year, clients approached the Financial Arbiter with petitions to open proceedings in matters which were not in his powers.

The fields were in particular the following:

- building saving (treatment of interest and government support)
- bank fees
- loan agreements (contractual conditions)
- queries on how to file a petition at the FA
- complaints about insurance companies
- complaints about bank employees
- seizures
- transfers outside EU
- queries outside the area of banking

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<sup>9</sup> Regulation 2560/2001/EC on cross-border payments in EUR

## 7. The Arbiter's International Cooperation



On 10 June 2005, there was yet another meeting of representatives of the EU member states associated in the FIN-NET network, namely in Prague under the auspices of the Financial Arbiter. The meeting took place in leased premises of the CNB's Congress Centre.

FIN-NET is an abbreviation which stands for „Cross-border Out-of-Court Complaints Network for Financial Services“. It is a network associating appropriate institutions of the EU member states for out-of-court settlement of disputes in the field of finance in order to help consumers with their problems that arise with regard to foreign entities, e.g. banks, insurance companies, loan and building societies and investment companies operating on the territory of the European Union.

More than 40 representatives of the FIN-NET network, that is of Financial Arbiters – ombudsmen from all enlarged EU member states took part in the above meeting.

In the course of the meeting, the Arbiter presented his contribution on his operation in the CR. A large number of topical issues of cooperation among individual countries was addressed. What was also discussed was the question of the Financial Arbiter's CR joining the above FIN-NET network which is very topical and necessary for the mutual all-European cooperation and co-ordination of activities.

The organizational arrangements, refreshments and all the conference services were ensured by the employees of the FA's office in cooperation with the employees of the CNB's Congress Centre.

### Experience from Spain

In January 2005, the Arbiter met the head of a section of the National Bank of Spain in order to obtain information on the activities in the area of the consumer protection in Spain. The Arbiter received from the representatives of Banco de Espana (BDE) – Mr. E. Rize and Mr. Gila, a comprehensive information on how the consumer protection works in Spain.

In Spain, according to the existing legislation, the consumer protection is ensured by a special department of the BDE (approx. 30 people).

The solution of disputes in Spain is free of charge and the disputes are launched only based on written groundwork materials with the original signature of the petitioner (that is they are not started based on fax or e-mail applications). Unlike the FA, this special department addresses all the areas in which the financial institutions operate similarly to Great Britain (loan and building societies, mortgages, etc.). The structure of issued recommendations (they are not binding for the institutions) is, according to what the gentlemen said, 50% in favour of the petitioner and 50% in favour of the institution.

The total number of days for the processing of a complaint is not longer in the BDE than 60 days (the institution is obliged to respond to the BDE within 10 days and the BDE to send a report to the petitioner within 15 days). The BDE discloses in its annual report names of specific institutions whose disputes were being solved with the clients.

The abuse of the payment card in Spain is not a big problem since the EU directive is applied here which concerns the deductible of the client amounting to EUR 150 (in the CR, this amount (CZK 4,500) is set out only in the Sample business conditions for issuing and using EPP as a recommendation which none of the institutions in the CR accepts).

During the second part of the meeting, Arbiter was informed about how the so-called back-office of the department works and about the existing software equipment used by the BDE since the year 1998. The system automatically checks for example whether the given dispute had already been addressed by the BDE, it checks the compliance with deadlines in respect of responses, etc.

### Experience from Germany

In May 2005, the Arbiter made a trip to Berlin for the purposes of the obtaining of information and experience of German ombudsmen with their activities. The first meeting in the Bundesverband Deutscher Banken (Association of German Banks) took place in the presence of Mr. Hansjörga Dölla – the member of the leadership of the Association, Mr. Thomas Lorenz – the director of the legal department.

In this association, there are currently four ombudsmen for private banks who are responsible for approx. 240 private banks.

Ombudsmen for private banks are provided with salaries based on lump-sum principle by the Association of German Banks. E.g. the number of disputes in the year 1992 amounted to 965, of them there were 254 justified but in the year 2004, there were already 5,098 disputes, of them 1,566 were justified. The processing of disputes takes place according to the given proceeding code. The whole proceeding code takes place only in a written form, namely on the part of the petitioner and on

the part of the bank. It starts with the filing of a petition instead of client complaints. If the petition is not justified, it is settled by the employees of this workplace. In case of a justified petition, this workplace prepares all the groundwork materials required for the decision including the viewpoint of the bank which has the deadline for making comments which is 30 days long or another period of 30 days. These groundwork materials are sent by the messenger to one of the ombudsmen for a decision. Disputes are allocated to the ombudsmen regularly in a determined order. The ombudsman makes a decision without any delay and sends the decision to both parties. The decision made by an ombudsman is binding if the amount of the subject of dispute is not in excess of EUR 5,000. The proceedings before an ombudsman is free of charge for the petitioner, the costs are reimbursed by the Association of German Banks. The petitioner pays only his costs (e.g. postal charges). If the petitioner does not agree with a decision made by the ombudsman, he may approach a court. In court, he has to submit a document proving an unsuccessful attempt to settle the dispute out of court which is issued to him by an office for client complaints.

