

Czech Republic

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MARKET AND REGULATION

1. Please give a brief overview of the public M&A market in your jurisdiction. (Has it been active? What were the big deals over the past year? Please distinguish between trade buyers and private equity backed deals.)

In 2009 there was a marked decline in M&A activity in the Czech Republic, reflecting the global economic downturn. On the other hand, there was considerable activity from certain players in the Czech Republic and the whole Central and Eastern European (CEE) region who consider the recent economic crisis as a chance for a good investment.

Energy continues to be one of the few recession-proof areas across the CEE (from the point of view of the level of activity and the prices negotiated in the deals), and this is also the case in the Czech Republic. For example, notable deals involving Czech bidders or targets announced in 2009 included:

- The sale of ŠKODA POWER a.s. (the world's leading manufacturer of steam turbines and heat exchangers) from ŠKODA HOLDING a.s. to the Korean company Doosan Heavy Industries & Construction, for EUR450 million (about US\$610 million).
- The consolidation of certain J&T energy group investments into a joint venture with PPF Partners for over EUR700 million (about US\$950 million).
- The sale of the largest Czech carbon power station, Opatovice, from British company International Power to the largest Slovak financial investor J&T Group for EUR864 million (about US\$1,180 million).
- The acquisition of the majority shareholding in the German coal mine Mibrag by Severoceske doly a.s. (a member of CEZ group) for EUR404 million (about US\$550 million).

Renewable energy is one of the most active areas in the energy sector and the recent trend is for involvement in green energy development, including wind, photovoltaic, and biomass.

2. What are the main means of obtaining control of a public company? (For example, public offer, legal merger, scheme of arrangement and so on.)

The main means of obtaining control of a public company are:

- **An agreement with a controlling shareholder.** This is an

agreement to purchase a controlling shareholding in the target. This is the one of the most common ways of obtaining control of a public company in the Czech Republic (see *Question 3*).

- **A public bid to acquire shares.** A public bid must be made whenever anyone:
 - makes an offer to at least 100 shareholders to acquire their shares in a public company, by way of purchase or share-for-share exchange, whether those shares are listed on a regulated market or not; or
 - makes an offer to fewer than 100 shareholders concerning shares representing a total of more than 1% of the company's capital.

The law provides rules relating to those bids, including the minimum content of, for example, the offer document (see *Question 12, Notification and publication of the bid*).

- **Takeovers.** A takeover involves the bidder making an offer to the target's shareholders to acquire their shares to the extent that this allows the bidder to gain control over the target. This is provided the target shares are listed on a regulated market. The bidding process differs depending on whether the takeover bid is voluntary or mandatory. However, in both cases the bidder and the target remain separate companies with the target becoming a subsidiary of the bidder.
- **Transformations.** There are a number of forms of company transformation. The two types which are relevant in the context of obtaining control of a public company are:
 - **Mergers.** This results in the assets of the merging company or companies being transferred to either:
 - a newly established company; or
 - an already existing company with the transferor(s) winding up without liquidation.

Where a wholly owned subsidiary merges with its parent company, the transformation is always classified as a merger and not as a transfer of assets;

- **Transfer of assets.** Transferring the company's assets to one of its shareholders causes the company to be wound up without liquidation, with the other shareholders receiving payment but not shares in the acquirer's company. The Transformation Act provides that the acquiring member must be an entrepreneur (that is, a person that independently carries out systematic activity in its own name and at its own liability for the purpose of making profit) with a residential address or registered office within the territory of the EU or European

Economic Area (EEA). It is not allowed to wind-up a co-operative by transferring assets to its member. A co-operative, in this context, is an association of an unrestricted number of persons (members) and is formed for the purpose of carrying on a business activity or of meeting its members' economic, social or other needs.

- **Squeeze-out.** See *Question 20*.

