

EN

***Case No COMP/M.5112  
– REWE PLUS/  
DISCOUNT***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 9(3)  
Date: 03/07/2008



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03/07/2008  
C(2008) 3488

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

  
PUBLIC VERSION

**COMMISSION DECISION**

**of 03.07 2008**

**referring case No COMP/M.5112 - REWE/ PLUS DISCOUNT**

**to the competent authorities of the Czech Republic,**

**pursuant to Article 9 of Regulation (EC) No 139/2004**

## COMMISSION DECISION

of 03.07 2008

**referring case No COMP/ M.5112 - REWE/ PLUS DISCOUNT  
to the competent authorities of the Czech Republic,  
pursuant to Article 9 of Regulation (EC) No 139/2004**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings<sup>1</sup> (hereinafter, "EC Merger Regulation"), and in particular Article 9(3) thereof,

Having regard to the notification made by REWE-Beteiligungs-Holding International GmbH on 15 May 2008, pursuant to article 4 of the EC Merger Regulation,

Having regard to the request of the Czech National Competition Authority ("NCA", Úřad pro ochranu hospodářské soutěže) of 5 June 2008,

WHEREAS:

1. On 15 May 2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking REWE-Beteiligungs-Holding International GmbH ("REWE", Germany) belonging to the REWE group acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking PLUS DISCOUNT spol. s.r.o. ("Plus CZ", Czech Republic) by way of purchase of shares.
2. The Czech NCA received a copy of the notification on 19 May 2008.
3. By letter dated 5 June 2008, the Czech NCA requested the referral to its competent authorities of the proposed concentration in its entirety with a view to assess it under the Czech national competition law. The request is based on Article 9(2)(a) or, alternatively, on Article 9(2)(b) of the EC Merger Regulation ("the request"). The Czech NCA considers that the notified transaction affects competition in 20 local markets for the retail sale of daily consumer goods via modern distribution channels in the Czech Republic, which present all the characteristics of distinct markets and do not constitute substantial parts of the Common Market. In addition, the Czech NCA submits that the notified transaction also threatens to significantly affect competition in the relevant

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<sup>1</sup> OJ L 24, 29.1.2004, p.1

retail and procurement markets as a whole, these markets also presenting the characteristics of distinct markets.

4. The notifying party was informed on 11 June 2008 of the referral request made by the Czech NCA and received a copy of the request at the same time. In its letter of 12 June 2008, the notifying party did not take any position on the substance of the referral request.

## **I THE PARTIES**

5. REWE is a German-based group active in food and non-food wholesale and retail, travel and tourism in a number of European countries. In the Czech Republic REWE owns and operates in total 171 Penny stores in the discount segment, and 181 Billa stores in the full-range supermarket segment. In 2007, REWE acquired the supermarket chain Delvita (case M.4590 Rewe/Delvita). The Delvita outlets are now mainly operated as Billa shops.
6. Plus CZ is active in the Czech Republic in the retail of daily consumer goods and operates 146 stores under the brand name "Plus" which are considered as discount shops. Plus CZ currently belongs to the German Tengelmann Group which is divesting its "Plus"- chain in different European countries. The present transaction only concerns the Czech activities of Plus.

## **II THE OPERATION**

7. On 3 March 2008, REWE entered into a Share Purchase Agreement with Plus Warenhandelsgesellschaft mbH to acquire 100% of the share capital of Plus CZ. Post-transaction, REWE will have sole control of Plus CZ.

## **III CONCENTRATION**

8. The proposed concentration is an acquisition of sole control for the purposes of Article 3(1)(b) of the EC Merger Regulation.

## **IV COMMUNITY DIMENSION**

9. The undertakings concerned have an aggregate worldwide turnover of more than EUR 5 billion (REWE: EUR 31,190 million; Plus CZ: EUR [...] million). The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million (REWE: EUR [...] million; Plus CZ: EUR [...] million) for 2006. While Plus CZ achieves the totality of its Community-wide turnover in the Czech Republic, REWE achieves more than two thirds of its Community wide turnover in Germany. The notified transaction therefore has a Community dimension.

