



Czech Republic: The Czech Office for the Protection of Competition fines REWE for not implementing the remedies agreed in a REWE/Plus Discount merger case

The Office for Protection of Competition (the “Office”) imposed a fine of CZK 24,890,000 (approx. EUR 983,000) on REWE Zentralfinanz eG (“REWE”) for non-compliance with the remedies imposed in merger control proceedings regarding the merger of REWE and PLUS-DISCOUNT spol. s.r.o. (“PLUS DISCOUNT”) (together the “Parties”), the companies who run the food stores chains Billa and Penny Market (REWE) and Plus (PLUS-DISCOUNT spol. s.r.o.) (the “Merger”).

Given the fact that the EU notification thresholds were met, in May 2008 the Merger was notified to the European Commission (“**Commission**”). In accordance with Art. 19, paragraph 1 of EC Regulation no 139/2004 on the Control of Concentrations between Undertakings (“**Merger Control Regulation**”) the Commission informed the national competition authorities of the Member States about the case. After a preliminary review of the notification, the Office came to the conclusion that the Merger might have an impact on some markets in the Czech Republic and requested that the Commission refer the case to it under Art. 9, paragraph 2 of the Merger Control Regulation. Accordingly, on 3 July 2008 the Commission issued a decision on the referral of the case to the Office.

Review by the Office

On 8 July 2008 the Office opened the merger control proceedings. In its review the Office identified two product markets in which the Parties were active – i.e. the (i) market for the retail sale of consumer goods in so-called “relevant formats” (the “**Market for the Retail Sale of Consumer Goods**”), and (ii) 19 independent markets for the wholesale purchase of consumer goods. In the view of the Office, “relevant formats” should be understood as the sale of consumer goods in non-specialised supermarkets and discount stores. However, the “relevant formats” do not include cash & carry stores, specialised stores or small stores at petrol stations.

In the view of the Office, the supply of various groups of food and non-food products is to be considered as constituting separate markets. This is based on the Office’s finding that in practice, the producers of these products are usually active only in the production of one product group, and the possibilities for the producers to switch to the production of other kinds of products are limited. The above-mentioned groups of products, for which separate markets have been defined by the Office, include (i) bread and bakery products, (ii) milk products, and (iii) non-alcoholic beverages (together “**Supply Markets**”).

From the geographical point of view, the Office defined the markets as region-wide in the case of the Market for the Retail Sale of Consumer Goods, and country-wide in the case of Supply Markets.

First decision of the Office – conditional clearance of the merger

As regards the Supply Markets, the market investigation conducted by the Office confirmed that although the Merger would lead to an increase in the aggregated market share of the Parties to a level exceeding 20 per cent in some of the Supply Markets (such as the markets for (i) animal feed, (ii) sweets, or (iii) beer), given the strong market position of suppliers in these markets, the increased market power of the Parties following the Merger might not have a negative impact on consumer prices. Therefore, the Office concluded that the Merger would not lead to any significant impediment to effective competition on the Supply Markets.

However, as regards the Markets for the Retail Sale of Consumer goods, the market investigation showed that after the Merger, in four of the regions the Parties would possess a market share of over



40 per cent. To remedy the Office's concerns that effective competition on these markets might be impeded after the Merger, the Parties proposed that the acquirer (i.e. REWE) would divest itself of one store in each of the four regions in order to decrease its market share in these regions. Additionally, the Parties argued that despite their high market shares, the market position of REWE will be weakened by the fact that further market entries are expected in the next future.

The Office conducted a market test of the remedies proposed by the Parties. Taking into consideration the expected new entries into the markets at question, the Office concluded that the remedies proposed by the Parties were capable of remedying the competition concerns of the Office. Therefore on 22 August 2008 the Office cleared the Merger upon the condition that the REWE, as the buyer, would divest itself of the stipulated stores within one year of the date of the enforceability of the clearance decision ("**Remedies**").

Second decision of the Office – fine imposed to REWE

In the years 2009 and 2010 REWE several times applied for a postponement of the deadline for the implementation of the Remedies and proposed a reassessment of the Remedies. Although, following the proposal of REWE, the Office partially adjusted the Remedies, REWE failed to implement the Remedies. Therefore, at the end of 2010 the Office initiated administrative proceedings with REWE for non-compliance with the imposed remedies. On 11 February 2013 the Office issued its decision in which it concluded that REWE had not made sufficient efforts to implement the Remedies for which an administrative fine of CZK 23,890,000 (approx. EUR 983,000) was imposed. In calculating the fine, the Office took into account the turnover of REWE in those regions in which it was supposed to divest itself of stores. Consequently, REWE filed an appeal against the above decision. President of the Office will decide on whether or not this appeal will be upheld.

Conclusion

The case is interesting for various reasons. Firstly, if the decision becomes effective, it will be 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.

Secondly, in this context, it is important to note that the Office recently imposed a fine in another merger case – the merger of Karel Holoubek Trade Group (solid fuel trading company) and the Karlovarká teplárenská (a heat production company). These cases concerned non-compliance with the obligation not to implement a merger before the decision on the merger proceedings was issued.

Generally, it could be concluded that these recent developments in the Czech merger case law show that the Office has been increasingly prosecuting infringements of merger control rules.

Source: *Karel Svoboda, The Czech Office for the Protection of Competition fines supermarket chain company for not implementing the remedies agreed in a merger case (REWE/Plus Discount), 11 février 2013, e-Competitions, N°51152, www.concurrences.com*

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