

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by the Czech Republic****27 November 2018**

This document reproduces a written contribution from the Czech Republic submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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Czech Republic

1. Introduction

1. Merger control in the Czech Republic is conferred on the Office for the Protection of Competition (hereinafter referred to as “the Office”) and it is mainly regulated by the Act No. 143/2001 Coll., On the Protection of Competition and Amending Certain Acts, as amended (hereinafter referred to as “the Competition Act”).¹ Transactions which constitute a concentration between undertakings pursuant to Art. 12 of the Competition Act² and at the same time fulfil the notification criteria defined in Art. 13 of the Competition Act³ shall be notified to the Office.

2. The administrative proceedings on the concentration between undertakings are initiated only on the basis of a notification, which have to be submitted by all undertakings intending to realise a concentration by a merger, acquiring the possibility directly or indirectly control another undertaking or its part, or establishing full-function joint venture. Therefore, the Office doesn’t have power to initiate proceedings concerning an impact assessment of unnotified concentration, on its own initiative.

3. A concentration notification may be submitted also prior to conclusion of the contract establishing the concentration or prior to acquisition of control over another undertaking in any other way. At the same time, the Competition Act doesn’t set a deadline for notification in such cases. Consequently, the only limitation for implementation of concentration is the obligation to refrain from implementation before its approval made by the Office.

4. The reason is that pursuant to the Article 18(1) of the Competition Act, the concentration may not be implemented before the day of filing the concentration

¹ The English translation of the Act is available at <http://www.uohs.cz/en/legislation.html>

² As the Concentration between undertakings shall be within the meaning of the Article 12 of the Competition Act considered merger of one or more undertakings previously independently operating in the market, situation when one or more entrepreneurs or one or more persons, who are not entrepreneurs but control at least one undertaking, acquire the possibility to directly or indirectly control another undertaking or part thereof, in particular by acquiring equity shares, business or membership interests or by a contract or by other means allowing them to control such undertaking or part thereof and also establishment of an undertaking jointly controlled by more undertakings that perform all functions of an autonomous economic entity on a lasting basis.

³ Pursuant to Art. 13 of the Competition Act, a concentration shall be subject to the approval by the Office, if a) 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 b) the net turnover achieved in the last accounting period in the market of the Czech Republic at least by one of the parties to the merger or by the undertaking or a part thereof over whom the control is acquired; or at least by one of the undertakings establishing the jointly controlled undertaking is higher than CZK 1.5 billion and at the same time the worldwide net turnover achieved in the last accounting period by another undertaking concerned exceeds CZK 1,5 billion.

notification and until the Office's decision on the concentration's approval enters into force.⁴ Violation of this prohibition may be fined by the Office up to CZK 10 million (i.e. approximately EUR 0.4 million) or up to up to 10 % of the net turnover achieved by the undertaking during the last completed accounting period, or it may annul the concentration.

5. In its decision making practice the Office has recognized nine cases of gun jumping. In seven cases, the merging undertakings implemented the concentration even before its notification to the Office. In one of those cases, the merging parties didn't submit the concentration notification at all, because they cancelled the planned transaction by restoring the original shareholder structure. In two other cases, the parties to the concentration implemented the concentration after the filling the concentration notification, but before the decision approving the concentration entered into force. In one of those, the merging parties continued in the implementation of the concentration, even though the merger had been blocked by the Office.

2. Detection Methods

6. The Office has detected infringements of the prohibition to implement the concentration in different ways. In three cases, it was based on a complaint, and in two of those, it was noticed through the acquired company. In two cases, the Office detected early implementation of the concentration from the documents, that were delivered to the Office by the parties to the concentration within the notification (e. g. the founding agreements for the transactions in question). In one case, the undertaking, that had implemented the concentration before the notification, realized its misconduct and reported it to the Office. In other cases, the Office detected an infringement of the Competition Act on the basis of the information gathered from the media monitoring.

