



Control of Mergers and Acquisitions



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Agenda

- Control of concentrations within the system of EC competition law
- Principles of control of concentrations
- Legal framework
- Ban on implementation of concentrations
- Jurisdictional issues
- Statistics
- Assessment of mergers
- Procedure

Principles

- Concentration as a behavior distorting competition
- *Ex ante* tool for influencing market structure (opposite to cartels and abuses)
- Control of significant concentrations (only)
 - see notification criteria
- Obligatory notification system
 - undertakings must submit notification
- Assessment of impact of concentration on competition (only)
 - not e.g. compliance with commercial law
- Ban on implementation of concentration prior to approval
 - undertakings shall postpone implementation of merger till the effective day of approval decision



Reasons

- Elimination of creation of market structure that would lead to abuse of market power and that would be (*ex post*) difficult to solve
- Control of external growth of undertakings exercised by the state
 - control of internal growth missing

History

- 1951
 - Treaty on European Community of Coal and Steel (Art. 66)
- Control of concentrations not explicitly regulated in EC Treaty
- Originally – absence of specific regulation
 - attempts to apply Art. 81 a 82 EC Treaty
- Legal basis – Council Regulation 4064/89 on the control of concentrations of undertakings
 - complex substantial and procedural law
 - applicable on all sectors
- Two basic functions of the Regulation
 - tool for intervention of or ban on concentrations distorting competition (but statistics of interventions – below 7 %)
 - single procedural system (one stop shop)
 - transparency, clear rules, deadlines
- Czech competition law
 - merger control since 1991

Revision of Regulation (2002-2004)

- Reasons and context
 - functioning of notifications criteria (turnover)
 - allocation of cases between 25 (27) MS and EC
 - making the assessment more effective
 - more cases
 - more complicated analysis
 - better understanding of competition law
 - three prohibition decision abolished by CFI
 - T-342/99 *Airtours*
 - T-301/01 *Schneider Electric*
 - T-5/02 *Tetra Laval*
 - international discussion (establishment of ICN)
 - debates on change from administrative to judicial system

Regulation 139/2004

- Effective as of 1 May 2004
- Changes
 - jurisdictional issues
 - procedural issues
 - substantive law issues
- Followed by
 - adoption of soft law
 - Guidelines for assessment of mergers
 - Consolidated jurisdictional notice
 - Modifications in the structure of DG Comp
 - i.e. establishment of Chief Economist Department and Consumer Liaison Officer

Hard law

- Art. 81 a 82 EC Treaty
- Council Regulation 139/2004
- Commission Regulation 802/2004
(implementing regulation)
 - detailed procedural provisions
 - form CO

Soft law

- Consolidated jurisdictional notice
- Notice on restrictions directly related and necessary for concentration
- Notice on the assessment of horizontal concentrations
- Notice on the assessment of non-horizontal concentrations
- Notice on referrals
- Notice on relevant market
- Notice on commitments
- Notice on simplified procedure,

Jurisdictional issues



Council Regulation 139/2003 on the control of concentrations between undertakings

Jurisdictional issues (overview)

- A transaction is subject to the approval of the Commission if (cumulatively)
 - independent undertakings are participating
 - amounts to concentration of undertakings
 - and there is community dimension

Independence of undertakings concerned

- Internal restructuring not subject to approval
 - e.g. merger of a parent company and a subsidiary, transfer of assets between two subsidiaries

- Change of control must be established on lasting basis
 - general rule – three years

Concept of concentration (overview)

- Art. 3 Regulation 139/2004
 - „merger“
 - acquisition of control of undertaking
 - establishing joint venture fulfilling all functions of economic unit (full-function JV)

Merger I

- Art. 3(1)(a) Regulation 139/2004
 - two or more undertakings combining their activities in a manner that they do no longer exist as an independent entities
- Amalgamation



- Absorption



Merger II

- Creation of a single economic entity is deemed to establish a merger
 - transfer of activities of previously independent undertakings
 - additional factors to be considered
 - internal compensation of losses and profits
 - joint responsibility
 - cross ownership of shares

Acquisition of control I

- Art. 3(3) Regulation 139/2004
- „Control“
 - ability to exercise decisional influence on other undertaking
 - legal of factual basis
 - direct or indirect
 - sole or joint
- „Acquisition“
 - acquisition of assets or shares
 - shareholders agreement
 - interlocking directorates
 - heavy commercial dependence

Acquisition of control II

- Who gains a control?
 - other undertaking
 - one or more individuals already controlling other undertaking
 - state?
 - M.931 *Neste/IVO* [1998] O.J. C218/4
 - S 145/02 *ČEZ/REAS* (ÚOHS)

Acquisition of control III

- „Object“ of control
 - undertaking
 - one or more companies, incl. subsidiaries and other corporate participations
 - assets (part of undertaking)
 - if a determinable turnover can be attributed to these assets
 - licenses, trademarks etc.

