

Merger Control

The international regulation of mergers and joint ventures in 75 jurisdictions worldwide

2014

Consulting editor: John Davies



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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The merger control regime is set out in Act No. 143/2001 Coll., on the Protection of Competition (the Act). It is enforced by the Office for the Protection of Competition (the Office). All merger notifications – as well as infringement proceedings in merger matters – are dealt with by the same department. The Office has no sector-specific departments dealing with mergers.

For mergers with a Union dimension, EUMR would apply and the European Commission would be the competent authority.

2 What kinds of mergers are caught?

The following types of transactions are caught:

- a merger (or amalgamation) of two or more previously independent undertakings;
- the acquisition of a business (or a part thereof) – by contract, in an auction, or by any other means – where ‘a part thereof’ can mean a part which is not an independent organisational unit but which nevertheless generates certain turnover through sales;
- the acquisition of direct or indirect (sole or joint) control by:
 - an acquisition of shares, ownership or membership interests; or
 - an agreement, or in any other manner; and
- the establishment of a jointly controlled undertaking (joint venture).

3 What types of joint ventures are caught?

Only fully functional joint ventures are notifiable (ie, those that perform all functions of an autonomous economic entity on a lasting basis).

On the other hand, cooperative joint ventures are subject to the scrutiny of the Office from an antitrust perspective (the Office has to assess whether they constitute cartel agreements or not).

4 Is there a definition of ‘control’ and are minority and other interests less than control caught?

Control is defined as the possibility to exert a decisive influence on the activity of another undertaking on the basis of fact or law, particularly on the basis of:

- a property right or the right of use in respect of an enterprise of the controlled undertaking, or a part thereof; or
- a right or other matters of law that exert a decisive influence on the composition, voting and decision-making of the controlled undertaking’s bodies.

Minority interests are caught, provided that the acquisition of such an interest constitutes the acquisition of control, as defined above.

It is also possible to acquire control by other means (by an agreement, on the basis of specific actual circumstances, etc).

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration of undertakings is subject to the approval of the Office, provided that:

- the combined net turnover of the concentrating undertakings for the last financial year in the Czech market exceeds 1.5 billion Czech koruna and at least two of the concentrating undertakings each achieved a net turnover of at least 250 million Czech koruna in the Czech market for the last financial year; or
- the net turnover of:
 - at least one of the merging or amalgamating undertakings (if the proposed transaction is structured as a merger); or
 - the acquired business (or a part thereof) or the acquired assets (if the proposed transaction is structured as the acquisition of a business, a part thereof or an acquisition of assets); or
 - the target (if the proposed transaction is structured as the acquisition of an undertaking’s shares, ownership interests or membership interests on the basis of an agreement, or any other means which allows the acquirer to control such undertaking); or
 - at least one of the undertakings establishing a joint venture (if the transaction is structured as the establishment of a joint venture) for the last financial year in the Czech market exceeds 1.5 billion Czech koruna, and the net worldwide turnover of another concentrating undertaking for the last financial year exceeds 1.5 billion Czech koruna.

There are no circumstances in which transactions falling below the above thresholds may be investigated.

The turnover shall be calculated as the aggregated net turnover achieved by the parties to the concentration solely by means of the activity that constitutes their scope of business, as follows:

- the turnover of the parties to the concentration; plus
- the turnover of entities controlled, directly or indirectly, solely or jointly, by the parties to the concentration; plus
- the turnover of entities that will control, directly or indirectly, solely or jointly, the parties to the concentration after the transaction; plus
- the turnover of entities controlled by an entity that will control, directly or indirectly, solely or jointly, the parties to the concentration after the transaction; plus
- the turnover of entities controlled jointly by two or more of the entities referred to above; minus

- sales discounts, value added tax and other turnover-related taxes; minus
- the portion of turnover achieved by the sale of goods and services among the entities referred to above (eg, intra-group sales; the turnover achieved by sales between merging companies is a part of their turnover calculated for the purpose of examining whether jurisdictional thresholds are met).

Special rules apply to the calculation of turnover of banking and other financial institutions and insurance undertakings.

- 6** Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory provided that the transaction presents a concentration within the meaning of the Czech merger control rules and that the turnover thresholds have been fulfilled.

