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Public Consultation on Possible Changes of Merger Control Legislation by the Czech Competition Authority

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Introduction

In the past two years, the Czech Competition Authority (CCA) added several new tools to its arsenal for competition enforcement. This year the CCA and the Government of the Czech Republic proposed another significant set of updates to the Czech Act No. 143/2001 Coll., on the Protection of Competition (the Act). Arguably, the most crucial change will target the current state of Czech merger control, with the introduction of the call-in model, which requires parties to notify under certain conditions a sub-threshold transaction for the CCAs prior approval. But, it seems that the CCA is still not satisfied, with the current state of merger control in the Czech Republic and has substantial plans to overhaul and improve several key aspects of the merger control regime.

On 10 July, the CCA released a public consultation notice regarding a possible revision of merger control rules. The proposed revision addresses both the statutory regulation contained in the Act and in sub-legislative regulations and soft law. With this notice, the CCA invites feedback from all stakeholders to the questions presented.

According to the CCA press release, there are several reasons for the planned revision. The major ones include the need to assess of whether there are gaps in the current merger control rules in the Czech Republic that allow transactions with the potential to significantly distort competition (e.g., killer acquisitions, serial transactions, etc.). Additionally, the effectiveness of turnover thresholds as a notification criterion will also have to be evaluated in relation to the number of mergers assessed by the CCA, as these have been unchanged for 20 years of validity and effectiveness of the turnover notification criteria in their current form. The CCA seeks, to the extent possible, to exclude from its reach transactions without a negative impact on competition in the markets in the Czech Republic.

This report aims to present the proposed changes and, to offer a critical analysis of these changes and the underlying reasoning behind them.

Statistics on Merger Control in Czechia

Before discussing the proposed changes, it is important to consider the merger control statistics provided by the CCA. Under the current notification criteria, from 2005 to 2023, the CCA initiated

915 administrative proceedings for concentration notifications, averaging 48 reviews per year. Out of 915 proceedings, 64 did not require CCA approval, and 5 were halted, leaving 846 mergers reviewed.

Of these, 808 posed no competition concerns at Phase I, while 38 raised concerns. In 7 cases, commitments were proposed, and 31 advanced to Phase II. In Phase II, 15 mergers were cleared without restrictions, 14 were approved with commitments, and only one was blocked. Overall, the CCA has blocked just one concentration and cleared 21 with commitments.

Correction to the definition of concentration

The first of many proposed changes involves a small grammatical adjustment, aimed at aligning the Czech approach with the established practices of the Court of Justice of the EU (CJEU) and European Commission (EC), when dealing with joint ventures (JV) and full functionality condition. Historically the Czech approach to this issue somewhat differed from the one present in the EU's Merger Regulation (EUMR).

The current wording of the Act differentiates between transactions involving the acquisition of joint control over an existing undertaking (Article 12(2) of the Act), for which the Act does not expressly require the jointly controlled undertaking to perform all functions of an autonomous economic entity, and transactions involving the establishment of a jointly controlled undertaking that does need to perform all functions of an autonomous economic entity (Article 12(5) of the Act).

This wording in the Czech competition legislation is not entirely aligned with the approach under the EUMR. Specifically, Article 3 (4) EUMR states that the creation of a JV performing on a lasting basis all the functions of an economic entity shall constitute a concentration within the meaning of Article 3(1) (b) EUMR, which concerns the acquisition of direct or indirect control over the other undertaking. The uncertainty regarding full functionality as a pre-condition for considering the creation of the JV as a concentration under Art. 3 EUMR was largely settled by the CJEU in its preliminary ruling in the *Austria Asphalt* case. The court clarified that a change from sole to joint control over an existing undertaking was a notifiable concentration "*only if the JV created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity*".

Before *Austria Asphalt*, the discrepancy between the two legal frameworks could results in the possibility that certain transactions will be treated as a concentration under Czech law but not under EUMR. To avoid this discrepancy with the EUMR, the CCA is proposing a slight modification to the wording of Article 12(5), aligning it more closely with the language used in Article 3(4) EUMR.

