

International Comparative Legal Guides



Merger Control 2020

A practical cross-border insight into merger control issues

16th Edition

Featuring contributions from:

A.M Wood and Company
(Inc. Abha Patel and Associates)

Accura Advokatpartnerselskab

Advokatfirmaet Grette AS

AlixPartners UK LLP

AnesuBryan & David

Antitrust Advisory

Arthur Cox

Ashurst LLP

Bányaiová Vožehová, s.r.o., advokátní kancelář

Blake, Cassels & Graydon LLP

BUNTSCHECK Rechtsanwaltsgesellschaft mbH

COBALT

Constantina Mitsingas & Associates LLC

DeHeng Law Offices

Dittmar & Indrenius

DORDA Rechtsanwälte GmbH

Drew & Napier LLC

ELIG Gürkaynak Attorneys-at-Law

FORT

Hamilton

Ibarra Abogados

Ilyashev & Partners

King & Wood Mallesons

L&L Partners Law Offices

Lee and Li, Attorneys-at-Law

LEGA Abogados

LNT & Partners

LPA-CGR avocats

Marval O'Farrell Mairal

MinterEllison

MinterEllisonRuddWatts

Morais Leitão, Galvão Teles,

Soares da Silva & Associados

Moravčević Vojnović i Partneri AOD

in cooperation with Schoenherr

MPR Partners | Maravela, Popescu & Roman

MSB Associates

Nagashima Ohno & Tsunematsu

Norton Rose Fulbright South Africa Inc

OLIVARES

Pinheiro Neto Advogados

Popov, Arnaudov & Partners

Portolano Cavallo

PUNUKA Attorneys & Solicitors

Schellenberg Wittmer Ltd

Shin & Kim

Sidley Austin LLP

Skadden, Arps, Slate, Meagher & Flom LLP

Stibbe

URBAN FALATH GAŠPEREC BOŠANSKÝ

Wardynski & Partners

Yrarrázaval, Ruiz-Tagle, Ovalle, Salas & Vial

Zdolšek Attorneys at law

ICLG.com

Expert Chapters

1

A Road Map to Assessing Local Market Mergers
David Wirth & Tom Puntun, Ashurst LLP

8

Af Gammelt Jern Smedes Nye Våben: Vestager's First Term in EU Merger Control and What to Expect Going Forward
Frederic Depoortere, Giorgio Motta & Alexander K. Pascall, Skadden, Arps, Slate, Meagher & Flom LLP

13

Economic Evidence in Retailer Mergers After Sainsbury's/Asda: Death by GUPPI?
Ben Forbes & Mat Hughes, AlixPartners UK LLP

Q&A Chapters

22

Algeria
LPA-CGR avocats: Rym Loucif

29

Argentina
Marval O'Farrell Mairal: Miguel del Pino & Santiago del Rio

36

Australia
MinterEllison: Geoff Carter & Miranda Noble

45

Austria
DORDA Rechtsanwälte GmbH: Heinrich Kuehnert & Lisa Todeschini

52

Bosnia & Herzegovina
Moravčević Vojnović i Partneri AOD
in cooperation with Schoenherr: Srđana Petronijević
& Danijel Stevanović

61

Brazil
Pinheiro Neto Advogados: Leonardo Rocha e Silva & José Rubens Battazza Iasbech

68

Bulgaria
Popov, Arnaudov & Partners: Hristo Koparanov & Emiliyan Arnaudov

75

Canada
Blake, Cassels & Graydon LLP: Julie Soloway & Corinne Xu

84

Chile
Yrarrázaval, Ruiz-Tagle, Ovalle, Salas & Vial:
Arturo Yrarrázaval, Gerardo Ovalle & Aníbal Vial

90

China
DeHeng Law Offices: Ding Liang

101

Colombia
Ibarra Abogados: Gabriel Ibarra Pardo & Santiago Osorio Salazar

108

Croatia
Moravčević Vojnović i Partneri AOD
in cooperation with Schoenherr: Srđana Petronijević
& Zoran Šoljaga

116

Cyprus
Constantina Mitsingas & Associates LLC:
Constantina Mitsingas

123

Czech Republic
Bányaiová Vožehová, s.r.o., advokátní kancelář:
Lucie Dolanská Bányiová & Zuzana Kulhánková