It is possible to make a simplified merger notification in the event that the parties to the transaction are not present in the same market, or their joint market share in the relevant market is lower than 15 per cent in the case of a horizontal concentration, or lower than 25 per cent in the case of a vertical concentration, or if an undertaking acquires full control over an undertaking that it previously controlled jointly.

- 7** Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Purely foreign-to-foreign mergers are not caught. However, should the turnover criteria (see question 5) be fulfilled, the transaction would be notifiable. This means that a local effects test applies.

- 8** Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no specific rules on foreign investment, nor are there any sector-specific rules.

Notification and clearance timetable

- 9** What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for making a filing. Parties usually file a notification immediately after the execution of the respective agreement. It is also possible to make a filing before the acquisition of control itself (eg, before the respective agreement has been entered into or a bid launched). However, the transaction must be filed and the clearance obtained prior to implementation.

There are no specific sanctions for not filing; the Office may impose fines only for failing to notify the transaction (see question 12).

- 10** Who is responsible for filing and are filing fees required?

In the case of the acquisition of sole control, the acquirer alone performs the notification. In the case of either the acquisition of joint control, a merger that creates a new undertaking, the creation of a joint venture or the acquisition of an enterprise (or a part thereof) on the basis of an agreement, the notification must be made jointly by the parties to the transaction or acquiring parties.

The filing fee is 100,000 Czech koruna.

- 11** What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The standard waiting period in Phase I is 30 calendar days from the date of the filing of a complete notification. The waiting period

is extended by 15 calendar days if commitments are offered. In the event of simplified proceedings, the waiting period is 20 days.

The waiting period for Phase II proceedings is up to five calendar months from the date of the filing of a complete notification. This period may also be extended by 15 calendar days if commitments are offered.

Should the Office fail to issue a decision within the above time limits, the concentration is deemed to have been approved upon the expiration of the time limits.

In practice, the Office often makes additional requests during merger proceedings – in such cases, the clock stops running until the requested information is provided. Therefore, the Phase I procedure usually lasts about six to eight weeks in practice; Phase II proceedings may take up to six months.

Until the notifiable transaction is approved by the Office, the merging undertakings are prohibited from implementing the transaction.

- 12** What are the possible sanctions involved in closing before clearance and are they applied in practice?

In the event of the violation of the prohibition on implementation of the transaction without approval or prior to approval being granted, the Office may impose a fine amounting up to 10 million Czech koruna or up to 10 per cent of the net turnover achieved by an undertaking in the previous financial year. The Office can also order a demerger (ie, order the companies to sell the shares, transfer the business, cancel any relevant agreements or adopt other measures necessary to restore effective competition in the relevant market). When considering the appropriate sanction for a violation, the Office takes into consideration its gravity, whether any reoccurrence of the breach has occurred and the duration of the breach.

There have been only a few cases where the Office has applied the above sanctions in practice. In the first – and most famous – case, *KMV/Podebradka*, the parties implemented a concentration despite the previous prohibition decision of the Office. The Office imposed a fine in the amount of 10 million Czech koruna on the acquirer and ordered a demerger (it ordered the sale of all shares of the target company to an independent third company).

In other, less significant cases, such as *Lasselsberger, Vitkovice Holding* and *Lumiis*, the Authority imposed only symbolic sanctions of up to 500,000 Czech koruna for a violation of the prohibition on implementing a transaction before clearance, in particular, by voting at the general meeting of target companies.

- 13** Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The same rules as above (see question 12) apply. However, so far, the Office has not imposed sanctions for closing before clearance in foreign-to-foreign mergers.

- 14** What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Foreign-to-foreign mergers usually cannot be implemented before clearance (see question 15 in relation to public bids). Depending on the structure of the transaction, it may be possible to separate the Czech part of the transaction from the rest and implement the transaction on a global level and in other jurisdictions prior to receiving clearance from the Office. However, the implementation of the transaction may not result in the exercise of any kind of control over the Czech target and the other entities acquired by the acquirer have to refrain from any action that could have an impact on the markets in the Czech Republic.

A safer option is to request the Office to grant an exemption from the prohibition on implementing a concentration before the Office grants its approval.