After the CJEU issued the judgement, the CCA began applying an EU law conform interpretation in response to that jurisprudence. As a result, the proposed legislative change is in fact a codification of the CJEU's jurisprudence.

Revision of the notification criteria

Merger Thresholds

The most prominent topic of discussion is the revision of the merger control thresholds and the possibility of expanding the notification criteria. The current Czech thresholds are two-fold. The first set of thresholds requires:

- a local turnover combined by all undertakings concerned of CZK 1,500 million (approx. EUR 61 million) and
- an individual local turnover of at least two of the undertakings concerned of CZK 250 million (approx. EUR 10 million),

The second set of thresholds combines:

- a global turnover of one undertaking concerned of CZK 1,500 million and
- a local turnover of the second undertaking concerned of CZK 1,500 million, while this second undertaking concerned is either one of the merging parties, the target undertaking or one of the parents of a JV.

These sets are alternatives, i.e. the fulfilment of either one is sufficient to establish the CCA's jurisdiction and the related notification obligation. Given that the thresholds have remained unchanged for two decades, the CCA is now exploring ways to implement a comprehensive update to the current system. The following section presents and analyses some of the potential approaches and improvements proposed by the CCA.

Thresholds for JVs

Firstly, in connection to the already discussed change, the CCA wants to effectively discard the provision of the Act that requires to notify establishment of the JV if only one of the establishing parties meets the turnover threshold in the Czech Republic. Currently, JV's are subject to notification even when their business activities are entirely outside the country, provided the parent companies meet the turnover thresholds, a notification will still be required if:

- The total net turnover of the merging parties in the Czech Republic exceeds CZK 1,500 million in the most recent financial period, and
- At least two parties exercising control over the jointly controlled company each exceed a turnover of CZK 250 million in the Czech Republic, or
- The jointly controlled company itself exceeds the CZK 1,500 million turnover threshold, and at least one of the controlling parties exceeds a global turnover of CZK 1,500 million.

After the proposed change of the wording of Article 12 (5) of the Act, the establishment of the JV would require the CCA's approval, if the total net turnover of the merging parties in the Czech Republic exceeded CZK 1,500 million, and either at least two undertakings exercising control over the JV or one of the undertakings exercising control over the JV and the JV itself achieved a net turnover in the Czech Republic exceeding CZK 250 million, or, alternatively, the net turnover of the merging competitors exceeded CZK 1,500 million. The JV would achieve a turnover in the Czech Republic exceeding CZK 1,500 million and at least one of the competitors controlling it would achieve CZK 1,500 million worldwide.

In summary, before the proposed change, JVs had to be notified even if only one parent company met the turnover threshold in the Czech Republic, regardless of the JV's operations being entirely outside the country. For example, if one parent company had a local turnover of CZK 1,500 million, the JV would still need to be notified even if the other parent had no turnover in the Czech Republic. After the proposed change, notification would only be required if both parent companies meet local thresholds (each having CZK 250 million in turnover) or if the JV itself exceeds CZK 1,500 million in local turnover. This ensures notification is focused on JVs with more significant local market impact.

Overhaul of notification thresholds and introduction of a Call-in model

The second proposal involves a substantial overhaul of the system of notification thresholds. In recent years, EC and National Competition Authorities (NCA's) have increasingly sought tools to assess the transactions that fall below mandatory merger notification thresholds but still have the potential to significantly impede competition (e.g. "killer acquisitions"). For EC, these efforts faced a setback with the recent landmark CJEU judgement in *Illumina Grail v Commission* prohibiting referral requests of concentrations below the referring Member State's thresholds, based on the revised Article 22 policy. According to the CJEU, the thresholds determining whether a transaction must be notified serve as "*an important guarantee of foreseeability and legal certainty*" for the companies involved (*Illumina Grail v Commission*, para. 209)

On the national level, many Member States are continuing their efforts, with several moving toward introducing a "call-in" model, which requires parties to notify certain sub-threshold transactions under specific conditions. The Czech Republic is following suit, with a recent amendment proposing its own call-in model. The Czech version would empower the CCA to require notification within six months of the concentration if the combined turnover of the parties exceeds CZK 1,500 million, with at least two parties each having a turnover of over CZK 100 million within the Czech Republic (compared to CZK 250 million under the current mandatory setting).