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Hostile bids are not prohibited. However, they are not common. This may be because the Czech Republic has limited opportunities for investors. The market is quite small with few large companies, only a minority of which have their shares listed for trading on regulated markets. The companies are often controlled by one or a small number of shareholders acting in concert, who are bound by the pre-emptive rights of other shareholders or their approval for potential transfers of their shares. It is more common in the Czech Republic to become a majority shareholder of a Czech joint stock company (a company whose registered capital is divided into a certain number of shares with a specific nominate value) by:

- Purchasing shares from another majority shareholder (see *Question 2*).
- Investing new capital or business opportunities in the company and providing opportunities for the other shareholders in exchange for acquiring new shares in the company or already existing shares from current shareholders.

This is usually undertaken with the co-operation of the target's board of directors.

4. How are public takeovers and mergers regulated, and by whom?

Regulations

The main regulations are contained in the:

- **Act No. 513/1991 Coll., Commercial Code, as amended (Commercial Code).** This is the main source of commercial and company law and provides for the detailed regulation of business companies and co-operatives that have their registered office in the Czech Republic. In relation to takeovers and mergers the Commercial Code provides rules for:
 - squeeze-outs;
 - public (including takeover) bids for non-listed shares; and
 - increases of registered capital.
- **Act No. 125/2008 Coll., on the Transformation of Business Companies and Co-operatives, as amended (Transformations Act).** The Act provides for the regulation of four specific types of transformation:
 - domestic and cross-border mergers;
 - divisions/splits;

- transfers of assets to members; and
- changes in legal form.

In relation to cross-border mergers, the Transformations Act only applies to transformations which have:

- at least one participating business company or co-operative with a registered office in the Czech Republic; or
- participating business companies or co-operatives from other EU or EEA member states, if the office of the company or co-operative that is created by the transformation will be registered in the Czech Republic.

- **Act No. 104/2008 Coll., on Takeover Bids, as amended (Takeover Bids Act).** This is the main source of regulation for takeover bids. The Act distinguishes between voluntary and mandatory takeover bids and applies:
 - to all offers for companies which have their securities admitted to trading on a regulated market in the Czech Republic and have their registered offices in the Czech Republic;
 - to certain offers with a foreign element, for example:
 - offers for companies which have their registered office in other EU member states, provided their securities have been admitted to trading on a regulated market solely in the Czech Republic; or
 - offers for companies which have their registered office in the Czech Republic where their securities have been admitted to trading on a regulated market solely in other EU member states.
- **Act No. 256/2004 Coll., on Business Activities on the Capital Market, as amended (Act on Capital Markets).** When the target of a takeover is listed, this Act is the main source of regulation in relation to the public offering, the prospectus and insider dealing.
- **Act No. 143/2001 Coll., on Protection of Competition, as amended (Competition Act).** This Act contains provisions related to control of mergers and other forms of concentration (including gaining control by acquiring shares (see *Question 2*)). The Act sets out which concentrations are subject to clearance by the Office for the Protection of Competition (Competition Office) (see *below, Regulatory authorities*). Similarly to Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (Merger Regulation), the decisive indicator is the turnover of undertakings engaged in the concentration.

Regulatory authorities

The main regulatory bodies are the:

- **Czech National Bank (CNB).** The CNB is the main financial regulator in the Czech Republic with broad supervisory authority over the capital market. In the field of takeovers, the CNB supervises the bidding process to check that it conforms to the requirements provided by the Takeover Bids Act (see *above, Regulations*).
- **Competition Office.** The Office assesses the impact of concentrations between undertakings on competition, gives

clearance to the concentrations subject to its appraisal and supervises the fulfilment of obligations and commitments stated in the Office's decisions.

- **Commercial Register.** The Register is administered by regional courts. Particular acts specify which information is to be entered in the Register and whether the entry involves legal effects (for example, the Transformation Act provides that a transformation becomes effective on the day when it is entered in the Commercial Register).

See box, *The regulatory authorities*.

PRE-BID

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

The bidder uses publicly available information to undertake due diligence before it approaches the target. If the target is prepared to support the offer, the bidder can present the target with a list of matters on which the target must provide further information as a condition to proceeding with the offer.

Hostile bid

Due diligence is usually limited to reviewing publicly available information.