131

Denmark
Accura Advokatpartnerselskab: Jesper Fabricius & Christina Heiberg-Grevy

142

Estonia
FORT: Rene Frolov & Liina Käis

150

European Union
Sidley Austin LLP: Ken Daly & Steve Spinks

165

Finland
Dittmar & Indrenius: Ilkka Leppihalme & Katrin Puolakainen

177

France
Ashurst LLP: Christophe Lemaire & Marie Florent

189

Germany
BUNTSHECK Rechtsanwälts-gesellschaft mbH:
Dr. Tatjana Mühlbach & Dr. Andreas Boos

199

Greece
MSB Associates: Efthymios Bourtzalas

208

India
L&L Partners Law Offices: Gurdev Raj Bhatia & Kanika Chaudhary Nayar

218

Ireland
Arthur Cox: Richard Ryan & Patrick Horan

228

Italy
Portolano Cavallo: Enzo Marasà & Irene Picciano

237

Japan
Nagashima Ohno & Tsunematsu: Ryohei Tanaka & Kota Suzuki

245

Korea
Shin & Kim: John H. Choi & Sangdon Lee

252

Latvia
COBALT: Dace Silava-Tomsone & Uģis Zeltiņš

260

Mexico
OLIVARES: Gustavo A. Alcocer & José Miguel Lecumberri Blanco

267

Montenegro
Moravčević Vojnović i Partneri AOD
in cooperation with Schoenherr: Srđana Petronijević
& Danijel Stevanović

275

Netherlands
Stibbe: Floris ten Have & Simone Evans

282	New Zealand MinterEllisonRuddWatts: Dr. Ross Patterson & Kristel McMeekin	387	South Africa Norton Rose Fulbright South Africa Inc: Rosalind Lake
290	Nigeria PUNUKA Attorneys & Solicitors: Anthony Idigbe, Ebelechukwu Eneadah & Tobenna Nnamani	397	Spain King & Wood Mallesons: Ramón García-Gallardo
300	North Macedonia Moravčević Vojnović i Partneri AOD in cooperation with Schoenherr: Srdana Petronijević & Danijel Stevanović	409	Sweden Hamilton: Mats Johnsson & Martina Sterner
309	Norway Advokatfirmaet Grette AS: Odd Stemsrud & Marie Braadland	417	Switzerland Schellenberg Wittmer Ltd: David Mamane & Amalie Wijesundera
316	Poland Wardyński & Partners: Andrzej Madała & Marcin Kulesza	426	Taiwan Lee and Li, Attorneys-at-Law: Stephen Wu & Yvonne Hsieh
323	Portugal Morais Leitão, Galvão Teles, Soares da Silva & Associados: Carlos Botelho Moniz & Pedro de Gouveia e Melo	434	Turkey ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak & Öznur İnanılır
335	Romania MPR Partners Maravela, Popescu & Roman: Alina Popescu & Magda Grigore	442	Ukraine Ilyashev & Partners: Oleksandr Fefelov
342	Russia Antitrust Advisory: Evgeny Khokhlov & Igor Panshensky	451	United Kingdom Ashurst LLP: Nigel Parr & Duncan Liddell
350	Serbia Moravčević Vojnović i Partneri AOD in cooperation with Schoenherr: Srdana Petronijević & Danijel Stevanović	470	USA Sidley Austin LLP: James W. Lowe & Marc E. Raven
359	Singapore Drew & Napier LLC: Lim Chong Kin & Dr. Corinne Chew	479	Venezuela LEGA Abogados: Faustino Flamarique & José Gregorio Torrealba
371	Slovakia URBAN FALATH GAŠPEREC BOŠANSKÝ: Ivan Gašperec & Marián Bošanský	484	Vietnam LNT & Partners: Dr. Nguyen Anh Tuan, Tran Hai Thinh & Tran Hoang My
379	Slovenia Zdolšek Attorneys at law: Stojan Zdolšek & Katja Zdolšek	492	Zambia A.M Wood and Company (Inc. Abha Patel and Associates): Nakasamba Banda-Chanda & Namaala Liebenthal
		499	Zimbabwe AnesuBryan & David: Simon Chivizhe & Tafadzwa Masukume

Czech Republic

Bányaiová Vožehová, s.r.o., advokátní kancelář



Lucie Dolanská Bányaiová



Zuzana Kulhánková

1 Relevant Authorities and Legislation

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

The supervising, decision-making and enforcement authority is the Office for the Protection of Economic Competition (“the Office”).