15 Are there any special merger control rules applicable to public takeover bids?

The implementation of a public bid or a series of transactions with listed securities is allowed, provided that it has been notified to the Office without delay and that prior to clearance the acquirer does not exercise the voting rights attached to the securities concerned. In certain limited circumstances the Office may also grant an exemption allowing completion prior to clearance.

16 What is the level of detail required in the preparation of a filing?

Decree of the Office No. 252/2009 Coll. provides a list of information to be provided in the filing. Parties are required to use a notification form. The level of detail depends on whether a standard or simplified procedure would apply.

A standard notification form requires the following data: information relating to the parties concerned, including their turnover; information relating to the concentration, including its nature and the sectors affected; information on the relevant markets (and the definition thereof); the position of the parties concerned on the markets; and the overall situation on the markets. A simplified notification form requires the same data, with the exception of the information on the situation on the relevant market, which does not have to be as detailed as in the event of a standard notification form. A notification form needs to be accompanied by further documents, such as an agreement constituting the concentration, the annual reports of the undertakings concerned, and excerpts from respective public registers relating to the undertakings concerned.

In practice, the level of detail depends on the anticipated impact of the concentration on the relevant markets. In particular, should a concentration result in a market share in a particular market exceeding 25 per cent, the Office usually requires very detailed information with respect to the situation in the relevant market, including the situation at a local level.

17 What is the timetable for clearance and can it be speeded up?

The statutory deadline in Phase I is 30 calendar days from the date of the filing of a complete notification and may be extended by 15 calendar days if commitments are offered. The deadline is 20 calendar days in the case of a simplified notification. In Phase II, the statutory deadline is five calendar months from the date of the filing of a complete notification and may be extended by 15 calendar days if commitments are offered.

However, at any time during the proceedings the Office may request the applicant to supply further facts or evidence. The above deadlines are suspended for the period between the day on which the applicant receives such a request and the day on which this obligation is fulfilled. For that reason, merger proceedings usually take six to eight weeks in Phase I and up to six months in Phase II.

An effective way of speeding up the clearance is to make use of pre-notification meetings during which a number of issues can be clarified. This informal part of procedure is very often used by notifying parties (currently in more than 60 per cent of all cases).

18 What are the typical steps and different phases of the investigation?

Upon notification, the Office publishes basic information regarding the transaction on its website and in the Commercial Bulletin. The interested parties are provided with a short period of time (usually five days) in which to send their comments. In the meantime, the

Office conducts a review of the proposed concentration. In more significant cases, it sends out market test requests to the interested parties (such as competitors, suppliers, customers, associations). It may also send additional requests for information to the applicant, conduct on-the-spot verifications or organise an oral hearing.

In Phase I, the Office's investigation is relatively limited, especially where a simplified procedure has been initiated. Should the Office decide to open Phase II (which is quite rare and occurs only a few times in a year), it conducts an in-depth investigation, including a detailed market analysis.

Substantive assessment

19 What is the substantive test for clearance?

The Office shall prohibit a concentration that would significantly impede effective competition in the relevant market, in particular if it would result in the undertakings concerned enjoying a dominant position or strengthen an already dominant position that they have enjoyed. It is assumed that a concentration does not result in a significant impediment to effective competition if the combined market share of all undertakings concerned in the relevant market does not exceed 25 per cent, unless the contrary is proven during the review of the concentration.

If the Office finds that a concentration has the potential to impede effective competition, it may block it or alternatively accept remedies. The Office basically accepts only structural remedies. In the past, there have been only a few decisions in which the Office has blocked a concentration and there tends to be a few clearance decisions with remedies every year.

As a result of the economic crisis, the Office has publicly declared its willingness to apply the concept of the 'failing firm defence', which is basically in line with the principles applied by the European Commission. The Office has also shown its willingness to grant an exemption from the prohibition on implementing a concentration before clearance, if necessary. None of these rules have so far been applied by the Office in relation to undertakings affected by the economic crisis.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures. However, the Office may also assess whether the object or effect of the creation of the joint venture would be to coordinate the behaviour of the parent companies in the relevant market. For that purpose, the parties are required to provide full details of overlapping activities in the markets concerned in the notification. The Office would use the criteria to assess prohibited agreements.

