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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from the Czech Republic

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Czech Republic--

1. This contribution deals with some of the issues related to the treatment of cross-border concentrations of undertakings. In the general part, a description of the Czech merger control regime is provided. In the following part, specific issues are discussed.

1. General points

2. In the Czech Republic, merger control regime is set out in the Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts, as amended (hereinafter referred to as “the Competition Act”).

3. In order to qualify as a concentration of undertakings notifiable to the Czech Competition Authority, a transaction must take the form of:

- a merger of one or more undertakings previously independently operating in the market, or
- an acquisition of an enterprise of another undertaking or a part thereof on the basis of a contract, auction or by other means, or
- obtaining the possibility to control an undertaking by another undertaking, or
- a creation of joint venture performing on a lasting basis all the functions of an autonomous economic entity.

4. In contrast, a concentration of undertakings does not occur in the following two situations:

- a qualified stake held by a bank in a legal entity by virtue of payment of the issue price of shares by a set-off of the bank’s receivables from such legal entity, where such qualified stake is held for the duration of the rescue operation or financial restructuring of such legal entity for a maximum of one year;
- delegation of certain powers of the statutory bodies of undertakings to persons engaged in activities pursuant to special legal regulations, e.g. a liquidator or an insolvency trustee.

5. A concentration of undertakings must be notified to the Czech Competition Authority (and is subject to approval by the Czech Competition Authority), if

- the total net turnover of all undertakings concerned achieved in the last accounting period in the market of the Czech Republic exceeds CZK 1.5 billion and each of at least two of the undertakings concerned achieved in the market of the Czech Republic in the last accounting period a net turnover exceeding CZK 250 million, or

- the net turnover achieved in the last accounting period in the market of the Czech Republic
 - in the case of a merger at least by one of the parties to the merger,
 - in the case of an acquisition of an enterprise by the acquired enterprise or a substantial part thereof,
 - in the case of an acquisition of control by the acquired undertaking, or
 - in the case of a creation of joint venture by at least one of the undertakings establishing a joint venture

is higher than CZK 1 500 000 000 and at the same time the worldwide net turnover achieved in the last accounting period by another undertaking concerned exceeds CZK 1 500 000 000.

1.1 Who must notify

6. A concentration which is in the form of a merger must be notified jointly by all the parties to the merger. In case of acquisition of an enterprise and acquisition of control, it is the acquiring undertaking which must notify. A joint notification by the undertakings establishing a joint venture is required where a concentration takes the form of creation of a joint venture.

1.2 Suspension of implementation

7. It is important to note that a concentration of undertakings must not be implemented before the approval by the Czech Competition Authority.

1.3 Notification of a concentration of undertakings

8. A concentration notification must contain substantiation, documents certifying the facts decisive for the concentration and the requisites set out in the implementing legal regulation (the Decree of the Czech Competition Authority No. 252/2009 Coll., stipulating details of a concentration notification). The requirements of a concentration notification are:

- duly and completely filled Form for the approval of a concentration;
- receipt of administrative fee payment (a concentration notification is subject to an administrative fee that amounts to CZK 100 000);
- written authorizations granted to the representatives of all notifying parties, if the parties are represented in the concentration approval proceeding,
- extracts from the Commercial Register or other similar register, concerning all the undertakings concerned;
- documents establishing the concentration or documents certifying the existence of the concentration;
- annual reports including the audit of yearly financial statements for the last finished accounting period of all the undertakings concerned;

- consolidated financial statements for the last finished accounting period of all the undertakings concerned;
- the scheme and method of turnover calculation, the amount of which substantiates the submission of a concentration notification; and
- analyses, reports, studies, surveys, and any comparable documents prepared for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to competitive conditions, undertakings (actual and potential), the rationale of the concentration, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions.

1.4 *Deadlines - procedure*

9. The Czech Competition Authority has to decide upon a concentration of undertakings within 30 days from the initiation of proceedings if the concentration does not result in a substantial distortion of competition (approval of a concentration of undertakings in the first phase). In the first phase, however, a concentration may also be cleared subject to the commitments proposed by the notifying parties if the concentration raises competition concerns. If a concentration raises serious concerns as to a significant impediment to competition, the Czech Competition usually launches second phase in-depth investigation. In such a case the Czech Competition Authority must adopt a decision within 5 months from the initiation of proceedings.