In the Notice on public consultation, the CCA also revealed that it is considering a substantial overhaul of the turnover criteria to capture "under the radar" anticompetitive transactions. The proposal discusses several potential measures, with the call-in model being one option. Other ideas to improve the effectiveness of the thresholds include lowering the thresholds, expanding the notification criteria by introducing market share thresholds or using a combination of the parties' profits and the value of the transaction.

While there is evidence that industry concentration has increased in the EU over the last 20 years, providing some justification for a stricter approach to merger control, I believe the CCA's potential changes to the notification criteria would be a step in the wrong direction. The current notification criteria are perfectly capable of capturing a sufficient majority of mergers that could potentially significantly distort competition in the Czech Republic. Adjusting it by adding additional criteria like the value of the transaction, assets or market shares of the merging parties would damage the established functioning of the Czech merger review. Besides, it would be non-transparent and not clear to the merging undertakings. Additionally, it is not clear if it would capture the problematic concentration either. Even the CCA itself admits in the Notice that these options are not ideal.

Lowering the turnover thresholds is also not advisable. If anything, they should be increased to account for inflation in the past two decades. The call-in model poses several problems as well. It reduces legal certainty for merging undertakings, that do not meet the turnover criteria for mandatory notification, as their merger could still be overturned based on an ex-post decision by the CCA. Additionally, it would increase the CCA's workload, requiring more time and resources to manage the call-in process. If the call-in model was introduced, more finetuning would be advisable. More precise conditions should be set for its applicability (at least in a soft-law form). For instance, a concept of comfort letters could be introduced.

Filing of concentration notification

In connection with the notification filing process, which is outlined in Article 15 of the Act, the CCA is proposing two legislative amendments to this provision. The first is only a minor change to the wording of Section 2, which aligns with the previously discussed amendment to Article 12, effectively omitting the entirety of Section 5.

The second proposed change is of particular significance for Czech competition lawyers, involved in filling a concentration notification. Under Czech law, merging parties are required to submit all the documents relevant to the concentration in the officially certified translation into the Czech language. This obligation originates from Article 16 of the Czech Act No. 500/2004 Coll. Administrative Procedure Code. It applies subsidiarily to all administrative proceedings in the Czech Republic.

However, the CCA acknowledges that this requirement often leads to increased costs for the merging undertakings and their legal representation. In many cases, one of the merging parties is a foreign entity, meaning that many of the original documents accompanying the merger notification such as the merger agreement, extracts from the commercial register or other similar register relating to the merging undertakings, annual reports and audited annual accounts are drafted in a language other than Czech (mostly English).

To address this issue, the CCA is proposing an option that would allow parties involved in the merger process to submit the relevant documentation in a basic translation, rather than an officially certified one. This basic translation would need to be accompanied by a statutory declaration from the notifying party, affirming that the documents are complete and authentic. This change is intended to reduce the financial burden on merging entities, particularly when dealing with cross-border transactions.

This amendment appears to be a straightforward attempt to simplify and expedite the merger notification filing process, one that stakeholders are unlikely to encounter major issues with.

Working days instead of calendar days for the time limits

Another proposal concerns the calculation of time limits in the merger review procedure. Currently, time limits are calculated in calendar days, unlike in the merger review proceedings before the EC, where time limits are calculated in working days. The CCA is now considering a shift from using calendar days to working days for time-limit calculations.

The reasoning behind this proposal argued by the CCA is that a significant portion of the time limit often falls on Saturdays, Sundays, and holidays. As a result, the CCA argues that a portion of the time limit is effectively wasted. The CCA also mentions the possibility of simultaneously reducing the time limits for issuing the decisions, if the shift from calendar to working days meets with a positive response.