## V ASSESSMENT

10. As noted above, the Czech NCA has made a request both under the Article 9(2)(b) and 9(2)(a) of the EC Merger Regulation seeking a referral of the whole of the notified concentration on the basis that the respective concentration affects competition in a number of markets within the Czech Republic, which present all the characteristics of distinct markets and which do not constitute a substantial part of the Common Market. Alternatively, the Czech NCA requested a referral under Article 9(2)(a) of the EC Merger Regulation, submitting that the relevant markets present all the characteristics of distinct markets, and the overlap of the parties on these relevant markets appears to be such that the concentration can be considered to be threatening to significantly affect competition in these markets also in the sense of Article 9(2)(a) of the EC Merger Regulation.
11. The Commission has sought to assess first, whether the conditions for a referral on the basis of Article 9(2)(b) were met, i.e. whether markets may be identified within the Czech Republic, which present all the characteristics of distinct markets, whether these markets do constitute a substantial part of the Common Market, and whether the transaction affects competition in these distinct markets. Secondly, the Commission has sought to assess whether the conditions for a referral according to Article 9(2)(a) were met, i.e. whether the concentration threatens to affect significantly competition in the relevant distinct markets.

### **A. Market Definition**

12. The proposed concentration concerns the market for the retail of daily consumer goods through modern distribution channels (hypermarkets, supermarkets and discounter) in the Czech Republic as well as several procurement markets in the Czech Republic.

#### A.1 Retail markets

##### *Product market*

13. According to the request of the Czech NCA, the parties' activities overlap in the area of retail sales of daily consumer goods via modern distribution channels.
14. The parties also consider that the relevant product market is the retail market for daily consumer goods comprising all modern distribution channels (hypermarkets, supermarkets and discounters) but excluding e.g. neighbourhood stores or fuel stations.
15. Both the Commission<sup>2</sup> and the Czech NCA<sup>3</sup> have in previous cases considered that there is a separate product market in the retail of daily consumer goods mainly carried

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<sup>2</sup> E.g. Commission's decisions in cases IV/M.784 Kesko/Tuko par. 19, 20; COMP/M.1221 REWE/Meinl par. 12, 16; COMP/M.1684 Carrefour/Promodes par. 9 and M.3646 Kesko/ICA/JV par.10 et seq in which the product market definition was left open. Whether discounters are to be included in the product market was left open in COMP/M.1684 Carrefour/Promodes par. 12 and COMP/M.1221-REWE/Meinl par. 17. In case COMP/M.3905 Tesco/Carrefour the market investigation confirmed that with regard to the pricing policy hypermarkets seem to be closer to discount stores than supermarkets, par.12.

out by retail outlets such as hypermarkets, supermarkets and discount chains<sup>4</sup>, and that these retailers are active in different markets than other retailers such as specialised outlets, service stations and others<sup>5</sup>. This product market definition has been confirmed as concerns the Czech Republic in last year's case Rewe/Delvita<sup>6</sup>.

16. The market investigation confirmed that the retail market for daily consumer goods through modern distribution channels should be considered as the relevant product market for this transaction. According to the parties' competitors, the modern distribution channels compete for the most products also with traditional outlets like neighbourhood stores, and kiosks. It was noted that the importance of the traditional outlets will decrease in the coming years.
17. Based on the above, it can be concluded that the product market definition applied by the Commission in previous cases is also relevant for the Czech Republic. The relevant product market for the purposes of this decision is therefore the retail market for daily consumer goods limited to modern distribution channels (hypermarkets, supermarkets and discounters).

#### *Geographic market*

18. In previous Commission cases the geographic market for the retail sale of daily consumer goods has been delineated, according to demand side arguments, by the boundaries of a territory where the outlets can be reached easily by consumers (radius of approximately 20 to 30 minutes driving time)<sup>7</sup>. In some cases<sup>8</sup>, the Commission has found on the basis on specific circumstances (for instance national price-setting, advertising or assortment) that the retail markets could be national in scope.
19. In line with previous decisions regarding the Czech retail market<sup>9</sup>, the parties submit that the Czech retail markets are the local markets of radius of 20-30 minutes driving time for the retail sale of daily consumer goods via modern distribution channels. They further submit that these local markets can be approximated by small administrative districts (okresy) and have provided market shares for these okresy. Indeed the parties submit that the okresy are, in most cases, equalling catchment areas of about 20-30 km around the respective outlets which are, in most cases, located in the geographical

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This product market definition as concerns the Czech Republic has been confirmed in the cases COMP/M.4590 REWE/Delvita par. 12, and COMP/M.3905 Tesco/Carrefour, par. 11.

