



ICLG

The International Comparative Legal Guide to:

Merger Control 2017

13th Edition

A practical cross-border insight into merger control issues

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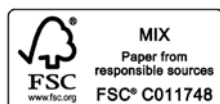
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EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 50 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Nigel Parr and Catherine Hammon of Ashurst LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The relevant authority in the Czech Republic to apply merger control legislation is the Office for the Protection of Competition (*Úřad pro ochranu hospodářské soutěže*; the “Office”), with its seat in Brno.

Decisions of the Office may be appealed before the Chairman of the Office (*předseda Úřadu*).

The decision of the Chairman of the Office can be challenged by bringing an administrative action to the Regional Court in Brno (*Krajský soud v Brně*).

The Supreme Administrative Court (*Nejvyšší správní soud*) is entitled to review the judgment of the Regional Court in Brno upon a cassation.

1.2 What is the merger legislation?

The relevant merger control legislation is set out in the Act on Protection of Competition (*zákon o ochraně hospodářské soutěže*, Act No. 143/2001, as amended; the “Act”). Procedural rules are contained in the Act on Administrative Procedure (*správní řád*, Act No. 500/2004, as amended).

Decree No. 252/2009 implements the Act and provides a merger notification form, and specifies other documents necessary for the filing of a concentration (*vyhláška ÚOHS č. 252/2009 Sb., kterou se stanoví náležitosti návrhu na povolení spojení soutěžitelů*).

The Office has also published several notices, i.e.: (i) the Notice on the calculation of turnover; (ii) the Notice on pre-notification contacts; (iii) the Notice on the concept of merger control; (iv) the Notice on the concept of undertakings; (v) the Notice on implementation of a concentration prior to the approval of the Office; (vi) the Notice on the application of the failing firm defence concept in the assessment of concentration of undertakings; and (vii) the Notice on simplified procedure, which are all classed as so-called soft law.

Transactions covered by the jurisdiction of the European Commission under the EU Merger Control Regulation (Council Regulation No. 139/2004; “EUMR”) are by virtue of Article 21 (3) of the EUMR outside the scope of Czech merger control (“one-stop-shop principle”).

1.3 Is there any other relevant legislation for foreign mergers?

The Act also applies to foreign mergers; no specific legislation exists in this regard.

1.4 Is there any other relevant legislation for mergers in particular sectors?

There are no specific provisions. All industry sectors are covered by the merger control regime. However, specific approvals may be necessary, particularly in the financial sector, where the approval of the Czech National Bank may be required.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a “merger” and how is the concept of “control” defined?

The Act defines the following types of transactions to constitute a “merger”:

- merger (consolidation) of two or more undertakings operating independently on the market;
- transactions where an undertaking acquires an enterprise of another undertaking or a part thereof on the basis of an agreement, in a public auction or in another manner;
- transactions where one or more persons already controlling at least one undertaking, or one or more undertakings directly or indirectly acquire control over another undertaking (target undertaking) either by acquisition of shares or ownership interest or by an agreement or by any other means, which enables the acquiring undertaking(s) to control the acquired undertaking; and
- the creation of joint control by more undertakings over another undertaking which, on a lasting basis, performs all the functions of an autonomous economic entity.

Certain transactions are not covered by the scope of merger control. These exceptions apply to financial institutions or bodies, and reflect the scope of exceptions defined under the EUMR.

The concept of “control” is defined as the possibility to exercise decisive influence over another undertaking, in particular by:

- ownership or the right to use an enterprise of the controlled undertaking or a part thereof; or

- rights or other legal facts that confer decisive influence on the composition, voting or decisions of the organs of the controlled undertaking.

A more detailed definition of control is set in the Notice on the notion of “undertakings concerned” under the Act (“Notice on the concept of undertakings”).

The Office always assesses the actual situation on a case-by-case basis. The acquisition of control, in addition to the change in the quality of control (from joint control to sole control and *vice versa*), is understood to be a concentration within the meaning of the Act.

2.2 Can the acquisition of a minority shareholding amount to a “merger”?

There is no explicit regulation of minority shareholdings contained in the Act. In practice, however, the Office has considered the acquisition of a minority shareholding a merger in the past. The case law of the Office shows that through acquisition of a minority shareholding, decisive influence over the target undertaking could be exercised either on a *de jure* or a *de facto* basis. *De jure* decisive influence may be conferred upon a minority shareholder holding preferential shares on the basis of which it holds the majority of voting rights or is in the position to decide on the commercial behaviour of the target undertaking. *De facto* decisive influence may be exercised by a minority shareholder if the remaining voting rights are widely spread, or if it has the right to determine the market behaviour of the target undertaking (“Notice on the concept of merger control”).

