

Position of the Office for the Protection of Competition of the Czech Republic (the Czech Competition Authority): Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control

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The Office for the Protection of Competition of the Czech Republic (hereinafter referred to as “the Czech Competition Authority”) welcomes the opportunity to comment on the European Commission's efforts to improve different procedural and jurisdictional aspects of the functioning of EU merger control. In this context, the “Evaluation of procedural and jurisdictional aspects of EU Merger Control” Questionnaire (“the Questionnaire”) has been drafted by the Services of the Directorate General for Competition with the aim of collecting views of citizens, businesses, associations, public authorities and other stakeholders on the following procedural and jurisdictional aspects of EU merger control: (i) “simplification” focusing on the issue of the treatment of certain categories of mergers that do not generally raise competition concerns, (ii) the functioning of the turnover-based jurisdictional thresholds, (iii) the functioning of the case referral mechanisms and (iv) certain technical aspects of the procedural and investigative framework for the assessment of mergers.

The Questionnaire and a public consultation that will follow build upon previous public consultations which were based on the European Commission's White Paper: “Towards more effective EU merger control” (“the White Paper”) and “Commission Staff Working Document accompanying the document White Paper: Towards more effective EU merger control” (“the Staff Working Document”) and in which some of the above issues had already been discussed.

In this contribution the Czech Competition Authority would like to express its views on different procedural and jurisdictional aspects of the functioning of EU merger control which have been raised in the Questionnaire. As many of questions in the Questionnaire are aimed at businesses rather than competition authorities the Czech Competition Authority chooses to provide its opinion in general and to respond only to those individual questions asked by the Questionnaire where it feels its answer is appropriate and could be supported by its own case practice and experience.

Publication of the contribution of the Czech Competition Authority

The Czech Competition Authority would like to state that its contribution can be directly published with organisation information. The Czech Competition Authority gives consent to publication of all information in this contribution in whole or in part including the name of the organisation, and declares that nothing within this contribution is unlawful or would

infringe the rights of any third party in a manner that would prevent publication. This contribution represents views of the Czech Competition Authority.

Further simplification of EU merger control procedure

Within the so-called “Simplification Project” changes to the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004 (“Simplified Procedure Notice”) had been made so that a wider range of types of concentrations between undertakings could be treated in a simplified procedure.

The European Commission considers simplifying merger control procedure further by:

- 1) exempting extra-EEA joint ventures from the European Commission's jurisdiction under Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter referred to as “EU Merger Regulation”): The European Commission suggests that Article 1 of EU Merger Regulation is amended so that the creation of a full-function joint-venture located and operating outside the EEA and with no effects on EEA markets, falls outside of the European Commission's jurisdiction, even if turnover thresholds are met. These transactions would not have to be notified to the European Commission.
- 2) further reducing notification requirements for other non-problematic cases which are currently treated as simplified procedure cases: Instead of a merger notification, the European Commission would be informed of these transactions by an information notice and would be free to investigate a case. If the European Commission decided not to investigate a case, the transaction could be implemented after three weeks without the need for a clearance decision.

The opinion of the Czech Competition Authority

The Czech Competition Authority would like to draw attention to several possible consequences of the suggested changes which need to be carefully considered when evaluating the two above ways in which the current EU merger control procedure could be further simplified.

First, concerning the suggested exemption of extra-EEA joint ventures from the European Commission's jurisdiction, (in response to Questions 8.1 and 13. of Part IV.1. “Simplification” of the Questionnaire) it could be argued that this would mean that a lot of these transactions would have to be notified at national level, which could lead to many multinational filings. This is due to the fact that it is often the case that large multinational undertakings that achieve high turnovers in many Member States create extra-EEA joint ventures. As a result, when discussing the above amendment it should also be considered whether the benefits of exempting the creation of extra-EEA joint ventures from the European Commission's jurisdiction would not be outweighed by an increased number of multijurisdictional filings in Member States. In light of this, the Czech Competition Authority does not view exempting extra-EEA joint ventures from the European Commission's jurisdiction as a suitable solution in efforts to simplify EU merger control procedure or reduce costs of merging undertakings.

Second, as regards widening the scope of application of the simplified procedure for more non-problematic cases in general, in our view (response to Question 6. of Part IV.1. “Simplification” of the Questionnaire) treating more merger cases in the simplified

procedure does not necessarily reduce costs (in terms of workload and resources spent) for notifying undertakings. To explain that, it should be noted that the issue whether a particular merger case qualifies for the treatment in the simplified procedure often depends on how the relevant market is defined. In many cases, the issue of defining the relevant market needs to be discussed with a competition authority at prenotification stage as notifying undertakings cannot always rely on that competition authority's past decision-making practice because (i) it has not dealt with a particular market yet or (ii) there is a past decision dealing with a particular market in which the exact definition of the relevant market was left open or (iii) there is a past decision in which the Czech Competition Authority did not deal with defining the relevant market because a merger was treated as a simplified procedure case.