Public domain

The following information about a target is publicly available:

- The memorandum and articles of association and related documents filed at the Commercial Register. These set out the target's basic corporate and organisational rules.
- Details of directors.
- Details of issued share capital and shareholders.
- Published accounts and related directors' and auditors' reports.
- Any past listing particulars or prospectus.
- Any market filings. For example, officially listed companies must notify the market of any:
 - major new developments, including significant acquisitions and disposals; and
 - material trading developments.
- Analysts' research.
- For listed companies, quarter-yearly financial information and other routine information, such as results of meetings and dividend details.

6. Are there any rules on maintaining secrecy until the bid is made?

Under the principle of confidentiality, a potential bid must be kept secret until it is formally announced.

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

To increase its chances of success, a bidder may seek acceptance undertakings from key target shareholders before making the offer. In a recommended bid, the bidder may approach major shareholders and target directors with shareholdings to secure undertakings. In a hostile bid, the bidder may seek irrevocable undertakings from major shareholders.

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there circumstances in which shareholdings, or derivative holdings, of associates could be aggregated for these purposes?

Restrictions

The following restrictions apply:

- **Acquisition of shares.** Some restrictions may apply to building a stake in a bank, insurance company or financial institutions, where the approval of the CNB is needed when passing certain ownership thresholds (*see Question 25*).

In other cases, an acquirer is not usually restricted by the need for any permit and does not have an information obligation towards the target until the acquisition is considered a takeover bid. However, steps which comprise essential elements of a takeover bid are considered to be a takeover bid (that is, a public offering aimed at the acquisition of control) (*section 4, Takeover Bids Act*). An example of such a step could include a bid to purchase the shares made in the form of "personal" letters addressed to all or most of the target's shareholders.

In the case of an acquisition of registered shares, the acquisition must be notified to the target company to enable the acquirer to exercise his shareholder's rights. The list of shareholders notified to the target is then accessible to any shareholder of the target. To be completed, a transfer of book-entry shares must be notified to and evidenced by the Prague Securities Centre (from the beginning of July notification should be made to the Central Depository).

- **Concentration.** If the takeover would constitute a concentration that is subject to merger control the Competition Office's approval is needed (*see Question 25*).
- **Insider dealing.** If a bidder has inside information about the target's matters, it is generally restricted from using such that information to (*section 124, Act on Capital Markets*):
 - acquire or dispose of the target's shares;
 - make recommendations to acquire or dispose of shares to another person.

More details are provided in section 124.

- **Mandatory takeover bid.** Rules apply to anyone who acquires

(whether alone or together with persons acting in concert (concerted parties)) more than a 30% stake in a company with securities listed on a regulated market (constituting control over that particular company). That person must make a public offer to all holders of listed securities of the target within 30 days from the acquisition of the stake (*section 35, Takeover Bids Act*). The acquisition of a lower stake does not impose any obligation to make a takeover bid on the buyer.

Disclosure obligations for dealings in the target's shares

Any person must notify a company and the CNB of dealings in a company's shares in certain circumstances (*see below*), where that company's shares are admitted to trading on a regulated market in either (*Act on Capital Markets*):

- An EU member state, and the company has a registered office in the Czech Republic.
- A non-EU member state if the prospectus for the shares of the company in question has been approved in the Czech Republic.

The disclosure requirements apply where that person:

- Reaches one of the following shareholding limits:
 - if the issuer's registered capital exceeds CZK100 million (about US\$5.2 million): 3%;
 - whatever the issuer's registered capital: 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50% or 75%.
- Reduces a shareholding to below one of those limits.

This rule is subject to several exceptions. Various rules apply to aggregate holdings of associates, within groups of companies or persons acting in concert on other grounds.

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

In an offer, the announcement and the offer documents (and the documents for the bidder's shareholders, if relevant) are usually the only documents recording the terms of the agreement between the parties. Formal merger agreements are, however, becoming more common when the offer is structured as a scheme of arrangement and the bidder wishes to exert some control over the actions of the target. Sometimes the parties' understanding of certain matters, such as the future conduct of the target's business, is recorded in comfort letters.

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable, and any restrictions on the size of the payment.

Break fees are not common. The target does not usually make any payment in connection with an unsuccessful bid. The bid-

der may provide that it will make a break fee payment if it includes this as a term of the offer document.