The appellate body is the chairperson of the Office. The chairperson is nominated by the Government and appointed by the President of the Czech Republic for a period of six years. The current chairperson of the Office is Mr. Petr Rafaj (appointed in 2015).

Appellate decisions of the chairperson of the Office are subject to review by a competent court, and such decisions may be further reviewed by the Supreme Administrative Court.

1.2 What is the merger legislation?

Act No. 143/2001 Coll. on Protection of Economic Competition (“the Competition Act”) is the primary legislation in the area of merger control. Decree No. 294/2016 Coll. (“the Decree”) contains the notification form for merger clearance and a list of documents to be presented to the Office for merger clearance.

1.3 Is there any other relevant legislation for foreign mergers?

Mergers within the EU with a “Community dimension” are not subject to the Competition Act and the Office and are regulated by Council Regulation (EC) No. 139/2004 on the control of concentration between competitors (“the Regulation”) and the European Commission (“the Commission”).

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

There is no sector-specific legislation applicable in the Czech Republic.

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 following types of transactions qualify as “mergers” under the Competition Act and may be subject to merger control:

- mergers or amalgamations of two or more competitors previously independently active in the market;
- transactions where an undertaking or undertakings or persons who are not entrepreneurs but who control at least one competitor acquire the option/possibility to control directly or indirectly another competitor or part thereof either by the acquisition of its shares or ownership interest or enterprise (i.e. business assets) or on the basis of an agreement or in another manner, which enables the acquirer to determine and influence the business (competitive) activities of the controlled competitor; and
- transactions where a joint control by more competitors is created over an entity, which performs, in the long term, all functions as an autonomous economic entity (concentrative joint venture).

The crucial factor is the change in control; hence, relationships within one group of companies (e.g. an intra-group merger of subsidiaries into a parent company) are not caught by the Competition Act.

The Competition Act defines “control” as the possibility to exercise decisive influence on a competitor or part thereof, in particular based on:

- the ownership title or the right to use an enterprise of the controlled competitor or part thereof; and/or
- rights or other legal facts that provide decisive influence on the composition, voting and decision-making of bodies of the controlled competitor.

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

Minority and other interests that do not result in or allow for change of control over the entity are not caught by the Competition Act.

2.3 Are joint ventures subject to merger control?

As mentioned in question 2.1, concentrative joint ventures are caught by the Competition Act. “Cooperative joint ventures” – the parties to which remain independent and the purpose of which is to coordinate their competitive conduct – are subjected to the scrutiny of the Office as restrictive agreements interfering with competition (cartel agreements).

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

A merger of competitors is subject to the approval of the Office, if:

- it involves competitors, the aggregate net turnover of which for the last completed accounting period within the market of the Czech Republic exceeds 1.5 billion CZK (approximately 55.5 million EUR or 61.4 million USD; all conversions herein are based on 2016 ECB bilateral exchange rates) and the aggregate net turnover of each of at least two of the merging entities for the last completed accounting period within the market of the Czech Republic exceeds 250 million CZK (approximately 9.2 million EUR or 10.2 million USD); or
- if the aggregate net turnover of:
 - at least one entity being a party to the merger or amalgamation;
 - an enterprise or its part being acquired;
 - a competitor, over which the control is being acquired; or
 - at least one of the competitors creating a concentrative joint venture,

for the last completed accounting period within the market of the Czech Republic exceeds 1.5 billion CZK and (cumulatively) the aggregate worldwide net turnover of the other of the merging entities for the last completed accounting period exceeds 1.5 billion CZK.

Aggregate net turnover comprises the net turnovers of (cumulatively):

- all merging competitors;
- all persons that will control the merging competitors after completion of the transaction and of all persons controlled by the merging competitors;
- all persons controlled by the same person that will control the merging competitors after completion of the transaction; and
- all persons jointly controlled by two or more persons referred to in the previous items.