Whether discounters are to be included in the product market was left open in COMP/M.1684-Carrefour/Promodes par. 12 and COMP/M.1221-Rewe/Meinl par. 17. In case COMP/M. 3905 Tesco/Carrefour the market investigation confirmed that with regard to the pricing policy hypermarkets seem to be closer to discount stores than supermarkets, par.12.

<sup>3</sup> S 30/05-5046/05-OOHS Julius Meinl/Ahold.

<sup>4</sup> Whether discounters are to be included in the product market was left open in COMP/M.1684-Carrefour/Promodes par. 12 and COMP/M.1221-Rewe/Meinl par. 17. In case COMP/M. 3905 Tesco/Carrefour the market investigation confirmed that with regard to the pricing policy hypermarkets seem to be closer to discount stores than supermarkets, par.12.

<sup>5</sup> E.g. Commission's decisions in cases IV/M.784 Kesko/Tuko par. 19, 20; COMP/M.1221-Rewe/Meinl par. 12, 16; COMP/M.1684-Carrefour/Promodes par. 9 and M.3646 Kesko/ICA/JV par.10 et seq in which the product market definition was left open.

<sup>6</sup> COMP/M.4590 Rewe / Delvita par. 12. See also COMP/M.3905 Tesco/Carrefour, par. 11.

<sup>7</sup> E.g. decision in cases IV/M.1085-Promodes/Catteau par. 14, and COMP/M.1684-Carrefour/Promodes par. 24.

<sup>8</sup> COMP/M.1221-REWE/Meinl par. 20

<sup>9</sup> COMP/M.4590 Rewe / Delvita par. 19; COMP/M.3905 Tesco / Carrefour (CZ/SK), par. 20.

centres of the okresy. The market investigation supported this approach and did not question the Commission's assessment in the previous decisions regarding the Czech retail market. It did not reveal compelling indications for a wider (national) geographic market. In its request the Czech NCA also submits that the markets are local and that the okresy level is appropriate to assess the impact of the concentration.

20. For the purpose of this decision and based on a preliminary assessment, the relevant geographic markets are therefore considered to be the local markets of radius of 20-30 minutes driving time for the retail sale of daily consumer goods via modern distribution channels and can be approximated by the okresy.

## A.2 Procurement markets

### *Product market*

21. Procurement markets comprise the sale of daily consumer goods by producers to customers such as wholesalers, retailers (like supermarkets etc) or others<sup>10</sup>. The Commission considered that separate procurement markets exist for different product categories in order to take into account that producers typically produce a single product or category of products and that therefore the flexibility to switch to alternative products is limited for these suppliers. In past decisions the Commission identified 19 product categories<sup>11</sup>. In the present case, Rewe submits information for these 19 procurements markets. In its referral request, the Czech NCA also bases its analysis on these product categories.
22. The market investigation has confirmed that these 19 product categories are still appropriate in the present case. For the purpose of this decision, the relevant procurement markets are therefore these 19 product categories.

### *Geographic market*

23. In line with Commission practice<sup>12</sup>, Rewe submits that the procurements markets are national in scope. In its referral request, the Czech NCA takes the same view and this was confirmed by the market investigation. For the purpose of this decision, the relevant procurement markets are therefore national in scope.

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<sup>10</sup> M. 1221 –Rewe/Meinl, para 75 et seq.