11. Is committed funding required before announcing an offer?

The announcement of a firm intention to make an offer effectively commits the bidder to make the offer. Therefore that announcement should only be made when the bidder has every reason to believe it can and will be able to continue to implement the offer. The offer announcement for a cash offer must include confirmation by an appropriate third party that sufficient funding is in place for the bidder to satisfy full acceptance of the offer (and this confirmation must be repeated in the offer document).

ANNOUNCING AND MAKING THE OFFER

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements), and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

Notification and publication of the bid

If the target has shares listed for trade on a regulated market, an announcement (publication) is required from the bidder (*Takeover Bids Act*):

- Where the bidder is required to make a mandatory bid because it acquires 30% or more of the voting rights in the target and that shareholding constitutes control (*see Question 8*).
- Where the bidder decides to make a voluntary bid.
- Where the bidder is preparing to make a bid and:
 - there has been considerable movement in the price of the target's shares or rumours or speculation have arisen relating to the takeover bid; and
 - it can be reasonably assumed that this movement and speculation originate from the preparation of the bid or from the bidder's consideration of whether to make a bid.

The Commercial Code, rather than the Takeover Bids Act, applies to the acquisition of shares that constitute control over a target's whose shares are not listed for trade on a regulated market, or to acquisitions of listed shares that are not aimed at obtaining control over the target. The rules are in most respects similar to those set out for takeover bids under the Takeover Bids Act. This answer will concern only the rules provided by the Takeover Bids Act.

There are two important stages concerning bid publicity:

- Notification of the bid (*sections 8 and 12, Takeover Bids Act*).
- Publication of the bid (*section 13, Takeover Bids Act*).

Notification. The bidder must, without undue delay, announce that it has decided to make a bid or that there have occurred circumstances that have resulted in the requirement to make a bid.

Within 15 business days after that decision has been made or those circumstances have arisen, the bidder must notify the offer document to the CNB. The CNB then considers whether the offer document complies with the law, is complete, and is not misleading. The CNB can extend this period to 30 business days on the bidder's request. The CNB can require the bidder to prove that it has sufficient funds to finance the bid and the origin of those funds.

Publication. If the CNB does not prohibit the publication of the offer document, the bidder must publish the offer document within the statutory period (15 to 30 days from notification).

The bidder must publish the offer document in the Czech Republic:

- In at least one national newspaper.
- In a manner allowing remote access (usually on the bidder's website) or provide it to the public free of charge in a written form at the registered office of the target and the bidder.

The content of the offer document must comply with formalities set out in sections 10 and 11 of the Takeover Bids Act.

Offer timetable

Voluntary bids. The Takeover Bids Act sets out several terms without exactly specifying the days, by using the phrase "without undue delay". In addition, some periods can be extended and shortened, and sometimes it only provides that there will be intervals of time. Therefore, the following timetable is not precise (days are business, not calendar days, unless indicated otherwise):

- **Day 0.** Decision of the bidder to make the bid. Without undue delay afterwards, the bidder must publicise this decision.
- **Day 15.** Last day for delivery of the offer document to the CNB for notification (*see above, Notification and publication of the bid*). The CNB can extend this period by 15 days.

In addition, the bidder must deliver the offer document to the target's board of directors and supervisory board, at least ten days before publication. (The bidder and the target must inform the target's employees of the bid without undue delay.)
- **Day 20.** Last day for the target to prepare its statement on the bid. The target's board of directors and supervisory board have five days to prepare the statement and another two days to deliver it to the bidder for publication alongside the offer document (*see Question 14*).
- **Day 22.** Delivery of the statement to the bidder and the CNB.
- **Day 30 to 45.** Publication of the offer document (*see above, Notification and publication of the bid*).
- **Four weeks after publication.** The bid must be open for a minimum of four weeks (acceptance period). The bidder can shorten this period to two weeks, if the CNB permits. If the acceptance period is longer than ten weeks, the bidder must publish notification of when the acceptance period terminates, two weeks before expiry of the acceptance period, in the same manner that it published the bid.