Acquisition of control IV

- Sole control
 - ability to exclusively decide strategic issues of other undertaking
 - shift from
 - no control
 - joint control
 - legal title
 - ability to exercise more than 50 % voting rights
 - lower threshold only if secures decisive influence (fragmentation)
 - assessment of factual situation (3 years backwards)
 - agreement (especially shareholder agreement)
 - if a single shareholder has the right to decide strategic issues
 - option if applicable in near future

Acquisition of control V

- Joint control
 - agreement among parent companies on strategic decisions of undertakings
 - veto rights (negative control) – an immanent threat of deadlock situations
 - examples
 - equal distribution of voting rights
 - veto rights
 - investments - yes, abolishing company - not
 - strong common interest of minority shareholders
 - but changing coalitions

Acquisition of control VI

- Change of control
 - from joint to sole
 - from sole to joint
 - joint (three) to joint (two or three)
 - concentration
- Change from direct to indirect control
 - is not deemed to establish concentration

Joint venture

- Art. 3(4) Regulation 139/2004
 - joint venture fulfilling all functions of independent economic unit (full-function JV)
 - essentials
 - joint control
 - long term functioning
 - equipment (resources)
 - ability to exercise all functions
 - comparison with other undertakings
 - initial dependence on parent companies not precluding FF JV
 - long term dependence
 - real business terms and conditions
 - value added
 - provision of goods and service to third parties

Multiple transactions

- Avoiding notification obligation?
 - two or more interrelated transactions are deemed to establish single concentration
 - test – is it reasonable to proceed with single transaction separately?
 - consequences
 - turnover calculation, extent of investigation (number of decisions, ban on implementation of concentrations etc.)

Concentration subject to approval

- Absence of parallel application of national and community competition law
- Community dimension
 - is established
 - concentration is subject to approval of the Commission
 - ... according to EC substantive and procedural law
 - is not subject to approval of any other NCA
 - is not established
 - concentration is not subject to approval of the Commission
 - but may be subject to NCA's approval (if respective thresholds are fulfilled)
 - ... according to national substantive and procedural law
- *One stop shop system*
 - merger notifiable to the Commission is not subject to approval of any other NCA

Community dimension 1/2

■ Art. 1(2) Council Regulation 139/2004

A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million;
and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Community dimension 2/2

- Art. 1(3) Council Regulation 139/2004

A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
 - (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
 - (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
 - (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,
- unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Overview

Variants	§ 13 ZOHS	Art. 1 Regulation 139/2004	Other NCA	Non member state	Who approves the merger?
A	Yes	No	No	No	ÚOHS
B	No	Yes	Yes	No	Commission
C	Yes	Yes	No	No	Commission
D	Yes	No	Yes	No	ÚOHS and NCA
E	Yes	Yes	Yes	Yes	Commission and non member state

Turnover calculation

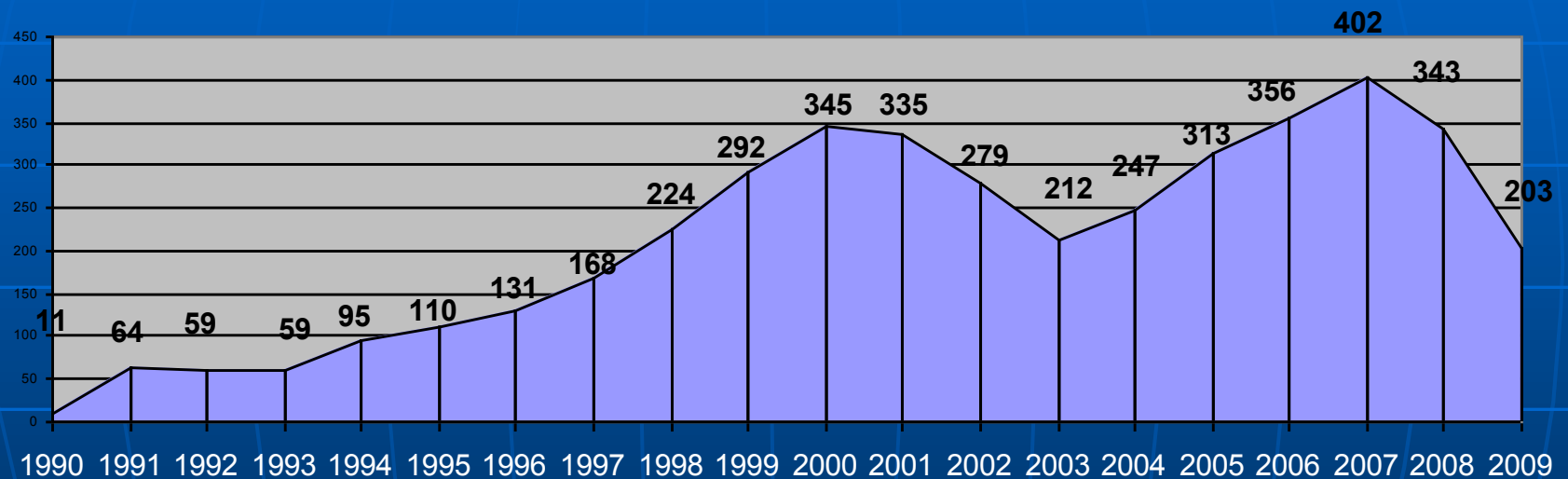
- Net turnover
 - consolidated
 - holding
 - all activities (not only sectors concerned)
 - last finished accounting period
- Territorial division of turnover
 - principle – according to the place or seat of customer
- Specific rules for banks, insurance companies etc.