The fact that the parties do not operate in the same relevant market in the Czech Republic, or their market share is low, means a simplified merger clearance procedure can be employed (please see question 3.9 for details).

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

The absence of a substantive overlap may allow for a simplified procedure (please see question 3.9 for details).

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?

Foreign-to-foreign mergers have to be notified, provided that the competitors realise turnovers exceeding the thresholds determined by the Competition Act in the Czech Republic.

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

Under the Regulation, a merger subject to the competence of the Office pursuant to the Competition Act may be reviewed by

the Commission even if it lacks a Community dimension at the request of the competitors, provided that the merger is capable of being reviewed under the national competition laws of at least three Member States, none of which disagrees with the submission to the Commission.

A merger with a Community dimension may be reviewed by the Office at the request of the competitors, provided the merger may significantly affect competition in the market within the Czech Republic.

The Commission may also refer the merger for review by the Office if:

- a concentration threatens to significantly affect competition in the market within the Czech Republic, which possesses all of the characteristics of a distinct market; or
- a concentration affects competition in a market within the Czech Republic, which possesses all of the characteristics of a distinct market and which does not constitute a substantial part of the common market.

The Czech Republic may request the Commission to examine any merger that does not have a Community dimension but affects trade between the Member States and threatens to significantly affect competition in the Czech Republic.

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?

Two or more mergers which are mutually conditional and related in terms of facts, time and subjects are considered as one sole merger. Furthermore, two or more mergers between the same competitors which took place in the course of two years are jointly considered as one sole 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?

All mergers falling within the thresholds set by the Competition Act are subject to the approval of the Office. There are no exceptions to this rule. Certain types of mergers can be approved via a simplified procedure (please see question 3.9 for details).

There is no specific deadline for the filing. The transaction must be filed and the clearance obtained before the merger is implemented (please see question 3.7 for details).

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

If the Commission has competence pursuant to the Regulation, the national legislation does not apply and local merger clearance is not necessary (please see question 1.3).

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

In the case of breach of the obligation to file, the parties face severe fines of up to 10 million CZK (approximately 370 EUR

or 410 USD) or up to 10 per cent of their pertinent turnover achieved in the preceding accounting year (e.g. a 7.5 million CZK fine was imposed in 2015; the Office indicated that it will start imposing higher fines of three to 10 per cent of the value of the sales, two per cent in case of subsequent clearance).

In addition, the Office may decide on measures necessary for the restoration of effective competition in the relevant market. The Office may, in particular, impose upon competitors the duty to “de-merge”, and, as the case may be, implement other adequate measures that are necessary to restore effective competition in the relevant market.

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

A merger may not be implemented prior to final clearance by the Office (please see question 3.7 for details). The Office is only concerned with mergers which have or may have an impact on competition on the territory of the Czech Republic. Hence, “carving out” the local completion is possible, provided that the structure of the transaction allows for prior completion in other countries without affecting competition in the market in the Czech Republic.

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

The notification can be filed at any stage of the transaction prior to the implementation of the merger (please see question 3.7 for details).

However, only filing a complete notification can result in the initiation of the proceedings, and the notification should contain details of the transaction and at least a sufficiently specific draft of the agreement (or other deed) to be concluded as the title for the merger; notification is, in practice, filed only after all of the details of the transaction are negotiated and finalised by the parties.

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?

Proceedings before the Office are initiated upon submission of a complete filing together with a petition for the Office's consent to the merger. In the case of the Office receiving an incomplete filing, the proceedings are not initiated. In such case, the Office can, based on the available documents, issue a written statement on whether or not the merger is subject to its approval and what needs to be supplemented for the Office to be able to initiate the proceedings and issue a decision.

As a rule, the Office renders its decision within 30 days of receipt of a complete filing. Within this time limit, the Office either decides that the merger in question is not subject to its consent or consents to the merger, provided that the merger does not substantially interfere with competition. For a simplified procedure, the time limit is 20 days.