Despite the CCA's argumentation, it would be more reasonable to maintain the current practice of using calendar days. In the Czech legal system, time limits are more frequently calculated using calendar days, which makes the overall calculation process simpler and more consistent across various legal contexts. Additionally, time limits based on calendar days are easier for parties to calculate and understand.

A more optimal solution might be to retain the current time limits while optimizing the merger clearance process or increasing the CCA's capacity. However, the CCA's practice does not indicate significant issues with the current deadlines.

Simplified procedure

The CCA's ideas to further expand the range of cases eligible for the simplified procedure are certainly welcome news for all stakeholders. This initiative appears to be inspired by the EC's merger simplification package released in September last year, which included a new Merger Implementing Regulation and Notice on Simplified Procedure. Like the EC, reducing the administrative burden can allow the CCA to allocate resources more efficiently to more complex cases. However, the notice does not specify any concrete changes, leaving the way open to public suggestions on how to optimize the criteria for the simplified procedure.

Currently, in the Czech Republic, a simplified procedure is available in cases with:

- horizontal overlaps below 15 % market share,
- vertical overlaps below 25 % and
- a change from joint to exclusive control

The Czech thresholds are more restrictive than those used by the EC. Under EC's simplified procedure the market share threshold for horizontal mergers is 20% and for vertical mergers, it is 30%. Additionally, the new Notice on Simplified Procedure includes several flexibility clauses, giving the EC the power to apply the simplified procedure to concentrations that do not initially fall under any of the categories qualifying for simplified treatment by default. The Czech simplified procedure, however, lacks similar tools that would allow the CCA to be more lenient with mergers that are unlikely to raise competition concerns.

Given these differences, the most straightforward way for the CCA to extend the range of cases eligible for the simplified procedure would be to align it more closely with the EC's version. This could involve adding more options for undertakings to qualify for the simplified procedure and increasing the market share thresholds while continuing to measure concentration levels using the Herfindahl-Hirschman Index.

Trustee

In connection with commitments and the proposed changes surrounding them, the CCA is considering codifying the option to appoint an independent third party (trustee) to monitor and ensure compliance with remedies or conditions imposed as a part of the merger clearance process. The trustee could be chosen by the undertaking in question and then be subject to the CCA's approval or the CCA could appoint the trustee itself. A trustee is a well-known concept in the merger review process especially in relation to divestment commitments.

Despite this not being a controversial change it appears somewhat unnecessary given the current state of the existing legislation, which seems adequate. The CCA has the authority to do appoint a trustee already in the agreement with the undertakings by approving the draft commitments or by imposing related conditions and obligations to ensure the commitments are met. The EC follows a similar approach making use of the trustee option without explicit provision in the EUMR.

Conclusion

The CCA's willingness to engage in the discussion about future adjustments of the merger control regime is certainly welcomed. After two decades the Czech merger control framework is overdue for thorough review and modernization, particularly given the rapid evolution of new industries. It remains to be seen what concrete legislative proposals the CCA will present following the conclusion of the public consultation. However, it is somewhat unfortunate that the CCA and the Czech Government have already proposed a series of significant amendments to the competition legislation, which are already advancing through the legislative process while the public consultation is still ongoing. This is especially concerning as the amendments, such as the introduction of the call-in model, have a substantial impact on the merger review regime. Hopefully, the CCA will carefully consider input from all participants, ensuring that the resulting reforms strike a balanced and effective approach to competition oversight.

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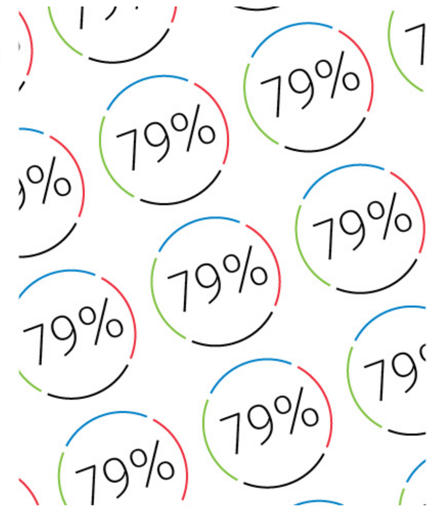

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