Lexis®PSL Competition

Czech Republic merger control

Produced in partnership with Schoenherr

A conversation with Jan Kupčík, attorney in the Prague office of regional law firm Schönherr, on key issues on merger control in the Czech Republic.

NOTE–to see whether notification thresholds in the Czech Republic and throughout the world are met, see Where to Notify.

1. Have there been any recent developments regarding the Czech merger control regime and are any updates/developments expected in the coming year? Are there any other 'hot' merger control issues in the Czech Republic?

There have not been any recent developments in the Czech merger control regime. At present, there are also no new legislative proposals to reform the merger control regime.

In terms of case law developments, no landmark decision has been taken either by the Czech Competition Authority or the courts. It remains to be seen how the Czech Competition Authority will be active with respect to below-thresholds transactions in the light of recent awake of Article 22 EUMR on the European Commission's level. There have been no public statements of the Authority on this topic so far.

2. Under Czech merger control law, is the control test the same as the EU concept of 'decisive influence'? If not, how does it differ and what is the position in relation to 'minority shareholdings'?

The concept of control in the Czech merger control regime is in line with the EU notion of decisive influence. The Act No. 143/2001 Coll., on the Protection of Competition (the Act) defines the term 'control' as a possibility to perform, on a legal or de facto basis, a decisive influence on the activity of another undertaking, particularly on basis of:

- property right or right to use an enterprise of the controlled undertaking or its part, or
- rights or other matters of law that confer decisive influence on the composition, voting or decisions of the organs of the controlled undertaking.

The definition of control is further set out in the Notice on the Notion of 'Undertakings Concerned' under the Act on Protection of Competition.

The Office however always assesses the actual situation on a case by case basis. Not only the acquisition of control, but also 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.

There is no explicit regulation of minority shareholdings contained in the Act. However, the Office has considered the acquisition of a minority shareholding a concentration in the past. The Office pursues the view 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 (which is regulated in the Notice on the concept of merger control issued by the Office).

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

Yes, joint ventures (including non-structural, and cooperative) are caught by the Czech merger control regime.

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 concentration and is, in line with Article 3 of the EU Merger Regulation, 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.

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any 'effects' doctrine/policy if relevant)?

A concentration has to be notified and is subject to approval by the Office, if:

- the aggregate net turnover of all parties to the concentration in the last completed accounting period within the market of the Czech Republic exceeds CZK 1.5bn and the aggregate net turnover of each of at least two of the parties to the concentration for the last completed accounting period within the market of the Czech Republic exceeds CZK 250m, or
- the aggregate net turnover of:
  - at least one undertaking being a party to the merger (consolidation)
  - an enterprise or its part being acquired
  - an undertaking whose control is being acquired (target), or
  - 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 1.5bn and the aggregate worldwide net turnover of the other party to the concentration for the last completed accounting period exceeds CZK 1.5bn.

The Act applies to concentrations 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 concentration (ie turnover made in the Czech Republic), that a foreign-to-foreign concentration might have an impact in the Czech Republic and therefore is subject to notification to the Office.

To see whether thresholds in the Czech Republic are met, see Where to Notify.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

In cases of banks, credit and other financial institutions, with the exception of insurance companies, net turnover is calculated as the sum of the incomes, in particular, income from interest securities and asset shares, fees and commissions and profits from financial operations.

As regards insurance companies, net turnover is calculated as the sum of premiums written resulting from all the insurance contracts concluded.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

Where the jurisdictional thresholds are met, notification is mandatory.

The parties to the concentration are prohibited from implementing the concentration before obtaining approval from the Office. Upon request, the Office may grant the notifying party 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. The Office must decide on the petition for granting such an exemption without delay after receiving the petition, but no later than 30

days from the receipt of the petition. The Office may attach conditions and obligations necessary for undistorted competition to its decision on exemption.

7. Is there any discretion to review transactions that fall below the notification thresholds?

No, there is no discretion to review transactions that fall below the notification thresholds.

8. Is it possible to close the deal globally prior to local clearance?

As the standstill obligation only applies to effects on markets within the Czech Republic, a 'hold-separate agreement' for the Czech part of a foreign transaction would probably not be seen as gun jumping.

9. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the Office for the Protection of Competition?

There is no deadline for the notification of a concentration. 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 documents, if the parties have at least agreed on the structure of the transaction. Transactions of a speculative nature cannot be notified.

The Office has 30 calendar days (in cases of a simplified procedure it has 20 calendar days) to assess a concentration and decide:

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

The period for the Office to issue the decision does not start to run until the notification filing is complete, ie once the Office has obtained all required information and documentation. In case where the Office initiates simplified proceedings but subsequently comes to the conclusion it needs additional information for a 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 notification. The proper proceedings, with a deadline of 30 days, will start once the complete notification is submitted. If the Office fails to decide within this 30 day time period, the concentration is deemed to be approved.

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.

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

A stop-the-clock mechanism applies as well. The administrative proceedings' deadline stops to run when the Office sends out a request for information to the parties to the proceedings. The clock starts to run again from the point when the Office is provided with the requested information.

NOTE–the first day of the investigation will be the day following the notification or referral to Phase II (as appropriate). If the deadline is due to end on a Saturday, Sunday or public holiday, the last day of the investigation will actually be the first following business day.

10. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

The notification has to be submitted:

- in cases of a merger by the merging parties
- in cases of an acquisition of sole control by the party acquiring sole control
- in cases of an acquisition of joint control, by the parties acquiring joint control.

The notification must be made in line with the prescribed notification form which is provided by Decree No. 252/2009 implementing the Act. The Decree further specifies other documents necessary for the filing of a concentration.

The notification is subject to the payment of an administrative fee of CZK 100,000.

11. Please confirm/comment on the penalties for failing to notify or suspend transactions pending clearance and the Office for the Protection of Competition's record/stance in terms of pursuing parties for failing to notify relevant transactions (commenting, if relevant, on any statute of limitations regarding sanctions for infringements of the applicable law).

If the Office discovers that a concentration was not notified to it, or if the parties to the concentration violated the prohibition to implement a concentration prior to clearance by the Office, the Office may take measures which 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 10m or 10% of the net turnover of the undertaking(s) which 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 been clarified yet under Czech law.

The Office has not been very active in terms of pursuing parties for failing to notify transactions in the past. However, in 2021 and 2022, the Office issued three gun-jumping decision, imposing fines of CZK 4.5m, 1.4m and 0.14m respectively.

In relation to the statute of limitations, this is either:

- five years from when the Competition Authority became aware of the infringement, or
- ten years from the end of the illegal behaviour.

On a final note, in cases of a breach of the prohibition to implement a concentration prior to clearance by the Office, non-binding soft law on the settlement procedure can be applied by the Office based on the request by the parties

12. Are there any other 'stakeholders' other than the Office for the Protection of Competition (for example, any 'sector regulators' who might have concurrent powers)?

There is the Czech Telecommunication Office (*Český telecomunikační úřad*, ČTÚ) and the Czech Energy Regulatory Office (*Energetický úřad,* ERÚ). Both authorities are tasked with ensuring a competitive environment in the markets they regulate. Therefore, the Office´s and their competencies sometimes overlap. There is also the Czech National Bank (*Česká národní banka*, ČNB) to which certain transactions involving financial institutions must be notified. In addition, the Czech Republic recently (in 2021) implemented foreign investments control regime, which makes certain transactions subject to mandatory notification and some other transactions susceptible for a voluntary consultation. It means that some transactions can require multiple notifications in the Czech Republic.