If the Office finds serious concerns that competition might be substantially reduced as a result of the merger, the Office may continue the proceedings even after the expiration of the said 30-day time limit (or 20 days, as the case may be). In this event, the Office is obligated to notify the competitors of extending the proceedings within 30 days or receiving a completed filing. In any case, a decision must be rendered no later than five months from the date of the opening of proceedings.

If the Office fails to decide on a filed petition within the above time limits, the merger is deemed to be approved. These deadlines are suspended from the day on which the Office requests the competitors, in writing, to supply further facts necessary for issuing a decision or to supply evidence of such facts, until the day such requests are met. Furthermore, the deadlines are extended by 15 days if the competitors submit a proposal of remedies (please see question 5.2 for details).

For deadlines in appellate proceedings, please see questions 5.9 and 5.10.

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?

Before the effective date of the Office's decision, the merger may not be “implemented”, i.e. the competitors concerned may not determine or influence the controlled entity's competitive conduct; in particular, by exercising the voting rights attached to the shares (interests) held by them or on the basis of control acquired otherwise. This means that until the Office renders its decision, the competitors concerned may not take any steps to implement the merger. However, the Office may grant an exception. Such leave is granted by the Office at its discretion at the request of the competitors.

Should the Office find out that the merging entities did implement the merger prior to the Office's clearance, it may impose a fine of up to 10 million CZK or up to 10 per cent of the net turnover of the relevant competitor for the completed preceding year. These fines are in practice imposed (a 5.4 million CZK fine was imposed in 2016). The fines may be imposed repeatedly.

In case the Office determines that there are no risks to the market resulting from the merger, it clears the merger and sanctions the fact the competitors had implemented the merger prior to the clearance. If the decision is negative (i.e. the merger is not permitted) and the Office finds out that the merger had been implemented, it shall prohibit the merger and also decide on the measures necessary to re-establish effective competition in the relevant market, including possibly ordering parties to de-merge and impose a fine. For details on such measures, please see question 3.3.

The prohibition to implement the merger does not apply to public bids to assume equity shares or on the basis of a sequence of operations with shares and securities accepted for trading in the European regulated market, due to which control shall be acquired by various entities, provided the application for the initiation for the proceedings was filed immediately and the voting rights are not exercised.

The Office may also allow full or partial implementation of the merger prior to clearance. Such exemption may be granted based on an application of the competitors where there is a threat of sustaining considerable damage or any other significant detriment to the competitors concerned or third parties.

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

The obligatory notification form (full and simplified) for merger clearance and a list of documents to be presented to the Office are stated in the Decree.

The application must specify the grounds thereof, must be accompanied by documents evidencing that there are no threats of distortion of competition and contain the information and

data required by the Decree. The application must be accompanied, *inter alia*, by: copies of extracts from the relevant company and commercial registers for the competitors, regarding the merging entities; annual reports of the competitors for the last completed accounting period; audited or consolidated annual financial statements for the last completed accounting period of the competitors (if applicable); the relevant agreement or other deed or a draft thereof, pursuant to which the merger is to be performed; detailed calculations of the turnover thresholds; and other documentation.

The notification must be filled in completely. The notification form anticipates, *inter alia*, a sufficiently detailed description of the actions constituting the merger, with respect to the legal, economic and financial structure of the merger, received state aid, information on the company groups of the competitors, turnovers of all members of the groups of the merging entities achieved in the Czech Republic and worldwide during the last completed accounting period, very detailed information on the relevant markets, research and development information, expected consequences of the merger, benefits of the merger and, if need be, an offer of commitments.

All documents and information presented to the Office must be true and complete. All documents should be in the Czech language or with a verified translation. All figures should be stated in the Czech currency (CZK). The documents presented to the Office should be originals or verified copies, properly legalised if issued in a foreign country.

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 procedure can be employed by the Office upon request of the parties to the proceedings if:

- the merging entities are not active in the same market or their joint market share in the relevant market is less than 15 per cent in the case of a horizontal concentration, or is less than 25 per cent in the case of a vertical concentration; or
- if one competitor is acquiring full control over an entity it previously controlled jointly.

In the simplified procedure, a simplified notification form applies and the deadline is reduced to 20 days in which the Office either issues a decision or calls on the competitors to file a full notification (in the absence of any action by the deadline the merger is deemed approved).