7. The Office has a variety of tools for the purposes of investigation of early merger implementation. For example, it uses public sources (economic news, websites of undertakings, data from business registry etc.). At the same time, the Office is empowered to request undertakings for information, and undertakings are legally obliged to provide the Office with the documents and information requested. The Office may request business books and other business records or other records which may be important for clarification of the subject of the investigation. In cases of early implementation of concentration, the Office requested most frequently minutes of shareholders meetings, minutes of boards of directors or minutes of supervisory boards.

8. The Office is also empowered to carry out on site investigation within all premises and means of transport which undertakings use in their business activities. Nevertheless, as regards to the investigation of early merger implementation, the Office has used this power only once.

⁴ Having said that, the Competition Act sets certain exceptions, such as the implementation of concentration that should occur on the basis of a public bid 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 of proceedings was filed immediately and provided the voting rights attached to such shares and securities are not exercised.

9. Concerning the duration of illegal implementation of a concentration, it varied in the range from a single action (voting at shareholders meetings) to a period of more than eight years.

3. Activities Representing Gun Jumping

10. According to the Article 18(1) of the Competition Act, the concentration may not be implemented before the day of filing the concentration notification, but also after the notification, till the day the Office's decision approving the concentration becomes final. With regards to the fact that the Competition Act doesn't specify which steps can be considered as "implementation of concentration", the Office has published the "*Notice on the prohibition of implementation of concentrations prior to the approval and exemptions thereof*"⁵ on its website as a guideline representing the soft law. Activities that the merging parties should avoid before the approval of the concentration are specified in the Notice.

11. With regards to a rather general definition of the prohibition to implement the concentration prior to the approval, and considering the exceptions to this prohibition, it could be concluded that the purpose of the abovementioned prohibition is to prevent from any changes in the structure of the market before the Office assess the impacts of the concentrations in question. Therefore, before the concentration is approved by the Office, not only the merger itself should not be carried out and possibility to control should not be acquired, but also, any other effective actions leading to any coordination of conduct of the merging parties should not be taken.

12. Nevertheless, during its decision-making practise the Office has concluded that the prohibition of early implementation of the concentration does not cover mere shareholding, under the condition that the shareholding will be separated from the exercise of voting rights connected to the shares, and at the same time, the concentration notification is filed.

13. On the contrary, the Office considers as a clear infringement of the prohibition to implement the concentration especially:

- an exercise of shareholders' rights within the undertaking over which the control is being acquired by the acquirer of control⁶ (for example voting during the shareholders assembly which takes decision on accounts clearances,⁷ on profits distribution,⁸ on amendments to statutes,⁹ on changes in statutory or supervisory bodies¹⁰ etc.),

⁵ Available from <http://www.uohs.cz/en/legislation.html>

⁶ The Office has considered as infringement of the prohibition to implement the concentration such situations when a joint control was established, and the shareholders, who could exercise the joint control, exercised their shareholders' right by reciprocal blocking of all proposals, e. g. Decision ref. no. S87/2007/KS *VTK GROUP/D.B.*

⁷ e.g. Decision ref. no. S837/2014/KS *GRADIENT GROUP.*

⁸ e.g. Decision ref. no. S164/2015/KS *ARMEX Oil.*

⁹ e.g. Decision ref. no. S029/2010/KS *BEST.*

¹⁰ e.g. Decision ref. no. S148/2011/KS *KAREL HOLOUBEK – Trade Group.*

- a coordination of competitive behaviour with other merging party or linking their business activities (for example in the field of pricing policy or approach towards customers or suppliers¹¹ etc.),
- a transfer of management control (for example by appointment persons from the acquirer of control to the board of directors or to managements positions in the companies over which the control is being acquired,¹² or by authorizing a person from the acquirer of control to taking legal actions on behalf of the target company¹³),
- requesting an approval of the acquirer of control on decisions of the board of directors of target company regarding business activity of the target company (for example in the fields of marketing policy or investment plans¹⁴),
- an unprotected exchange of sensitive information¹⁵ and others.¹⁶

4. Sanctions for Gun Jumping

14. The Office can impose two basic types of penalties for an infringement of the prohibition of early merger implementation. Firstly, if the merging entities don't notify the concentration, although the Office has initiated administrative proceedings on the infringement of the duty defined in the Art. 18(1) of the Competition Act, the Office may impose on the undertaking concerned an obligation to sell the undertaking (or its part) over which a control was acquired, or on obligation to terminate the contract which established the unnotified concentration.