2.3 Are joint ventures subject to merger control?

The establishment of an undertaking jointly controlled by more undertakings that perform all functions of an autonomous economic entity (joint venture) on a lasting basis shall be deemed to constitute a merger and is subject to merger control.

Joint ventures whose aim is the coordination of behaviour of the parties controlling them are not considered mergers. However, they may be subject to the scrutiny of the Office as potential cartel agreements.

2.4 What are the jurisdictional thresholds for application of merger control?

A merger is subject to approval by the Office if:

- the aggregate net turnover of all parties to the merger in the last completed accounting period within the market of the Czech Republic exceeds CZK 1.5 billion (approximately EUR 55.5 million) and the aggregate net turnover of each of at least two of the parties to the merger for the last completed accounting period within the market of the Czech Republic exceeds CZK 250 million (approximately EUR 9.2 million); or
- the aggregate net turnover of: (i) at least one undertaking being a party to the merger (consolidation); (ii) an enterprise or its part being acquired; (iii) an undertaking whose control is being acquired (target); or (iv) at least one of the undertakings creating a concentrative joint venture, for the last completed accounting period within the market of the Czech Republic exceeds CZK 1.5 billion (approximately EUR 55.5 million) and the aggregate worldwide net turnover of the other party to the merger for the last completed accounting period exceeds CZK 1.5 billion (approximately EUR 55.5 million).

The aggregated turnover of the party to the concentration comprises the turnovers:

- of all parties to the concentration (seller(s) and target);
- of all persons who control the parties to the concentration and persons who will be controlling the parties to the concentration after its completion;
- of all persons controlled by the same person who will control the parties to the concentration after its completion; and
- of all persons jointly controlled by two or more persons referred to in the previous items.

The turnover resulting from the sale of products between the parties to the concentration and those persons listed under the second, third and fourth bullet points above shall not be taken into account.

If only part of an undertaking is subject to the concentration, only that portion of the turnover achieved by this part shall be taken into account when calculating the turnover.

For the purposes of calculation, the aggregated turnover of the undertaking does not include sales, income or receivables from the sale of goods between merging undertakings.

2.5 Does merger control apply in the absence of a substantive overlap?

Merger control also applies in the absence of an overlap.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction (“foreign-to-foreign” transactions) would be caught by your merger control legislation?

The Act applies to mergers abroad if these have, or may have, an impact on competition on the Czech market.

It is presumed with regard to the turnover thresholds, which primarily take into account Czech turnover of the parties to the merger, that a foreign-to-foreign concentration might have an impact in the Czech Republic, and is therefore subject to notification to the Office.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The ECMR has precedence over the national legislation and applies to transactions that have a Community Dimension, in light of the one-stop-shop principle.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

If the same transaction is implemented in several steps or two or more transactions that are not subject to the merger control are implemented among the same parties within a period of two years, these various stages constitute a single transaction and are assessed as one merger.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

A merger that meets turnover thresholds must be notified to the Office. There is no deadline for filing the notification, but the transaction may not be implemented prior to clearance by the Office. The merger could also be notified to the Office prior to a legally binding agreement based upon which the concentration is concluded (pre-merger notification), or if another fact giving rise to the merger has occurred. In such a case, the notification must also contain written reasoning and written documents certifying essential facts for the merger.

Pre-notification contacts with the Office are also possible, and are very often used by parties to the merger. Details of pre-notification contacts are specified in the Office's Guidelines on pre-notification contacts within merger control.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

All transactions are subject to notification to the Office if the transaction constitutes a merger according to the Act and the turnover thresholds are met.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

If the Office discovers that a merger was not notified to it, or if the parties to the merger violated the prohibition to implement a concentration prior to clearance by the Office, the Office may take measures which it considers necessary in order to restore effective competition on the relevant market, particularly a "demerger" obligation.

Also, it may impose a fine on the party to the merger which breached the notification obligation. The fine may be up to CZK 10 million (approximately EUR 370,000) or 10% of the net turnover of the undertaking(s) that breached the notification obligation.

There is a risk, however, that the respective transaction will be deemed invalid. This question has not, as yet, been clarified under Czech law.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Agreements, under which the Czech business is kept strictly separate from the remaining business of the target undertaking until clearance is obtained, could allow for a closing of the transaction without the Czech part of the target undertaking.