The competitors may speed up the process by filing a complete notification file. In case of large mergers, initiation of pre-notification discussions and engaging an experienced advisor may be effective and practical to speed up the process as well.

3.10 Who is responsible for making the notification?

In the event that the transaction occurs by merger, amalgamation or sale of an enterprise (or a part thereof) or establishment of a joint venture, a petition for the Office's consent to the merger is filed jointly by all of the entities involved in the case of amalgamation and by the acquirer in the case of sale of an enterprise and establishment of a joint venture. In the event that a merger occurs as a result of otherwise acquiring control over a competitor, the respective acquirer files the petition.

3.11 Are there any fees in relation to merger control?

Filing a petition is subject to the payment of an administrative fee of 100,000 CZK (approximately 9,700 EUR or 41,000 USD).

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?

No special rules apply to public takeover bids, except that the competitors may implement the merger before clearance, provided the application for initiation of the proceedings is filed immediately and provided the voting rights attached to such takeover are not exercised.

3.13 Will the notification be published?

The Office immediately publishes the announcement of initiation of the proceedings in the commercial bulletin and on its website. The announcement contains only basic data relating to the notification.

In the course of the proceedings, inspection of a file is possible (please see question 4.6 for details).

At the end of the proceedings, the decision of the Office is published in the Collection of Decisions of the Office and on the Office's official website. It is the practice of the Office that prior to publication of its final decision it requests the merging parties to determine which information and data disclosed by them are considered as business secrets and thus may not be published.

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 is obligated to particularly bear in mind the necessity to maintain efficient competition. In the light of this fact, the Office assesses all aspects of the pertinent merger and the structure of all the markets affected by the merger, the market share of the merging entities, their economic and financial strength, legal and other obstacles preventing other competitors from entering the market affected by the merger, the possibility for other entities to act as suppliers or customers of the merging entities, the development of the supply and the demand in the affected markets, as well as the needs and interests of the consumers and research and development, the results of which are for the benefit of the consumers and do not prevent efficient competition.

The Office shall not permit a merger if it would result in a material interference with competition in the relevant market.

On the other hand, if the joint share of the merging entities in the relevant market does not exceed 25 per cent, their merger shall be deemed as a merger that does not result in a material interference with competition, unless the contrary is proven during the evaluation of the merger.

The Office may make the approval of a merger conditional upon fulfilment of commitments (remedies) proposed to the Office by the merging entities (please see questions 5.2 to 5.7 for details).

4.2 To what extent are efficiency considerations taken into account?

The ultimate purpose of merger control is to protect competition; hence, all potential factors (including factors with a positive impact) must be balanced in order for the Office to grant clearance. In this respect, efficiency considerations are taken into account to the same extent as all of the other factors.

For example, the Office concluded that it may only be applied in cases where the merger will cause serious distortion to competition; however, all other alternative solutions (such as bankruptcy of the failing firm) would have an equally or more harmful effect on competition.

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

The Office primarily takes into account criteria and factors with a direct link to the protection of competition and the market. No special rules apply to any industry sector or particular producer.

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

Third parties, including customers and competitors of the merging entities, have the opportunity to raise objections to a contemplated merger upon publication of the notification. As third parties, they are only entitled to submit information to the Office. However, they are not parties to the proceedings and do not have the right to appeal against or otherwise challenge the decisions of the Office.

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

Upon the Office's written request, every entity is obligated to provide its business records which could be of importance for the purpose of clarification of the subject of the proceedings. The provided business records must be complete, correct and true.

Under certain circumstances, the Office is also entitled to carry out an investigation at the business premises of the merging competitors, inspect and copy records, place seals, request cooperation and explanations.

Failure to comply may result in fines which may be imposed repeatedly of up to 1 million CZK or 10 per cent of the turnover for the last completed accounting period.

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

As stated in question 3.13, the Office publishes all merger approval applications and decisions.

As stated in question 4.5, the Office is entitled to request information from the merging entities as well as from third parties. All persons are requested to identify confidential information and business secrets that should not be disclosed to third parties.

It is not possible to withhold information or documents from the Office on the grounds of confidentiality concerns, as confidentiality is deemed sufficiently secured by the statutory obligation of the office and all of its employees to protect confidential information.