21 What are the 'theories of harm' that the authorities will investigate?

The Office examines in detail a wide range of competition issues that may arise. Dominance is the main form of harm examined. The others include, in particular, potential unilateral and coordinated effects of the concentration, as well as conglomerate effects.

22 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

The Office may only prohibit a concentration that significantly impedes effective competition. Therefore, non-competition issues could play only a limited role. In practice, the Office often considers the broader effects of a concentration, such as consumer benefits or whether a concentration would be in compliance with government policy in a particular field. These considerations may have a significant impact on the approach of the Office towards a particular concentration.

23 To what extent does the authority take into account economic efficiencies in the review process?

The Office is obliged to take into account efficiencies in the review process. The applicant is encouraged to note in a specific section of the notification questionnaire what kind of efficiencies the transaction would bring. The Office pays attention to efficiency claims. For example, in *Zentiva/SL Pharma* (2003), the Office considered a concentration involving two generics producers; the Office found that their stronger position in the market would lead to an overall decrease in the prices of pharmaceuticals, thus improving competition in the market and providing benefits to consumers and the overall health-care system. The Office also noted that the increased financial strength of the merged undertaking would improve its position in the market and would enhance its competitiveness and will enable it to invest more into research and development. In *Gorenje/Mora Moravia* (2004), the Office referred to the principles laid down in the respective Commission guidelines and noted that, despite a high market share of the merged undertaking, the transaction would have allocative and dynamic efficiencies, thus approving the transaction.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Office will prohibit a concentration if it would result in a substantial distortion of competition in the relevant market. The Office may also approve the concentration subject to fulfilment of commitments that are proposed by the undertakings concerned for the purposes of maintaining effective competition.

Prior approval is required before the implementation of a transaction. The Office is empowered to impose severe fines in the event of a violation of the prohibition on implementation of the transaction without approval or prior to the approval being granted. The fine may amount to up to 10 million Czech koruna or up to 10 per cent of the net turnover achieved by an undertaking in the previous financial year. The Office may also order a demerger (ie, order the companies to sell the shares, transfer the business, cancel any relevant agreements or adopt other measures necessary to restore effective competition in the relevant market). When considering the appropriate sanction for a violation, the Office takes into consideration the gravity of the violation, whether or not any reoccurrence of the breach has occurred and the duration of the breach.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Parties may negotiate undertakings in order to remedy concerns raised by the Office. The Office currently prefers structural remedies (such as the sale of a subsidiary or of a part of a business); behavioural remedies (eg restrictions on price increases, imposing an obligation to keep separate distribution channels or separate labels, measures facilitating the entry of third parties to the market) are rather rare.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Remedies are offered in the event that the Office reaches a preliminary conclusion that the transaction would significantly impede competition in the relevant market and that there is a likelihood that the offered remedies may dispel the concerns of the Office. There are no specific material conditions that need to be fulfilled.

As regards timing, the remedies may be offered as part of the notification or at any later stage of a merger proceeding, but no later than 15 days after the receipt of a statement of objections. Parties usually submit remedies offers only after they receive a statement of

objections. The Office may even take into consideration offers made after the expiry of the deadline, but only in exceptional circumstances and provided that they are made within 15 days of the expiry of the above 15-day deadline.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

As noted under question 7, purely foreign-to-foreign mergers are not caught. Only if the turnover criteria are fulfilled would the transaction be notifiable.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The clearance decision also applies to restrictions of competition declared by undertakings in the notification form that have a direct connection with the concentration and that are indispensable to its implementation. The Office has not prepared any explanatory document in this regard, but in order to determine what kind of restrictions would be acceptable, the respective Commission's Ancillary Restraints Notice may be used as a guideline.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

Interested parties (mainly customers, competitors and consumer associations) have the opportunity to submit their comments on the contemplated transaction. Following a merger notification, the Office publishes a short notice on its website and in the Commercial Bulletin and encourages interested parties to submit their comments within the set deadline. In some (usually more complicated) cases, the Office also sends out detailed questionnaires to interested parties and asks for additional data and views on the transaction.

Third parties are not parties to merger procedure; their procedural rights are limited only to the right to submit their comments and to receive information from the Office about how their submission has been treated. They may also be called as witnesses in oral hearings, which is, however, not common.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Office publishes a short notice on its website and in the Commercial Bulletin about the notification and invites third parties to make comments. After the adoption of a decision, the Office publishes a press release. A non-confidential copy of the decision is made available on the website of the Office and in its collection of decisions.