3.5 At what stage in the transaction timetable can the notification be filed?

There is no deadline for the notification of a merger. The parties may file it as soon as the legally binding transaction documents

have been signed. The notification may be submitted prior to the signing of the relevant transaction agreements, if the parties have at least agreed on the structure of the transaction. Transactions of a speculative nature cannot be notified.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The Office has 30 days to assess a transaction and decide that the transaction:

- does not constitute a merger that must be notified;
- needs to approve the merger; or
- needs to open a Phase II investigation, because there are serious concerns that the merger would significantly impede competition.

If the Office decides to open a Phase II investigation, a decision must be issued no later than five months from the date of the opening of the notification proceedings.

The period for the Office to issue the decision does not start to run until the notification filing is complete, i.e. the Office has obtained all required information and documentation. If the Office fails to decide within this time period, the merger is deemed to be approved after the lapse of such time period.

A stop-the-clock mechanism also applies. This means that the administrative proceedings' deadline stops running when the Office sends out a request for information to the parties to the proceedings. The clock starts to run again once the Office is provided with the requested information.

Upon suggestion of commitments by the notifying party, the review period for both Phase I and Phase II may be extended by 15 days.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The parties to the concentration are prohibited from implementing the concentration before obtaining approval from the Office. Upon request, the Office may grant an exemption from the prohibition on completing the concentration before clearance is received, if the acquiring undertaking or any third party runs the risk of suffering substantial damage or another serious detriment. After receiving the petition (the filing fee is CZK 10,000; approximately EUR 370), the Office must decide on the petition for granting such an exemption without delay, but no later than 30 days from the receipt of the petition. The Office may impose conditions and obligations necessary for undistorted competition to its decision on exemption.

If the Office discovers that the parties to the merger violated the prohibition to implement a concentration prior to clearance by the Office, the Office may take measures it considers necessary to restore effective competition on the relevant market, particularly a "demerger" obligation.

Also, it may impose a fine on the party to the concentration which breached the notification obligation. The fine may be up to CZK 10 million (approximately EUR 370,000) or 10% of the net turnover of the undertaking(s) that breached the notification obligation. In assessing the amount of the fine, the Office takes into account the severity of the infringement, especially with respect to the form of an infringement and its impact on the market.

There is a risk, however, that the respective transaction will be deemed invalid. This question has not, as yet, been clarified under Czech law.

3.8 Where notification is required, is there a prescribed format?

The Office's Decree No. 252/2009 provides a merger notification form and specifies other documents necessary for the filing of a concentration. The notification form must be filed in the Czech language.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

A simplified notification of a merger may be filed when:

- none of the undertakings involved is operating in the same relevant market, or their combined share in such a market does not exceed 15%, and at the same time, none of the undertakings concerned is operating in the market vertically connected to the relevant market in which another undertaking operates, or their share in every such market does not exceed 25%; or
- the undertaking acquires exclusive control over the joint venture in which it has participated in joint control thus far.

This form simplifies the procedure for the parties in such a way that less information and fewer supporting documents are required for the filing. Information on potentially affected markets is not required. Detailed information and requirements, including the prescribed notification form, are set out in the Office's Notice on simplified procedure. The Office is obliged to issue a decision within a period of 20 days from the moment when the notification is deemed complete, if the concentration will not impede competition. If any additional information from the parties to the proceedings is required, the stop-the-clock mechanism will apply.

In cases where the Office comes to the conclusion that the concentration is subject to approval and that it needs additional information for proper assessment, it shall send a request within 20 days of the initiation of proceedings to the parties to the proceedings to file a complete merger notification. The proper proceedings with a deadline of 30 days will start after the notification is complete.

3.10 Who is responsible for making the notification?

The notification has to be submitted:

- in the case of a merger by the merging parties;
- in the case of acquisition of sole control by the party acquiring sole control; and
- in the case of acquisition of joint control by the parties acquiring joint control.

3.11 Are there any fees in relation to merger control?

The notification is subject to the payment of an administrative fee of CZK 100,000 (EUR 3,700). It must be paid with the submission of the notification the latest, because the confirmation about the payment of the fee is a mandatory annex to the notification.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

An exemption from the standstill requirement in cases of public bids is foreseen by the Act. The standstill requirement shall not apply to implementation of concentrations on the basis of a public bid in order to assume equity shares or on the basis of a sequence of operations with securities, the consequence of which control shall be acquired from different entities, provided that the notification was filed immediately, and provided that the voting rights attached to such securities are not exercised.