To illustrate that it is advisable for undertakings to gain certainty on how the relevant market is defined in a particular case, (reply to Question 3. of Part IV.1. "Simplification" of the Questionnaire) there are at least four cases of mergers for the past six years which were notified in the simplified procedure but where the Czech Competition Authority reverted a case to the normal procedure. In two of these cases a notifying undertaking did not take into consideration that conditions for applying the simplified procedure (market shares below thresholds set in the Czech Competition Act) were not met under all plausible alternative definitions of the relevant market or a notifying undertaking defined the relevant market incorrectly as there were no previous decisions of the Czech Competition Authority dealing with that particular market.

In addition, (reply to Question 4. of Part IV.1. "Simplification" of the Questionnaire) there are cases in practice of the Czech Competition Authority where notifying undertakings chose to notify a merger in the normal procedure, not in the simplified despite the fact that conditions for the simplified procedure were met. This can be explained in particular by the fact that notifying undertakings are afraid that during the simplified procedure a third party submits objections against a notified merger which the Czech Competition Authority has to deal with or by the fact that the clock (a deadline for adopting a decision) starts from the beginning if a merger case is reverted from the simplified to the normal procedure (Please note that according to the Czech Competition Act a deadline for adopting a decision in the simplified procedure is 20 calendar days from the date of a short-form notification, while in the normal procedure a deadline for adopting a decision is 30 calendar days for Phase I and 5 months for Phase II from the date of a full-form notification).

Third, concerning the proposal that certain categories of non-problematic cases would not have to be notified in the simplified procedure but instead merging parties would inform the European Commission by an information notice, merging undertakings would have to wait three weeks during which the European Commission may decide to investigate their case and only then could implement their merger. Nevertheless, it is foreseen as well that even after a merger is implemented, the European Commission could still interfere with the implemented merger within a deadline of up to several months (as suggested in paragraphs 108. - 110. of the Staff Working Document in the so-called "target transparency system" which was considered as one of the options to deal with acquisitions of non-controlling minority shareholdings at EU level). The Czech Competition Authority is of the opinion that this would create uncertainty for merging undertakings in that there would be no decision of the European Commission clearing their merger, negotiations of the merged entity with its suppliers and customers would have to postponed until these several months has expired

etc. In this regard the Czech Competition Authority would like to stress the importance of legal certainty for businesses in the Czech Republic.

The effectiveness of turnover-based notification jurisdictional criteria

When evaluating EU Merger Regulation turnover-based notification criteria which are currently in place, a recent discussion has raised a question whether these purely turnover-based notification jurisdictional thresholds allow to capture all transactions that might have an impact on competition in the internal market. Transactions in the pharmaceutical sector where a target, a development-stage company with promising pipeline products, or in the IT sector where an acquired company, that provides most of its services or products free of charge, generates little or no turnover, but in the future could play an important competitive role in the market, could serve as examples of transactions that despite their potential effect on the internal market, fall outside of the scope of EU Merger Regulation if purely turnover-based notification jurisdictional criteria are applied.

To solve the above problem, it is considered that in addition to turnover-based notification criteria, a new set of notification criteria, such as the value of a transaction, could be introduced in EU Merger Regulation.

The opinion of the Czech Competition Authority

First of all, the Czech Competition Authority holds the view that one of the benefits of the current turnover-based notification criteria is that these criteria are straightforward and allow merging undertakings to establish quickly whether their transaction is notifiable under EU Merger Regulation. Adding other criteria to turnover thresholds would make notification criteria less transparent and could be burdensome for undertakings.

Second, the Czech Competition Authority would like to state that even if a concentration between undertakings which could result in such a change in the market structure which could give rise to competition concerns (such as by creating a dominant player in a market), is not caught by turnover-based notification criteria, the European Commission has at its disposal other ex-post tools to deal with a possibly anti-competitive behaviour of the merged entity (for example abuse of dominant position).

Third, the Czech Competition Authority does not consider the value of a transaction (a price paid for an acquired undertaking) as a suitable notification criterion for the following reason. To the knowledge of the Czech Competition Authority, there are merger cases in which the value of a transaction is not set as a fixed sum but is based on how a target's business will fare in the future. In these cases the calculation of a price takes into account future business results (such as earnings or other criteria) of a target. In these cases a precise price (the value of a transaction) is not known at the time when it needs to be assessed whether notification criteria are met. Therefore, it would be difficult to establish whether a particular merger has to be notified.

Fourth, the Czech Competition Authority believes that even if notification jurisdictional criteria were changed they should be the same for any sector or industry.

Finally, if the discussion on a possible change in the notification criteria shows that this change is really necessary, it must be thoroughly reasoned.

Changes to rules for referring merger cases from the European Commission to Members States and vice versa

Article 4(5) of EU Merger Regulation: pre-notification referrals from Member States to the European Commission

Concerning rules for Article 4(5) case referrals, the European Commission proposes that the current two-step procedure (a reasoned submission followed by a notification) should be abolished. Under the proposal, merging undertakings would notify a transaction directly to the European Commission and the European Commission would have jurisdiction to review the whole transaction, unless a competent Member State opposes the referral request.

In the European Commission's opinion, this change would speed up Article 4(5) case referrals and make them more efficient while maintaining the right of Member States to veto a referral request.