The following areas are within the powers of the ombudsmen for private banks:

- securities
- system of payment (including the abuse of payment cards) and the maintenance of accounts („Account for Everybody“)
- mortgage loans
- saving
- guarantees

For private banks, the whole proceedings before ombudsmen last on average 3 to 6 months.

Another meeting at the Bundesverband Öffentlicher Banken Deutschlands (Association of German Public Banks) took place in the presence of Mrs. Claudia Theisen-Wacket – the directress of the legal department and Mr. Frank Lücke from the client complaints office.

The ombudsman activities within this Association are very similar to those at the Association of German Banks. The difference is only in the number of disputes which is derived from the number of approx. 30 public banks for whom the ombudsman is responsible. In the year 1999, the number of disputes was 112 and, in the year 2003, already 912.

### **Experience from Austria**

The Arbiter met, in November 2005 at Vienna, with an Austrian ombudsman, Mag. jur. Herbert Beisteiner operating in the Gemeinsame Schlichtungsstelle der Österreichischen Kreditwirtschaft (GSOK), a member of FIN-NET.

GSOK consists of an independent ombudsman who is appointed for a period of at least 3 years (he may be appointed to this position even repeatedly), and an office, which is a contact place for client complaints, supports the ombudsman from the administrative point of view.

GSOK powers:

- cross-border transfers
- electronic payment card transactions
- electronic system of payment
- cross-border payments in EUR
- remote access to financial services
- complaints in respect of erroneous information on providing mortgages

In this system of out-of-court settlement of disputes in Austria, most of the institutions are involved (approx. 600 out of 800). The membership in this system is voluntary.

The proceedings before the ombudsman takes place in a similar way to the CR.

The ombudsman prepares a finding justified in writing. If this is not possible, a proposal for a settlement may be made. The finding or a proposal for a settlement are sent to both parties without any delay. The decision made by an ombudsman is binding for institutions up to the amount of EUR 4,000. If the amount of the subject of dispute is in excess of EUR 4,000, the institution may voluntary undertake to fulfil the finding. For the petitioner, the finding is binding if he announces to have accepted it within 4 weeks. If this is not the case, the finding is not binding not even for the institution. Other than that, the institution is obliged to execute the finding without any delay. Ombudsmen's findings are not disclosed.

The costs of proceedings or representation during the proceedings are borne by each of the parties. Otherwise, the proceedings before the ombudsman are free of charge.

In the year 2003, the ombudsman addressed the total number of 23 complaints and, in the year 2004, 19 complaints.

## **Experience from Finland**

In October 2005, the Arbiter's deputy went to Helsinki. During a meeting, experience and information were shared and the activities of both institutions were compared.

On behalf of the Advisory Office for Bank Customers (AOBC) - The Finnish Securities Complain Board, Mr. Erik Sirén - director, Mrs. Helen Laine - legal advisor and expert in the area of banking Mr. Vesa Sainio - legal advisor and expert in the area of banking and securities took part in the meeting. The AOBC was established in September 1998 based on an agreement between banks and the banking association, the consumer protection act and an EU Directive. 3 years ago, its power was extended to cover also the solution of disputes concerning the area of securities. The AOBC has four employees and the areas of disputes are divided in such a way that the banking area has 2.5 employees allocated and the area of securities 1.5 employees. 1 employee (a legal advisor) thus addresses disputes both from the banking area and from the area of securities.

The AOBC director is appointed by the committee of directors consisting of the members of the Finnish banking association. The activities of the office are funded through the Finnish banking association using contributions from institutions whose disputes the AOBC addresses. They pay a certain financial amount to the Finnish banking association. The whole system of funding does not work based on the law, it is a voluntary arrangement.

AOBC's decisions are not legally binding but usually, the banks adhere to them. If, quite exceptionally, it happens that an institution does not agree and fails to respect the AOBC's decision, the AOBC's director discusses the case before a committee consisting of 4 delegates of the banking association. The institution always respects a decision made by the committee. In the 7 years of the AOBC's activities, it happened only once that a bank sued the AOBC in court. The dispute was addressed by the Finnish High Court. Unlike the Financial Arbiter of the Czech Republic, the AOBC does not have a limit for addressing the disputes (it does not respect recommendations made by the EU) in cross-border transfers - EUR 50,000. The AOBC has the authority to address the disputes regardless of the disputed amount.

In the year 2003, more than 74 % of disputes were resolved at a distance (by telephone, e-mail), and more than 25 % of the disputes required the examination of documents and a solution in cooperation with the banks. In the year 2005, in late September, 42 % of the resolved disputes were disputes concerning the use of an account within the system of payment, 35 % were loan disputes (mortgages, household loans), 7 % were disputes arising from savings at banks and 16 % were represented by other disputes (e.g. concerning the bank secret, inheritance, etc.).