3.13 Will the notification be published?

The Office only publishes an announcement regarding the notification of mergers without delay in the Commercial Bulletin and on its website. The announcement contains an invitation to third parties to submit their potential objections and comments.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The Office assesses the notified mergers against a test basically corresponding to the test of "substantial impediment to effective competition" under the EU Merger Control Regulation. The Office shall prohibit implementation of mergers that would significantly impede competition in the relevant market. A significant impediment to competition can be caused by the creation or strengthening of a dominant position.

Nevertheless, the substantive test is not only restricted to the creation or strengthening of a dominant position. A number of legal and economic aspects that must be taken into account when pursuing the test are demonstratively listed by the Act (such as the necessity of maintaining and further developing competition, the structure of all affected markets, the market shares of the parties to the merger, the economic and financial power of the parties, the legal and other barriers to entry to the market, the ability of suppliers and customers of the parties to switch, the development of supply and demand in the affected markets, the needs and interests of consumers and research and development).

Jurisprudence of the EC courts and the decision-making practice of the European Commission should also be taken into account. A merger's impact on competition must be assessed with regard to all these combined criteria.

Therefore, a merger of parties whose aggregate market share is less than 30%, where one of the merging parties owns an important patent, might be regarded as a significant impediment to competition. On the other hand, if the contemplated merger faces strong competition even a merger of parties whose combined market share is 60% may be regarded as not impeding competition significantly.

Since the substantive test under the Czech merger legislation does not comprise only the creation or strengthening of a dominant position, it is applicable to vertical, as well as horizontal and conglomerate, concentrations.

4.2 To what extent are efficiency considerations taken into account?

If the Office has established that a merger may lead to a substantial lessening of competition, the parties to the merger bear the burden of demonstrating the existence of circumstances that may justify a clearance, such as substantiated merger-related efficiencies.

4.3 Are non-competition issues taken into account in assessing the merger?

The Office recognises that non-competition clauses are often integral to mergers. With respect to concentration, the Office assesses the non-compete obligation in line with the Commission practice.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third parties do not have legal standing in the proceeding. However, they have the right to make comments and remarks on the proposed merger. The Office's announcement regarding the notification of mergers contains an invitation to third parties to submit their potential objections. In addition, the Office may invite third parties to express their opinion on the likely impact of the transaction. If the third parties request to be heard and show reasonable interest, the Office may allow them to participate in the oral hearing.

4.5 What information gathering powers does the merger authority enjoy in relation to the scrutiny of a merger?

The Office is entitled to request all information necessary for assessing the merger, as well as for reviewing and copying relevant documents from the parties to the concentration, third parties or other public authorities.

If the parties submit incomplete or misleading information, the Office may impose a fine of up to CZK 300,000 (approximately EUR 11,000) or up to 1% of their turnover from the last financial year.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The Office is obliged to respect the confidentiality of all business secrets indicated by the parties in all submitted documents. In addition to the confidential version of the respective documents, the Office may also require non-confidential versions.

All business secrets indicated by the parties must be deleted from published documents, and must not be disclosed to third parties.

The final decision can only be published in its non-confidential version. Under the Act, the Office staff are also under the obligation (during their employment at the Office, as well as after their termination) not to disclose business secrets or other confidential information which they acquired during their employment at the Office.

In the case of pre-notification contacts between the Office and the notifying parties, information exchanged is confidential and does not become part of the administrative file in the case of a merger notification.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Following the assessment of the merger, the Office with its decision (i) holds that the merger is not subject to merger control, (ii) approves the merger, (iii) approves the merger with remedies, or (iv) prohibits the merger.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

If the transaction gives rise to competition concerns, the Office may invite the parties to the merger to offer structural or behavioural commitments that would remedy the identified competition problem. The parties have 15 days from the Office's request to propose remedies which will lessen or eliminate the potential obstacles to effective competition. The remedies proposed by the parties are not binding for the Office.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Thus far, the Office has not imposed remedies on foreign-to-foreign mergers.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

Remedies may be proposed by the parties before initiation of merger proceedings or during their course, but no later than 15 days from the day on which the last of the participants in the proceedings received the notice of objections. Proposals for remedies made on a later date, or changes to their content, shall be taken into consideration by the Office only in cases deserving special attention, provided that they are submitted to the Office within 15 days following termination of the deadline above. Should the parties propose these remedies within the first 30 days of merger proceedings, the deadline for the Office to issue a decision within 30 days shall be extended by 15 days. Should the parties propose these remedies after being informed by the Office that proceedings shall continue in Phase II, the deadline for issuing a decision within five months shall be extended by 15 days.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There is no standard approach or special regulation which would outline the conditions necessary for accepting neither the proposed remedies nor a standard approach to structural remedies, including divestments. The Office follows the wording of the Act, which only states that remedies, the purpose of which is the preserving of effective competition, are allowed.