- See Consolidated Jurisdictional Notice

Referrals

- Notification criteria flexible not enough
 - threat of multiple notifications
 - costs
 - divergent decisions
 - solution – referral system
 - Commission ■ one or more NCAs
 - one or more NCAs ■ Commission
 - in prenotification phase as well
 - Commission may invite referral submission

Commission Notifications 1990 - 2009



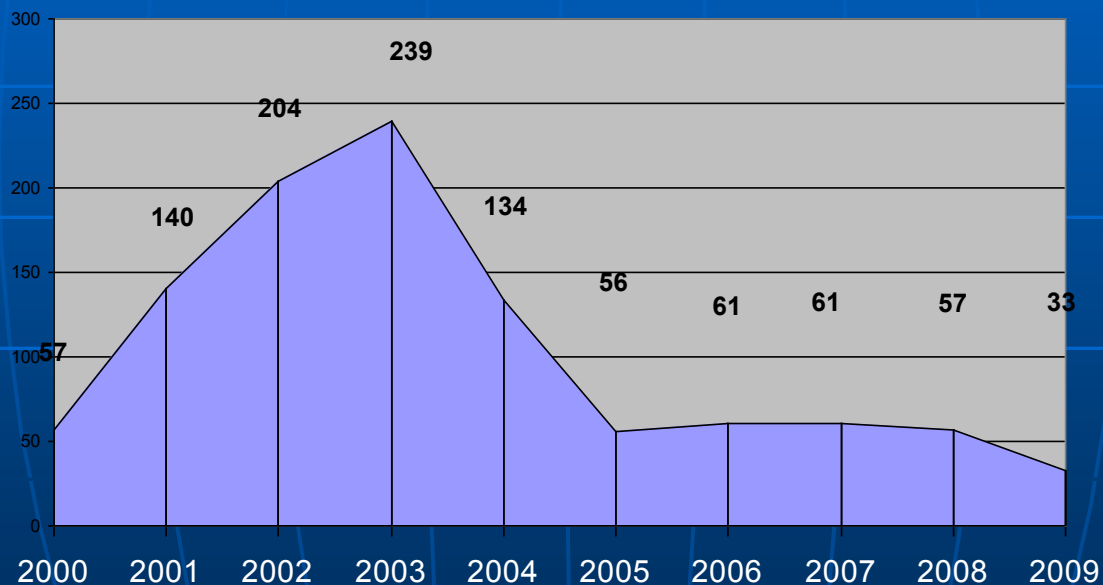
Commission - Statistics

Notifications	Prohibitions	Commitments decision (I. and II. phase)
4218 (100 %)	20 (0,5 %)	277 (6,6 %)

Year	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09
Notific ations	11	64	59	59	95	110	131	168	224	276	330	335	277	211	247	313	356	402	343	203
Prohibi tions	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0
Commi tments	0	6	7	2	4	6	3	9	16	23	38	20	15	17	16	18	19	22	24	12

ÚOHS

Notifications 2000 - 2009





Substantive test



Substantive test

Introduction

- Purpose of the existence of control of concentrations
 - prevention of creation or strengthening of market power, that would lead to distortion of competition.
- Future oriented competition analysis
- Main question
 - does a merger lead to critical increase of market power that would enable the merged entity raise prices or lower quality?
- This assessment is exercised within the framework of substantive test

- *Substantive test*
 - way how to analyze probable effects of concentration in question on existing terms of competition.
 - conditions for prohibition

Substantive test Classification

- Dominance test
 - creation of strengthening of individual or collective dominance
 - dominance – see Art. 82 EC Treaty
 - legal term, but economic interpretation
 - mainly continental Europe
- SLC test
 - significant impediment to competition
 - no matter whether it is due to creation or strengthening of dominance
 - USA, UK
- Public interest test
- and their combinations

Substantive test in Regulation 139/2004

- Art. 2(3)
 - *a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market*
- Criteria - Art. 2(1)
 - the market position,
 - economic and financial power,
 - the alternatives available to suppliers and users, their access to supplies or
 - markets,
 - legal or other barriers to entry,
 - supply and demand trends for the relevant goods and services,
 - the interests of consumers,
 - the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.