10. The above deadlines are suspended if the Czech Competition Authority asks the notifying parties to provide additional information necessary for the assessment of the concentration of undertakings.

1.5 *Simplified procedure*

11. The notifying undertakings may enjoy benefits of a simplified procedure (short form requiring less information than full form; deadline of 20 days for the Czech Competition Authority to decide upon a case) if:

- none of the undertakings involved is operating in the same relevant market, or their combined share in such a market is below 15%, and at the same time none of the undertakings concerned is operating in the market vertically connected to the relevant market in which another undertaking operates, or their share in every such market is below 25%, or
- the undertaking acquires exclusive control over the joint venture in which it has participated in joint control so far.

1.6 *Substantive test*

12. Substantive test is used to assess concentrations of undertakings (a significant impediment to competition test) - covers both non-coordinated and coordinated effects that may stem from a concentration.

13. In our jurisdiction, there are no special rules which would apply to cross-border concentrations of undertakings.

2. Specific questions

2.1 *Cooperation among competition authorities*

14. In our jurisdiction, a model waiver of confidentiality has been introduced. If such a waiver is granted by the undertakings, the Czech Competition Authority may exchange confidential information relating to the particular case of a concentration with other competition authorities (note that only non-confidential information may be exchanged without a waiver).

15. In cases where we asked merging undertakings for a waiver, which was later granted, we discussed with the competition authorities of Slovakia and Austria whether the particular concentrations were also notifiable in these two jurisdictions, as well as the issue of the relevant market definition. Given the fact that none of these concentrations raised competition concerns in any of these jurisdictions, there was no need for a detailed exchange of information.

16. When assessing individual cases of cross-border concentrations of undertakings that fall within the jurisdiction of the Czech Republic, the Czech Competition Authority pursues only the primary goal of its powers in the field of merger control, which is the protection of effective competition on relevant markets. Competition rules of the Czech Republic are silent on the issue whether the Czech Competition Authority may take into consideration foreign interests when assessing a cross-border concentration of undertakings. So far, in our decision-making practice there has not been a case that would require dealing with this issue.

2.1.1 *International cooperation*

17. The Czech Competition Authority is involved in activities and discussions within the ICN and is, to a large extent, familiar with principles and recommendations set out in its key documents in the field of merger control. Moreover, many of these principles, recommendations and procedures are used by the Czech Competition Authority when assessing concentrations of undertakings.

2.1.2 *Regional cooperation*

18. The Czech Competition Authority is also a part of regional cooperation within the area of mergers. To illustrate this, the participation of the Czech Competition Authority in the initiative presented at the Marchfeld Competition Forum could be mentioned. This initiative, aiming to strengthen regional cooperation and coordination between European countries (with a focus on Central and Eastern Europe) has resulted in creating a database for cross-border merger cases focusing on mergers notifiable in countries of Central and Eastern Europe (e.g. Czech Republic, Slovakia, Latvia or Bulgaria, but also in Austria and Switzerland).

2.2 *Jurisdictional issues (notification, information exchange, enforcement, extra-territoriality)*

2.2.1 *Suitability of notification turnover thresholds*

19. We believe that the current notification turnover thresholds set out in the Competition Act are capable of capturing a huge majority of concentrations of undertakings that could have an impact on relevant markets within the territory of the Czech Republic. To this end, a local nexus has been introduced in 2004 in the Competition Act meaning that as from 2004 only transactions where the parties achieve substantial turnover in the Czech Republic are subject to approval by the Czech Competition Authority.

2.2.2 *Relying on actions and decisions taken by foreign competition authorities*

20. It has to be pointed out that if a merger meets notification criteria set out in the Competition Act, it must be notified to the Czech Competition Authority, which has no other option than investigate the merger and adopt a decision on the merger.

2.3 ***Remedies (types, consultation, monitoring, enforcement)***

21. In the past, the Czech Competition Authority cooperated with other competition authorities in one case of concentration of undertakings that had raised serious competition concerns which needed to be solved by remedies.

22. It is the merger case of *Zentiva/Slovakofarma* which took place in the pharmaceutical industry; the Czech Competition Authority and the Slovak Competition Authority contacted each other to discuss on an informal level the relevant market definition, possible impact of this concentration on their respective jurisdictions as well as the issue of suitable remedies to remove the identified competition concerns.