5.6 Can the parties complete the merger before the remedies have been complied with?

It depends on the wording of the remedy imposed. If a remedy consists in the promise of future behaviour, the concentration may be implemented before the remedy has been complied with. However, in the case of remedies which must be complied with prior to the implementation of the concentration, the prior implementation would amount to a breach of the suspension clause.

5.7 How are any negotiated remedies enforced?

If the parties to the merger do not comply with the remedies, the Office may order the parties to sell shares or ownership interests acquired or to terminate the contract on the basis of which the concentration was implemented.

In addition, the Office may impose a fine for breach of non-compliance with remedies of up to CZK 10 million (approximately EUR 370,000) or up to 10% of the turnover.

5.8 Will a clearance decision cover ancillary restrictions?

The clearance decision will cover ancillary restrictions directly related to, and necessary for, the implementation of the concentration.

5.9 Can a decision on merger clearance be appealed?

The party to the proceeding is entitled to appeal the decision of the Office. The appealed body is the Chairman of the Office.

5.10 What is the time limit for any appeal?

The party to the proceeding is entitled to appeal the decision of the Office within 15 days from the date of delivery of the decision. The appealed body is the Chairman of the Office.

The decision of the Chairman of the Office can be challenged by bringing an administrative action to the Regional Court in Brno. The action to the Regional Court has to be lodged within two months.

However, the administrative action has no suspensive effect on the decision of the Office unless the court grants it at the special request of the plaintiff.

The appeal is only possible on the legal grounds of the decision. Due to the legal grounds of Czech law and previous case law, only the notifying parties have standing to appeal.

5.11 Is there a time limit for enforcement of merger control legislation?

A fine for breach of merger control legislation may be imposed within 10 years of the breach of the obligation set out by the merger control legislation (objective limitation period), but within five years from the opening of a proceedings for breach of the merger control legislation (subjective limitation period).

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The Office co-operates with the European Commission and with the competition authorities of other EU Member States within the European Competition Network (“ECN”). The Office liaises particularly closely with the Slovak Antimonopoly Office, with which it signed a memorandum of co-operation in 2014. In addition, the Office is a member of the International Competition Network (“ICN”) and liaises with the Organisation for Economic Co-operation and Development (“OECD”).

6.2 Are there any proposals for reform of the merger control regime in your jurisdiction?

At present, there are no new proposals for the merger control regime.

6.3 Please identify the date as at which your answers are up to date.

These answers are up to date as of 30 August 2016.

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Jitka Linhartová is a senior attorney and head of the competition practice in Schoenherr's Prague office. She specialises in competition law and regulatory issues, especially in the areas of energy law and waste management. Jitka previously worked as a case handler with the Czech Competition Authority for three years, mainly in cartel and abuse of dominant position investigations. She was also a member of the Financial Services Group, and worked on an analysis of the banking sector across the Member States. In addition, she interned at the DG Competition, Cartel Unit of the European Commission. She advises both local and international clients from various sectors in investigations by Czech and Slovak competition authorities and the European Commission, as well as in merger control cases. She also provides competition compliance training to clients, and advises them while developing their compliance programmes, in the field of regulatory law. Recently, she has also focused on harmonising several clients' general commercial conditions with Slovak and Czech acts on significant market positions, and regularly publishes in competition and energy publications (e.g. *The International Law Office Competition Newsletter*, *Antitrust Magazine*, *Global Legal Insights*, and *The European Energy Handbook*).

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Claudia Bock has been an associate with Schoenherr's Prague and Brussels offices since 2014. Her main areas of practice include Czech, Slovak and EU competition law, general EU law and EU regulatory issues. She previously worked in international law firms in Germany and the Czech Republic, and was an intern in the competition team of the Legal Service of the European Commission in Brussels. Claudia holds a law degree from Charles University in Prague, and an undergraduate degree in business administration from the State University of New York.

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