## **Experience from the OECD**

The Financial Arbiter's representative took part, in June 2005, in the meeting of the OECD - the work group for cross-border financial transactions and the fight with financial criminality.

Representatives of the OECD member states took part in the meeting. The key role in the activities of the work group (hereinafter referred to only as the „PS“) is the monitoring of complaints according to the standards in force in international financial transactions.

The PS returned again to the conference „Global Forum on Governance - Fighting Corruption and Promoting Integrity in Public Procurement“ (DAF/INV/BR/WD(2005)7) which took place in Paris in 29 - 30 November 2004. The document from this conference should serve as a „work guidebook“. Most countries consider it a very good proposal in which, however, it is necessary to first define three basic areas - the reason for a „work guidebook“, what countries it will focus on (whether on the OECD countries or the developing countries) and the mutual cooperation among individual countries.

The PS then dealt with an adjusted version of the instructions concerning the second stage in the assessment of individual member states. The PS agreed with the proposed changes in the new document and agreed that in the future it will issue an information booklet on this area of issues.

Within the Tour de Table, the secretariat distributed a document which summed up cases of foreign corruption in individual countries.

The PS commented on the Outreach Strategy stating that the most important point is to define three groups of countries - countries that are ready to join the PS; countries which are not ready yet but are interested to join; countries which are not interested in joining. Germany expressed its opinion that there could be also a fourth group of countries which are not ready to join the PS and are even not too interested in joining but the PS is interested in their joining.

Another point of the meeting was comments on the Draft Russian Legislation. The PS agreed on the fact that Russia wants to become a valid member of the PS. The PS will try to arrange for the whole accession process to take place quickly and thus it will, in the near future, contact competent representatives of Russia in order to arrange the required formalities.

At the conclusion, brief information was provided about the procedure of accepting the SAR as a member of the PS and the announcement that at the October meeting SAR will be invited already as the PS member.



## 8. Proposed Legislative Changes

In the year 2005, the Arbiter presented an amendment of the act on the Financial Arbiter which was later included into the negotiated government draft on the change of acts in conjunction with the unification of the supervision over the financial market (issued as act No. 57/2006 Coll. on the change in acts in conjunction with the unification of the supervision over the financial market – part fourteen, with the effect as from 1 April 2006). The amendment concerned the extension of the authority of the Financial Arbiter in decision-making over disputes in the area of corrective settlement even to savings cooperatives. The amendment also contained a draft proposal concerning the election of the Arbiter and his deputy. Also the proposal to introduce the deadline for issuing a finding applicable also to the Financial Arbiter must be assessed as positive.

In the previous period, the parliament discussed also the amendment of the act on the system of payment (act No. 62/2006 Coll. by which the act on the system of payment is amended as well as other acts of 8 March 2006) from which, among other things, the extension of the protection of the consumer in the CR ensues in the area of a transfer of funds for the benefit of tax offices or customs bodies as per the act on tax and charges administration act<sup>10</sup> or the payment of premium for social security<sup>11</sup> or the payment of premium for general health insurance<sup>12</sup>.

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<sup>10</sup> Act No. 337/1992 Coll., on administration of taxes and charges

<sup>11</sup> Act No. 589/1992 Coll., on premium on social security and the contribution to the government employment policy

<sup>12</sup> Act No. 592/1992 Coll. on the premium for general health insurance



## Conclusion

This annual report of the Financial Arbiter for the year 2005 includes, in a comprehensive way, the knowledge obtained from the third year of his term of office.

The Financial Arbiter closely cooperated with the media in this period to expand the awareness of the CR citizens in the area of using the possibility of out-of-court settlement of disputes through the Financial Arbiter. In order to even more support the promotion of his activities, the Arbiter pro-actively co-operated with various consumer protection associations or unions and also participated in seminars focused on the consumer protection which took place under the auspices of the Members of the Parliament of the Czech Republic.

Some FIN-NET member countries also assessed as very positive the organization of the FIN-NET meeting by the FA office in Prague in June 2005, although at that time the Financial Arbiter was not the regular member of this platform yet, which platform associates member institutions dealing with the out-of-court resolving of disputes.

# APPENDIX NO. 1

## Overview of the Utilisation of Funds in the Year 2005

Item name	amount in CZK million
Total costs of the year 2005	10.4
of them::	
<b>Personnel costs</b>	<b>7.4</b>
wages 7.1 cost of education 0.3	
<b>Administrative activities</b> i.e. for example telecommunication fees (0.3), consultation services (0.7), translation services (0.1), typographical services (0.1), services in respect of the use of flats and non-residential areas (0.1), travel expenses (0.8)	<b>2.1</b>
<b>Operation of buildings and equipment</b> rent (0.7), depreciation of assets (0.2)	<b>0.9</b>

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