15. Secondly, the Office may impose a fine on the undertakings which has duty to submit the notification. In case of an individual, who is not an entrepreneur, for an early implementation of concentration the Office is obliged to impose a fine up to CZK 10 million. In case of a legal entity or a natural person – entrepreneur, the Office may impose a fine up to CZK 10 million, or up to 10 % of the net turnover achieved by the undertaking during the last completed accounting period.

¹¹ e.g. Decision ref. no. S224/03 *Karlovarské minerální vody*.

¹² e.g. Decision ref. no. S104/2015/KS *BOHEMIA ENERGY* entity.

¹³ e.g. Decision ref. no. S225/2009/KS *Lumius*.

¹⁴ e.g. Decision ref. no. S224/03 *Karlovarské minerální vody*.

¹⁵ e.g. Decision ref. no. S224/03 *Karlovarské minerální vody*, when the target company provided the acquirer of control with information on development of monthly sales of its products or on planned investments, and the acquirer provided the target company with material, which were its exclusive intellectual property).

¹⁶ e.g. Decision ref. no. S029/2010/KS *BEST* (the company BEST sent a letter to bank companies providing credit to the target company, where it asked them not to finance the target company anymore, because the company BEST didn't agreed to the business moves, which the target company intended to make; the banks then stopped the financing of the target company, and one of their reasons for that was the disagreement between the shareholders of the target company – the target company had two shareholders who blocked their proposals on the shareholders meetings reciprocally).

16. Finally to increase transparency of its procedure, the Office published on its website guidelines on setting a fine for different types of the Competition Act infringements (hereinafter referred to as “the Fining guidelines”).¹⁷

17. In accordance with the guidelines, the procedure of setting a fine for an infringement of the prohibition of early implementation of concentration consists of several individual steps, namely:

- **calculation of the value of the sales**, i. e. the turnover achieved by the undertaking derived from the sale of goods directly or indirectly affected by the distortion of competition,
- **calculation of the proportion of the value of the sales**, depending on the gravity of the offence, taking into account the manner in which the offence was committed and its consequences, as well as the circumstances leading to committing the offence, eventually the number of partial attacks in case of a continuing offence,
- **calculation of the time coefficient**, depending on the duration of the infringement,
- **calculation of the basic amount of the fine** on the basis of the proportion of the value of the sales and time coefficient,
- **calculation of the final amount of the fine on the basis of mitigating and aggravating circumstances**,
- **consideration of other possible anticompetitive offences** on the grounds of the principle of absorption,
- **adjustment of the final amount of the fine with regard to a total net turnover of the undertaking** and
- **adjustment of the total amount of the fine with regard to eventuality of the fine being eliminating.**

18. When calculating the value of the sales, the Office considers the value of the sales achieved by the undertakings on all markets within the territory of the Czech Republic in which they operate, on a basis of the last complete accounting year in which the undertaking committed the infringement.¹⁸

19. When calculating the proportion of the value of the sales, which is used by the Office for the purposes of calculation of the basic amount of the fine, the gravity of the offence defined by the characteristics of the offence, and individual gravity of the offence which is based on the manner, in which the offence was committed, its consequences and other circumstances, are considered.

20. In accordance with the Fining Guidelines, the Office distinguishes three types of gravity: very serious offences, serious offences and minor offences. An infringement of the

¹⁷ See *Guidelines of the Office for the Protection of Competition on the Method of Setting Fines*, available from <https://www.uohs.cz/en/legislation.html>

¹⁸ Under the Fining Guidelines applicable till 22/4/2018 (hereinafter referred to as „the previous Fining Guidelines“), when calculating the value of the sales for the purpose of a setting fine for the breach of the prohibition of early implementation of concentration, the Office calculated the value of the sales achieved by the acquired undertaking on all markets within the territory of the Czech Republic, and at the same time, the value of the sales of the acquirer on the markets, where activities of the merging parties overlapped or they were connected vertically.

prohibition to implement the concentration prior to its clearance can be classified as serious or minor offence.