<sup>11</sup> Namely (1) Meat and sausage, (2) Poultry and eggs, (3) Bread and pastry, (4) Dairy products, (5) Fresh fruits and vegetables, (6) Beer, (7) Wine and liquor, (8) Alcohol-free beverages, (9) Hot beverages, (10) Confectionery, (11) Basic food products, (12) Preserves, (13) Frozen goods, (14) Baby food, (15) Pet food, (16) Body care articles and cosmetics, (17) Detergents and cleaning agents, (18) Other drugstore products and (19) Other non-food products usually found in supermarkets (e.g. newspapers, magazines, entertainment).

<sup>12</sup> See e.g. M.1221 Rewe/Meinl, par 83, COMP/M.1684-Carrefour/Promodes par. 24

## **B. Assessment under Article 9(2)(b)**

### B.1 Retail markets

24. The Czech NCA argues that the conditions of Article 9(2)(b) of the EC Merger Regulation are fulfilled for 20 local markets where the combined market share of the parties exceeds [20-30]%.  
25. Under Article 9(2)(b), the Commission determines whether a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market. If these criteria are fulfilled, the Commission has to refer the case without discretion.

#### *Distinct market*

26. As discussed above, the geographic dimension of the retail markets is local in scope. This applies to the above mentioned 20 markets with combined market shares over [20-30]%. In any event, the geographic market is not larger than national covering the Czech Republic.  
27. It can therefore be concluded that they represent markets within a Member State which present all the characteristics of a distinct market.

#### *Impact on Competition*

28. The Czech NCA considers that the concentration will affect competition in the meaning of Article 9(2)(b) of the EC Merger Regulation in the above mentioned 20 local markets, and describes why competition is affected on these markets, in particular based on the combined market shares of the parties and the HHI levels.

<b>Okres</b>	<b>Plus CZ market share (2006)</b>	<b>REWE market share (2006)</b>	<b>Combined market share (2006)</b>
Jindřichův Hradec	[5-10]%	[10-20]%	[20-30]%
Kutná Hora	[5-10]%	[10-20]%	[20-30]%
Havlíčkův Brod	[0-5]%	[20-30]%	[20-30]%
Děčín	[5-10]%	[10-20]%	[20-30]%
Svitavy	[5-10]%	[20-30]%	[20-30]%
Žďár nad Sázavou	[5-10]%	[10-20]%	[20-30]%
Bruntál	[5-10]%	[20-30]%	[20-30]%
Rakovník	[10-20]%	[5-10]%	[20-30]%
Chomutov	[10-20]%	[10-20]%	[20-30]%
Náchod	[10-20]%	[10-20]%	[20-30]%
Jičín	[5-10]%	[20-30]%	[20-30]%
Sokolov	[10-20]%	[10-20]%	[20-30]%



Okres	Plus CZ market share (2006)	REWE market share (2006)	Combined market share (2006)
Semily	[10-20]%	[10-20]%	[30-40]%
Most	[10-20]%	[10-20]%	[30-40]%
Rychnov nad Kněžnou	[10-20]%	[10-20]%	[30-40]%
Litoměřice	[5-10]%	[20-30]%	[30-40]%
Domažlice	[10-20]%	[20-30]%	[30-40]%
Cheb	[10-20]%	[20-30]%	[30-40]%
Trutnov	[10-20]%	[20-30]%	[30-40]%
Jablonec nad Nisou	[10-20]%	[20-30]%	[35-45]%

29. For all of these markets, the parties argue that due to the general competition situation in the retail sale of daily consumer goods in the Czech Republic, which is characterised in particular by the presence of West-European daily consumer goods retailers, the proposed concentration will not raise any competition concerns. In addition they submit that in some of the local markets, significant regional competitors are present.
30. The market investigation indicated that there may be potential entrants to the Czech market. However, some competitors complained of competition constraints post-merger, stressing in particular the strengthening of the barriers to entry, and of the position of the parties both in the retail sector and as buyers on the procurement markets. This would lead to negative impacts upon the final customers.
31. In view of the parties' combined market shares of above [20-30]% on the 20 local markets it can therefore be concluded that the concentration affects competition for the retail sale of daily consumer goods in hypermarkets, supermarkets and discount stores in a number of local markets in the Czech Republic in the meaning of Article 9(2)(b) of the EC Merger Regulation.