The Office may permit parties to the proceedings and other persons having legitimate reasons to inspect the relevant file. However, the Office must ensure that no business secrets are disclosed. All employees of the Office are bound by the duty of confidentiality.

The Office may share confidential information within the European Competition Network.

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

5.1 How does the regulatory process end?

The regulatory process ends with one of the following decisions of the Office:

- That the merger is not subject to approval by the Office.
- Approval of the merger with or without remedies.
- The merger is not approved.
- The termination of the proceedings after the merger is referred to the Commission and the Commission decides to conduct the proceedings by itself.

When the deadline by which the Office has to issue a decision has passed, the merger is deemed approved.

Issued decisions are published (please see question 3.13 for details).

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

The Office may approve the merger with commitments (remedies) proposed by the merging competitors.

The Competition Act is not specific as to the nature of such remedies. Remedies may be of a structural, behavioural or quasi-structural nature. The conditions imposed by the Office may include requirements for the competitors to: divest, modify or terminate agreements which might interfere with competition or be detrimental to consumers; refrain from increasing prices; and inform all consumers of any intention to restructure production, etc.

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

The Office does not differentiate between foreign-to-foreign and domestic concentrations of undertakings.

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

Proposals of the remedies may be submitted to the Office before commencement or in the course of the proceedings. In proceedings on breach of the Competition Act, the deadline is 15 days from the day when the last of the parties to the proceedings received the statement of objections from the Office.

The Office may also impose conditions and obligations necessary for securing the fulfilment of the remedies.

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?

The Competition Act does not stipulate any conditions to a divestment or to any other remedy. The essential and sole condition is that, by a divestment or any other remedy, competition in the Czech Republic ceases to be distorted or to be threatened by distortion. Each case is evaluated and decided on an individual basis.

The remedies are imposed following a proposal of the merging competitors discussed and agreed as sufficient with the Office.

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

The Office usually sets a deadline for the fulfilment of the remedies in its decision.

5.7 How are any negotiated remedies enforced?

If the remedy is not fulfilled, the Office may cancel the decision on approval of the merger.

The Office is also entitled to enforce fulfilment of the remedies by imposing fines of up to 10 million CZK or up to 10 per cent of their turnover for the preceding accounting year.

5.8 Will a clearance decision cover ancillary restrictions?

If the arrangement forming a part of the transaction can be considered as directly related to and necessary for the implementation of the merger, they are covered by the clearance decision of the Office. Such arrangements are considered ancillary restraints.

5.9 Can a decision on merger clearance be appealed?

The addressee of the decision is entitled to appeal against the decision. The appellate body is the chairperson of the Office.

The appeal has a suspensive effect; the decision of the Office does not come into force. The chairperson should issue an appellate decision without undue delay, within 30 days at the latest. This deadline may be prolonged depending on the individual circumstances of the case.

An appellate decision of the Office is subject to judicial review by the competent court. This judicial decision may be further appealed by filing a cassation complaint with the Supreme Administrative Court.

5.10 What is the time limit for any appeal?

The addressee of the decision may appeal within 15 days from the date of delivery of the decision.

The deadline to file a lawsuit against the appellate decision is two months from the delivery of the decision. The deadline for filing a cassation complaint is two weeks from the delivery of the decision of the court.

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

The general limitation period under the Competition Act is 10 years; if the running of the period is interrupted, the general overall limitation period is 14 years.

A limitation period for the cancellation of the decision of the Office on approval of the merger is one year from learning about the facts which could lead to cancellation, and, overall, five years from the occurrence of such facts.

6 Miscellaneous

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

The primary concern and the ultimate aim of the Office is always the protection of competition in the Czech market in which the Office remains the most competent authority for analysis and decision-making.

The Office is a member of the International Competition Network and participates in conferences organised by the OECD. The cooperation is mainly aimed at exchanging experience and the development of protection of competition on a general level.