Three types of significant lessening of competition

- Unilateral (non coordinated) effects
 - creation or strengthening of individual dominant position
 - creation of non collusive oligopoly (so called unilateral effects in a narrow meaning)
- Creation or strengthening of collusive oligopoly (collective dominance)
 - See Guidelines on assessment of horizontal mergers

Unilateral (non-coordinated) effects

■ Alternatives

- creation or strengthening of dominant position
 - ability
 - to behave to a large extent independently of competitors and consumers
 - set independently prices
- Unilateral effects in a narrow meaning
 - elimination of significant competitive pressure
 - case *Heinz/Beech Nut*

Coordinated effects

- Creation or strengthening of collective dominance
- Criteria
 - market transparency (possibility to check compliance with common strategy)
 - long term sustainability – deterrent mechanism
 - absence of response from competitors and/or customers, that would jeopardize common strategy
... judgment CFI T-342/99 *Airtours*

Typology of concentrations a their effects on competition

- Horizontal mergers
 - concentration between existing or potential competitors
 - most harmful, elimination of existing competitive power
- Vertical mergers
 - concentration between undertakings active on various (subsequent) levels of distribution chain (producer – distributor)
 - threat of foreclosure of *down-stream* or *up-stream* market
 - increasing costs of competitors by limiting access to inputs or customers
 - access to confidential information on competitors
 - but at the same time efficiencies (increase in effectiveness, reduction of costs etc.)
- Conglomerate mergers
 - concentration of undertakings active on different relevant markets
 - possible relevant threats only in case of related neighboring markets (complementary goods)
 - *bundling* and *tying*



Procedure



Procedure generally

- Rules on procedure as one of main advantages
- Basic features
 - administrative system
 - *ex ante* system (ban on implementation of concentration)
 - predictable and transparent time framework (including fictions)
 - legal certainty and predictability (format and content of decisions)
 - EU: participation of MSs (Advisory Committee)
 - right on defense (SO, hearing officer)
- Merger Task Force dissolved

Notification

- Initiation of proceedings
- Obligation to notify
- Format of notification
 - form (Form CO, decree of ÚOHS)
 - documents
- Responsibility for validity and completeness of information – merging entities
- Incomplete notification
 - proceeding is not launched
 - clock is stopped
- Prenotification talks
- Notification fee
 - ČR - 100.000,- CZK
 - EU – 0,- EUR

First phase

- System 1+4 months
- First phase
 - approx. 1 month
 - checking information submitted in notification
 - third parties generally informed and can submit comments and standpoints
 - is the merger subject to notification?
 - no – closing of proceedings
 - yes, than
 - is there a threat to competition?
 - no – approval decision
 - yes
 - commitments decision
 - decision to continue in proceedings

Second phase

- Max. 4 months
- In depth investigation of concentration and its impact on competition (questionnaire surveys, studies, tests etc.)
 - specific competitors and customers targeted
- Statement of objections
 - concentration would lead to substantial impediment to competition
 - approval with remedies (commitments)
 - prohibition
 - concentration would not lead to substantial impediment to competition
 - approval (unconditional)

Investigation

- Powers of the competition authority
 - request information and documents from any undertaking
 - enter business premises and do dawn-raids
 - resistance to investigation – fine up to 1 % of annual turnover
 - seals
 - but – investigation powers in mergers are slightly softer than in antitrust

Types of decisions - summary

- Concentration is not subject to approval (1st phase)
- Referral (prenotification and 1st phase)
- Approval (1st and 2nd phase)
- Approval with remedies (1st and 2nd phase)
- Prohibition (2nd phase)

Consequences

- If the result of concentration is significant impediment to competition
 - prohibition
 - Approval with remedies (conditional approval)

Remedies

- Initiative of merging parties
- Potential to eliminate doubts as to negative impact of merger on competition
- Classification
 - structural remedies
 - lead to a permanent change of market structure
 - sale of assets, shares etc.
 - most effective, do not require extensive control
 - behavioral remedies
 - commitment concerning future behavior, do not change market structure
 - e.g. commitment to continue with production, retain independent distribution channels etc.
 - minor interference into rights of undertakings, but less effective and uneasy to control
 - quasi-structural remedies (transfer of IP rights)
 - elimination of interlocking directorates
- Failure to fulfill commitments might lead to revocation of approval

Revocation of approval

- Applicable in three scenarios
 - merger was approved on the basis of untrue or incomplete information submitted by merging parties
 - the approval has been obtained by deceit
 - or where the parties fail to fulfill the remedies
- Restrictive approach
- Max. 5 years after effective date of approval and not later than 1 year of learning about the relevant facts

Thank you for your attention



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