21. An early implementation of concentration can be classified as a serious offence if the concentration in question is not approved by the Office, or it is approved under commitments in favour of maintaining effective competition. In case of serious offences, the basic margin for calculation of the percentage from the value of the sales shall be set between 3 % and 10 %. Other cases of concentrations, i. e. unproblematic from the competition point of view, contradicting Art. 18(1) of the Competition Act can be classified as minor offences. For committing minor offences, the Office sets the basic margin for calculation of the percentage from the value of the sales in relation to the fact whether the concentration in question was or should be notified within so called simplified procedure, or not.¹⁹ In case of the concentration which was or should be notified within so called simplified procedure, the basic margin for calculation of the percentage from the value of the sales shall be set within a range up to 1 %, in other cases, still unproblematic from the competition point of view, up to 2 %.

22. When setting the specific percentage from the value of the sales within the basic margin, the Office assesses the individual gravity of the specific case of early implementation of concentration. For these purposes, the Office takes into account, whether the illegal conduct had real or only potential impact on competition, benefits achieved by the undertakings as a result of an infringement of the Competition Act, the nature and type of the goods in question, the impact of the conduct on the final consumers or the market power of the merging undertakings.

23. The Office takes into account duration of the infringement as well, when setting a fine for a breach of the prohibition of early implementation of concentration – the proportion of the value of the sales is multiplied by so called time coefficient. The time coefficient ranges between 1 and 10, while infringements lasting up to one year are classified with coefficient of 1, and infringements lasting more than 10 years with coefficient of 10.

24. In cases of infringements defined in Art. 18(1) of the Competition Act, the first action that can be classified as implementation of concentration is considered to be a beginning of illegal conduct. On the other hand, three different situations are considered to be an end of illegal conduct. Firstly, it can be a moment when the decision, by which the Office approved the concentration, comes into force. Then it is a moment when the decision, by which the Office approved an exception from the prohibition of early implementation of concentration²⁰, comes into force. And finally, a moment when the merging undertakings voluntarily end their illegal conduct before the decision of the Office comes into force is also considered as the end of illegal conduct.

¹⁹ Pursuant to the Art. 16a(1) of the Competition Act, a concentration of undertakings may be notified within so called simplified proceedings, if it is a conglomerate-type concentration, or if it is a horizontal-type concentration, but the combined share of the new undertaking does not exceed 15 %, or if it is a vertical-type concentration, but the share of the merging parties in the vertically connected markets does not exceed 25 %, or of the undertaking acquires sole control over another undertaking or part thereof, in which it has participated in joint control so far.

²⁰ Pursuant to the Art. 18(3) of the Competition Act, the Office may decide upon application of the undertakings on the approval of an exemption from the prohibition of early implementation of concentration, where there is a threat of sustaining considerable damage or any other significant detriment to the undertakings concerned or third parties.

25. Next step in setting a fine is a consideration whether there are mitigating or aggravating circumstances, which can lead to up to 70 % adjustment of the amount of the fine.

26. Mitigating circumstances usually involve situations, when the undertaking, who has committed the infringement, notifies such misconduct, or extraordinarily cooperates with the Office during the investigation and such cooperation significantly contributes to investigation and helps to prove the existence of infringement of the Competition Act, or the undertaking takes active steps aimed at reducing or eliminating the harmful consequences of the offence.

27. Aggravating circumstances include in particular previous or intentional commitment of an offence.

28. Once the fine is calculated, the Office is obliged to check whether the fine is not eliminating for the infringer and whether it does not exceed the legal limit of 10 % from the net turnover.