As the Czech Republic is a member of the EU, the Office closely cooperates with the Commission and other national competition authorities within the European Competition Network, mainly in cases where the effects of the behaviour of the competitors are not confined to the Czech Republic. The Commission and the Office exchange documents and information (including confidential information) and consult on EU law issues. The Office carries out investigations and provides other assistance at the request of the Commission, and at its discretion also at the request of another Member State. The Office sends its draft decisions to the Commission 30 days prior to issuance.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

In 2018, the Office commenced 57 proceedings on mergers and issued 55 decisions, 15 of which were standard proceedings and 40 simplified proceedings. All of the decisions were approvals, in one case the Office and the merging parties agreed on structural commitments.

No fines were imposed in 2018.

The recent trend is in favour of approving mergers.

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

There are currently no amendments in the legislative process.

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

The answers are up to date as of October 31, 2019.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

The ongoing debate on competition protection in the digital market in the Czech Republic in the past few years revolves around concerns that some significant digital mergers may avoid the clearance procedure. The contemplated change is to include a total transaction value as additional notification criteria. While the state authorities support the change, legal experts

from the private sector oppose and criticise it as discriminatory and superfluous. The experts believe that the current legislation is sufficiently broad and general and it is the task of the state authorities to adjust application and interpretation thereof to the constant development of the market, rather than undermine legal certainty by legislative amendments.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

Works on amendment have not commenced yet.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

Several mergers of companies which conduct part of their business online took place in the Czech Republic in the past years, however, no purely digital merger has occurred yet. The Office for the Protection of Competition did not express any difficulties with the review of such mergers. The concerns concentrate on mergers which were never subjected to the clearance procedure.



Lucie Dolanská Bányaiová is a partner in our law office. She focuses primarily on litigation, competition law, conflict of laws and European law. Lucie has been a member of the Czech Bar Association (*Česká advokátní komora*) since 2004. She speaks Czech and English.

Lucie has represented major companies in proceedings before the Competition office, in judicial review proceedings and has also pleaded before the General Court of the EU. She also successfully represents clients before Czech courts. Thanks to her broad litigation and competition law practice, she has gained knowledge about the legal environment of various industries including the dairy, agriculture and telecommunications industries. She is also active in the academic sphere, at the Law Faculty of Charles University in Prague she leads seminars and lectures on competition law to international students of LLM and Erasmus programmes.

Lucie has been listed among the top attorneys in the field of competition law by *Chambers* and *The Legal 500*.

Bányaiová Vožehová, s.r.o., advokátní kancelář

Lazarská 13/8
Building b, 4th Floor
120 00 Prague 2
Czech Republic

Tel: +420 602 625 212
Email: lucie.banyaiova@bvlaw.cz
URL: www.bvlaw.cz



Zuzana Kulhánková is a graduate of the Law School at Masaryk University in Brno; she also studied International Law at the University of Iceland. Zuzana has been a member of the Czech Bar Association (*Česká advokátní komora*) since 2010. She speaks Czech and English.

Zuzana focuses on real estate law, business law and dispute resolution. She has assisted international real estate development companies as well as banks with their real estate projects in the Czech Republic, participated in acquisitions and gained experience in drafting commercial contracts and handling litigation, including arbitration and insolvency proceedings.

Bányaiová Vožehová, s.r.o., advokátní kancelář

Lazarská 13/8
Building b, 4th Floor
120 00 Prague 2
Czech Republic

Tel: +420 774 091 328
Email: zuzana.kulhankova@bvlaw.cz
URL: www.bvlaw.cz

We provide comprehensive legal services and advice to global corporations, as well as to clients operating regionally or just locally. Our services include private as well as public law, including assistance with criminal law matters.

The team is led by partners with extensive, longstanding practice who have vast experience working on elaborate projects and transactions touching on various areas of the law. Our lawyers have in-depth knowledge of the legal environment as well as regulatory and commercial connotation which helps our clients make an effective and informed decision.

We are a member of the e-iure [<http://www.e-iure.com/>], international association of law offices/attorneys-at-law, and therefore we are able to arrange the provision of legal services through this network of law offices elsewhere in Europe and all over the world.

www.bvlaw.cz



ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Law
Business Crime
Cartels & Leniency
Class and Group Actions
Competition Litigation
Construction & Engineering Law
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection
Employment & Labour Law

Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investments
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation

Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media and Internet Laws
Trade Marks
Vertical Agreements and Dominant Firms