*Non-substantial Part of the Common Market*

32. When assessing whether any markets form a substantial part of the Common Market, the Commission in the past considered in particular such factors as the economic importance of the services and territories concerned, the volume of cross-border trade concerned, as well as general geographic factors.<sup>13</sup> Such situations are generally limited to markets with a narrow geographic scope, within a Member State.<sup>14</sup>
33. The Czech NCA submits that all relevant geographic markets affected by the concentration are distinct markets within the Czech Republic which do not form a substantial part of the Common Market.

<sup>13</sup> E.g. COMP/M.3669 – Blackstone (TBG CareCo)/NHP, par. 35; COMP/M.4522 – Carrefour/Ahold Polska, par. 40 and 41, COMP/ M.3905 Tesco/Carrefour, par. 32.

<sup>14</sup> Commission Notice on Case Referral in respect of concentrations OJ C 56 of 5 March 2005 ("Commission Notice on Case Referral"), par. 40.

34. The Czech NCA explains that these local markets within the territory of the Czech Republic are very small – both with regard to their area and to their population. In the opinion of the Czech NCA, in particular the population of the okresy can serve as a proxy for assessing whether these markets constitute a non-substantial part of the Common Market. Moreover, the calculation of the market shares is based upon the consumption per capita. When compared to the total population of the EU, the population of the distinct affected okresy would amount to 0.01 to 0.03%, respectively, the aggregated population to approximately 0.5%. In addition, they argue that the retail sale of consumer goods is aimed at the everyday needs of local inhabitants for food and some non-food products.
35. Furthermore, the Czech NCA submits that most of the okresy are dispersed in different areas of the Czech territory. Even if one were to aggregate the contiguous okresy, the narrow geographic and economic importance of these areas suggests that it would not be a substantial part of the Common Market.
36. Hence, the Czech NCA concludes that these distinct local markets cannot be considered as a substantial part of the Common Market, and that both conditions for a referral according to Article 9(2)(b) of the EC Merger regulation are fulfilled.
37. In the light of the above, the Commission considers that on the basis of previous practice there are strong indications that the criteria of Article 9(2)(b) are met.
38. However, it can ultimately be left open whether the local markets individually or taken together constitute a substantial part of the Common Market within the meaning of Article 9(2)(b) of the EC Merger Regulation since the requirements of Article 9(2)(a) are also fulfilled.

## B.2 Procurement markets

39. The requirements of Article 9(2)(b) are not fulfilled for the procurement markets. Indeed, the national procurement markets clearly constitute a substantial part of the Common Market within the meaning of Article 9(2)(b).

## **C. Assessment under Article 9(2)(a)**

### C.1 Retail markets

40. The Czech NCA argues that the conditions of Article 9(2)(a) of the EC Merger Regulation are also fulfilled for the 20 local markets where the combined market share of the parties exceeds [20-30]%.  
[20-30]%
41. Under Article 9(2)(a), the Commission determines whether a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market. If these criteria are fulfilled, the Commission can exercise its discretion to refer the case or not.

### *Distinct market*

42. As discussed above, the above mentioned 20 markets with combined market shares over [20-30]% represent markets within a Member State which present all the characteristics of a distinct market.

### *Impact on Competition*

43. As discussed above, the concentration affects competition for the retail sale of daily consumer goods in hypermarkets, supermarkets and discount stores in the above mentioned 20 markets.
44. Furthermore, the combined market share of the parties is higher than 30% with significant overlaps (from [5-10]% to [10-20]%) in at least eight of the local markets. It can therefore be concluded that the concentration threatens to significantly affect competition in at least these markets in the sense of Article 9(2)(a) of the EC Merger Regulation.
45. Hence, the Commission considers that the legal requirements of Article 9(2)(a) are fulfilled.

### *Discretion*

46. According to the Notice on Referrals, in exercising its discretion the Commission determines whether the competition authority requesting the referral is in the best position to deal with the case<sup>15</sup>. The Commission considers that, given the local scope of the markets affected by the transaction, the competent authorities of the Czech Republic are better placed to carry out a thorough investigation of the whole case, also due to its previous experience in the Czech retail and procurement markets. It is therefore appropriate for the Commission to exercise its discretion under Article 9(3)(b) so as to grant the referral.