29. Having concluded an infringement of the prohibition of early implementation of concentration, the Office shall reduce the fine, the amount of which it has notified in the Statement of objections, within so called settlement procedure, subject to condition the party to the proceeding admits liability for the offence, while the Office considers envisaged fine to be sufficient with respect to the nature and seriousness of the offence. This procedure can be implemented on the basis of an application submitted by the party to the proceeding only. The application shall be submitted within 15 days at the latest from the day when the Statement of objections was delivered. Since its introduction in the Competition Act, the settlement procedure has been used frequently – parties to the proceedings applied for it in three out of four cases of early implementation of concentration.

30. As mentioned above, the Office may impose serious penalties for an early implementation of concentration. Nevertheless, the Office may decide, after a preliminary investigation, not to initiate proceeding on the infringement of the Competition Act, if there is no public interest in its proceedings due to the low level of detrimental effects of the conduct on effective competition.

31. In this respect, the Office has published as a part of the soft law on its website *Notice on the Alternative Solution of Competition Issues and on the Discontinuance of the Proceedings*.²¹ Within this document, the Office has concluded that public interest on conducting proceedings on a prohibited implementation of concentration does usually not exist if the competition was not distorted as a consequence of such infringement, and if its impunity doesn't thread the principle of *ex ante* assessment of the Office's merger review. This condition is met when the concentration in question could be approved within simplified procedure, and the undertaking who infringed the Competition Act ceased from implementation of concentration in question before the Office became aware of it. That means that the Office doesn't initiate proceedings provided that the acquiring company is re-divided or the acquirer loses control over another undertaking or its part.

32. Although the Office may impose very serious penalties, the fines imposed so far were set close to the lower limit of its possible amount, in the range of CZK 50,000 (i. e.

²¹ Currently available in the Czech language only. See <http://www.uohs.cz/cs/legislativa/hospodarska-soutez.html>

approximately EUR 2,000) and CZK 10 million (i. e. approximately EUR 0.4 million).²² In terms of proportion to the turnover of the undertakings, none of the fines exceeded margin of 0.2 % from the amount of turnover of the merging undertakings.

33. This is mainly caused by the fact that except of two cases, the early implemented concentrations were unconditionally approved afterwards while they were generally qualified for the application of simplified proceedings. Only two cases raised competition concerns – one of them was approved subject to commitments in favour of maintaining effective competition, and the later was prohibited. Nevertheless, these were the very first cases in which the Office concluded a breach of the prohibition of early implementation of concentration, and therefore, taking into account that there existed no precedent, the Office didn't impose high fines. Moreover, in the cases in which the Office prohibited the concentration, it did not only impose a fine (amounting CZK 10 million), but it also imposed a remedy upon the merging parties, consisting in the restoring of the original state, as it was before the implementation of the concentration.

5. How Far Reaching is Gun Jumping?

34. The concept of “gun jumping” is generally used for all unlawful pre-merger coordination actions between the merging parties. There are two basic types of competitors' coordination activities which might be found as a gun jumping. Without reasonable doubt it is some kind of conduct enabling to take direct or indirect control over the acquired company in advance of merger transaction clearance. Nevertheless, disclosure of competitively sensitive information (like production plan) prior to merger clearance shall be considered as gun jumping as well.

35. In the Office's point of view, the Czech legal framework incorporates both of these borderline scenarios, similarly to the EU competition law. Nevertheless, in the decision making practice of the Office, there was only one case when disclosing sensitive information was investigated within the proceeding on possible infringement of the prohibition of early implementation of concentration, and even in that case, it was only one of several related activities constituting the infringement.²³ Therefore it can be concluded, the Office has never dealt with a case of gun jumping based exclusively on the disclosure of sensitive information.

36. For this reason it is understandable that the concept of gun jumping committed only by disclosing competitively sensitive information has never been contested before the Czech courts. It can be concluded that such kind of conduct definitely constitutes an infringement of the Competition Act, whether in the form of an infringement of the prohibition of early implementation of concentration, or in a form of a cartel agreement.

²² All cases of early implementation of concentration sanctioned by the Office so far were dealt with before publishing The *Fining Guidelines* which are currently applicable.

²³ See the abovementioned Decision ref. no. S224/03 *Karlovarské minerální vody*.