Access to the file containing all the relevant information and documents relating to the transaction in question is usually only granted to the applicant, who is the only party to the proceedings. Interested parties may also be granted access to the file, provided that they can show a 'legal interest' or other serious reason and provided that such access does not jeopardise the rights of a party to the proceedings, other parties concerned or the public interest. In any event, these parties are granted access only to the 'non-confidential file' (ie, the file not containing business secrets). If a party believes that its interests would be harmed if any of the information supplied were to be published or otherwise divulged to other parties, this information should be submitted with each page clearly marked 'business secrets'.

No employee of the Office shall disclose to third parties any facts whatsoever which he or she learned during this activity and which constitute business secrets or confidential information. This

Update and trends

Parties are increasingly using pre-notification negotiations. They are also making use of simplified proceedings, which currently account for more than 60 per cent of all merger proceedings. On the other hand, there have only been a limited number of cases in which the Office has had to accept remedies (in 2012, three concentrations were approved with remedies, namely *Agrofert/Euro Bakeries*, *Agrofert/Loredana* and *Ceská lékárna/Lloyds*).

The Office has used the available capacity due to the decrease in merger notifications for a review of compliance with merger control regulations, in particular concerning the suspension obligation. It is also focusing on the review of compliance with undertakings accepted in previous merger cases. In *Rewe/Plus-Discount*, the Office imposed a fine for non-compliance with undertakings imposed in merger control proceedings concerning the merger of REWE and Plus-Discount spol sro, the companies who run the food stores chains Billa and Penny Market (REWE) and Plus. The fine imposed amounted to 23,890,000 Czech koruna. This is the first fine imposed by the Office for non-compliance with remedies and at the same time, the highest fine imposed in a merger case.

obligation shall remain in force even after the termination of this relationship with the Office.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Office cooperates with the European Commission and other national competition authorities within the European Competition Network. The cooperation is naturally more intensive in cross-border cases. The cooperation with the European Commission in merger cases has been regulated in EU and Czech law. The Office may refer a case to the European Commission and vice versa. So far, this has only been used on a few occasions.

Judicial review

32 What are the opportunities for appeal or judicial review?

A party to the proceedings may file an appeal with the chairman of the Office within 15 days of the delivery of the decision of the Office.

A decision of the chairman is subject to a court review, which is undertaken by the Regional Court in Brno. The action must be filed within two months of the delivery of the decision of the chairman. Filing an action does not suspend the effectiveness of the decision, unless the court issues an order ruling otherwise.

Subject to certain conditions, it is possible to make an extraordinary redress against a court decision with the Supreme Administrative Court in Brno.

A judicial review of merger control decisions occurs very rarely – generally only in the event of a prohibition decision (eg, *Bakeries International Luxembourg/Delta Pekárny, Südzucker/Saint Louise Sucre*).

33 What is the usual time frame for appeal or judicial review?

There are no statutory time limits for appeal proceedings or a judicial review. Appeal proceedings usually take several months, and a judicial review even longer, in particular if a party makes a decision to file a petition for extraordinary redress with the Supreme Administrative Court.

Enforcement practice and future developments

34 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

The level of activity of the Office has been lower in recent years due to the economic crisis. The Office currently deals with around 50 merger cases annually. The share of simplified proceedings has dramatically increased since its introduction in 2009 and they currently account for more than 60 per cent of all merger proceedings. On the other hand, every year there are only a few Phase II proceedings or proceedings in which remedies are accepted by the Office.

The Office also initiates a few infringement proceedings every year. For more details, see question 35.

As regards foreign-to-foreign mergers, please see question 7 for more details.

35 What are the current enforcement concerns of the authorities?

Due to a lower level of transaction activity caused by the economic crisis, the Office has announced that it will focus more on compliance with merger control regulations. It has recently initiated several infringement proceedings, mainly due to a breach of the obligation to suspend the implementation of the transaction. In one case, the infringement proceeding concerned the breach of a remedy.

36 Are there current proposals to change the legislation?

There are no current proposals to change the legislation concerning merger control.

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