## C.2 Procurement markets

### *Distinct market*

47. As discussed above, the above mentioned 19 procurement markets are national in scope. They therefore represent markets within a Member State which present all the characteristics of a distinct market.

### *Impact on Competition*

48. In its referral request, the Czech NCA does not take a position as to whether the legal requirements of Article 9(2)(a) are fulfilled for the procurement markets. However, the Czech NCA notes that the combined market share of the parties exceeds [20-30]% in at least four procurement markets (beer, wine/liquors, confectionery and pet food).

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<sup>15</sup> Commission Notice on Case Referral, at par. 37.

49. As stated by the Commission in previous cases<sup>16</sup>, buyer power is not per se anticompetitive: when competition is effective downstream, the powerful buyers are constrained to pass on the improvement of their purchasing conditions to the end consumer. A contrario, if the seller side is concentrated, buyer power can be anticompetitive and reinforce the downstream market power. Concerns in the retail and procurement markets are therefore intertwined.
50. Thus, since the concentration threatens to significantly affect competition in some retail markets and given the market shares in the procurement markets, it cannot be excluded that the concentration also threatens to significantly affect competition on the basis of an increase in market power on the procurement markets.

*Application of Article 9 (3) of the merger regulation*

51. In any case, it is not necessary to determine whether the legal requirements of Article 9(2)(a) are fulfilled also for the procurement markets. As discussed above, the Commission considers that the prerequisites of a referral under Article 9 (2) (a) are met with regard to the retail markets. Competition concerns in the procurement markets cannot be assessed independently from competition concerns in the retail markets. Also, the procurement markets are not wider than national in scope and the Czech authorities are well placed to analyze this part of the case as well. Therefore, the Commission considers that the case should be referred to the Czech authorities as a whole, including the analysis of the procurement markets.. This is in line with the Commission general policy that a case should where possible be referred in its entirety in order not to split the case<sup>17</sup> as well as with the recent Commission practice regarding retail cases<sup>18</sup>.

## VII CONCLUSION

52. From the above it follows that the conditions to request a referral under Article 9(2) are met. The Czech NCA has demonstrated that the transaction affects competition in a large number of local markets for retail sale of daily consumer goods via modern distribution channels in the Czech Republic according to Article 9(2)(b) of the EC Merger Regulation. These local markets present all the characteristics of distinct markets. It can be left open whether they constitute a substantial part of the Common Markets, as the Czech NCA has further demonstrated that also conditions for a referral according to Article 9(2)(a) of the EC Merger Regulation are fulfilled, as the concentration threatens to significantly affect competition in at least some of the relevant markets.
53. For efficiency reasons and in order not to split the current transaction, the Commission considers that the case should be referred in its entirety, including all retail and

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<sup>16</sup> See M.1221 Rewe/Meinl at par. 71, M.5047 Rewe/Adeg at par. 96.

<sup>17</sup> Commission Notice on Case Referral, at par. 17, and the *obiter dictum* of the CFI in *Philips v The Commission* that "fragmentation" of a case is "undesirable in view of the 'one-stop-shop' principle on which" the EC Merger Regulation is based – Case T-119/02 of 3 April 2003.

<sup>18</sup> COMP/M.4522 Carrefour/Ahold Polska, par. 45

procurement markets. Indeed, an assessment of the procurement markets without the assessment of the retail markets does not appear appropriate.

54. It is therefore concluded that the whole concentration should be referred to the competent Czech authorities with a view to the application of the national competition laws of the Member State in question.

HAS ADOPTED THIS DECISION:

**Article 1**

The notified concentration resulting in the acquisition of control by REWE of the undertaking PLUS CZ is referred in its entirety to the competent authorities of the Czech Republic, pursuant to Article 9 of Council Regulation (EC) No 139/2004.

**Article 2**

This decision is addressed to the Czech Republic.

Done at Brussels, 03/07/2008

For the Commission  
*signed*  
Ján FIGEL'  
Member of the Commission