The opinion of the Czech Competition Authority

The Czech Competition Authority is in favour of the suggested removal of the two-stage procedure in Article 4(5) referral mechanism for the same reasons that the European Commission highlights.

Article 22 of EU Merger Regulation: post-notification referrals from Member States to the European Commission

Concerning rules for Article 22 post-notification case referrals, the European Commission proposes introducing in particular the following changes:

- Only Member State(s) competent to review a transaction under their national law could request a referral to the European Commission.
- If a referral is requested, any other competent Member State can oppose it. The Member State would not have to justify its veto, considering the fact that it has jurisdiction to examine the merger.
- If no competent Member State vetoes the referral, the European Commission has discretion to accept or decline the referral. The European Commission could decline the referral for instance if the merger has no European scope (it affects purely national markets and has no cross-border effects).
- If the European Commission decides to accept the referral, it would give it jurisdiction for the whole EEA territory. It would therefore be no longer necessary for Member States to join the referral request.
- If any competent Member State vetoes the referral, all Member States would retain their jurisdiction.

The opinion of the Czech Competition Authority

The Czech Competition Authority welcomes the suggested changes to Article 22 case referral mechanism.

In particular, the Czech Competition Authority supports the suggested change which would give the European Commission jurisdiction over a referred case for the whole EEA territory because this would avoid splitting the assessment of a transaction which has significant cross-border effects and affects trade between Member States between several competition authorities (the European Commission and Member States). As a result, merging undertakings would be able to benefit from a clear outcome of the assessment of a referred

transaction (there would be one merger decision assessing the transaction for the whole EEA territory).

Article 4(4) of EU Merger Regulation: pre-notification referrals from the European Commission to a Member State

Concerning rules for Article 4(4) case referrals the European Commission proposes amending the substantive test in Article 4(4) so that merging undertakings would not have to claim that their transaction may lead to a “significant effect in a market” in order for a case to qualify for a referral. According to the European Commission, showing that the concentration is likely to primarily impact a distinct market in the Member State in question would be sufficient.

At present, according to Article 4(4) of EU Merger Regulation prior to the notification of a concentration, the parties may request that the transaction is reviewed at the Member State level when a concentration “may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.”

The opinion of the Czech Competition Authority

The Czech Competition Authority welcomes such an amendment as, in its view, according to the current wording of Article 4(4) of EU Merger Regulation merging undertakings may seem to be required to show that a transaction could lead to adverse effects in a market, which may discourage undertakings from seeking Article 4(4) case referrals.

Other technical changes

Concerning other technical changes which are proposed by the European Commission, the Czech Competition Authority would like to express its opinion with regard to the following:

Including the methodology for the calculating a joint venture's relevant turnover in Article 5(4) of EU Merger Regulation

In the European Commission's view Article 5(4) of EU Merger Regulation should be amended to explicitly articulate the methodology for the calculating a joint venture's relevant turnover. The methodology is currently laid out in the Commission Consolidated Jurisdictional Notice (Section 5.2. of this Notice). This change would merely clarify how the law is currently applied.

The opinion of the Czech Competition Authority

The Czech Competition Authority holds the view that it would not be feasible to describe the methodology for the calculating a joint venture's relevant turnover in detail in EU Merger Regulation. Neither would it be a sensible solution as the current state, where in EU Merger Regulation there are general rules for calculating relevant turnovers of the undertakings concerned (Article 5(4) of EU Merger Regulation) which are then clarified for different “merger” situations in the Commission Consolidated Jurisdictional Notice works well and is clear enough for undertakings who need to calculate their relevant turnovers when creating joint ventures.

The European Commission's power to revoke decisions in case of Article 4(4) referrals (referrals from the European Commission to Member States) if a referral is based on incorrect or misleading information

The European Commission proposes that similar to the European Commission's power to revoke a decision clearing a merger if that decision was obtained by deceit or is based on incorrect information for which one of the merging parties is responsible (see Articles 6(3)(a) and 8(6)(a) of EU Merger Regulation), the European Commission should also have the power to revoke referral decisions for falsely-obtained Article 4(4) referrals from the European Commission to Member States if that referral decision is based on deceit or false information for which one of the merging parties is responsible.

The opinion of the Czech Competition Authority

The Czech Competition Authority would like to draw attention to possible problems which could result from conferring the power to revoke its decisions in Article 4(4) case referrals which were based on incorrect or misleading information on the European Commission. In the Czech Competition Authority's view, this change would raise doubts as to legal certainty in situations where the European Commission's decision referring a merger case was revoked after a Member State's decision clearing a merger was adopted and merging undertakings started to implement their merger. Legal certainty concerns would grow even more in situations where a merger was cleared by a Member State subject to commitments as these commitments may mean involvement of third parties (for example where merging undertakings committed to divest part of their business to an independent third party). By revoking its Article 4(4) case referral decision, the European Commission would interfere with rights of these third parties.

Nevertheless, should the European Commission be given the power to revoke decisions in Article 4(4) case referrals, a very short deadline would have to be set for exercising such a power so that the above scenario (that is the European Commission's referral decision is revoked after the transaction had already been cleared by a Member State) could not occur.