- **Within the acceptance period (for unconditional offers).** An agreement with an unconditional offer (which is not concluded on the regulated market) is concluded on delivery to the bidder of notification of acceptance of the bid. The bidder notifies conclusion of the agreement to all persons who accepted the offer.
- **Without undue delay after the end of the acceptance period.** Publication of the results of the bid.
- **Within one month after the end of the acceptance period.** Information about the conclusion of the agreements which may be posted on the bidder's website.

The timetable for a hostile bid will not differ substantially.

Mandatory bid. The timetable will differ from a voluntary bid in the following respects:

- A mandatory bid cannot be published without the CNB's consent. If the CNB does not make a decision within the 15-day time limit, it is deemed to have granted consent. Unlike a voluntary bid, the CNB will analyse a mandatory bid not only to check that it is in accordance with the law, complete and not misleading (*see above, Notification and publication of the bid*), but also to check that:
 - the consideration proposed is determined in accordance with the law under section 43 of the Takeover Bids Act (*see below*);
 - the procedure for calculating the premium price was complied with.
- The offer timetable may be modified if the CNB decides to review or modify the consideration. The CNB can require the bidder to demonstrate the adequacy of the consideration with an expert opinion. The bidder must have at least 30 days to do this. In that case, the 15-day time limit for the CNB to provide its decision is suspended. The CNB will have another 15 days after delivery of the opinion or after the end of the period set for the expert opinion. (The CNB is not entitled to review or modify the consideration for a voluntary bid.) If there is reasonable doubt concerning the conclusions of that expert opinion, the CNB can consult that expert for a further explanation. If the doubts are not removed, the CNB can appoint another expert to undertake a further expert opinion within a period of no more than 60 calendar days. From the moment the CNB issues a resolution to appoint a new expert, the 15-day time limit to provide the decision is suspended, and another 15 days will apply once the opinion is submitted (or after expiry of the period set for submitting the opinion).

Competing offer

A competing offer is an offer made by another bidder within the acceptance period of the original offer. A competing offer must be published at least five business days before the end of the acceptance period of the original offer and it must last for the longer of the end of the acceptance period of the original offer, or ten business days. If the acceptance period of the competing offer is to expire later than the acceptance period of the original offer, the acceptance period of the original offer is extended so that both offers expire on the same day.

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

A voluntary takeover bid can be subject to various conditions, provided that the fulfilment of those conditions does not depend on the bidder's subjective judgement or the judgement of the bidder's concerted party. If the bidder or a concerted party are able to influence the fulfilment of those conditions, they must undertake all reasonable efforts to ensure the conditions are fulfilled.

The bidder cannot impose conditions on a mandatory takeover bid. This is to protect the remaining shareholders if another person gains control over the company.

The CNB can interfere in the takeover procedure and decide on additional conditions for a particular takeover bid if special circumstances connected with a breach of the Takeover Bids Act occur. This might apply in various cases of breaches under the Takeover Bids Act, for example, failure to provide the required information and adhere to the required procedure. It solely depends on the discretion of the CNB if it chooses to set additional conditions. The right to interfere applies to both mandatory and voluntary takeover bids.

The conditions for a voluntary takeover bid can vary, depending on the bidder's or target's aims. There are no limitations. The most usual condition is an acquisition of a certain threshold of shareholding interest which enables the bidder to:

- Become a majority shareholder (more than 50%).
- Decide solely on the most important issues regarding the company (in most cases at least 66% or 75%).
- Become entitled to a squeeze-out of the other shareholders (at least 90% share of the target's registered capital and voting rights) (*see Question 20*).

Other conditions include:

- Obtaining the approval of regulatory authorities, for example in the case of certain concentrations (*see Question 25*).
- That the target is not or will not become bankrupt and that an insolvency procedure will not be started in relation to the target.
- That no court or administrative procedure will be started relating to the target's liquidation or winding up.
- That all licences relevant to the performance of the target's business will be maintained.
- That there do not exist any specified material detriments related to the company that are not publicly known and of which the bidder is unaware (for example, material litigation).

14. What documents do the target's shareholders receive on a recommended and hostile bid? (Please briefly describe their purpose and main terms, and which party has responsibility for each document.)

The target's shareholders will receive the following:

- Notification of the decision of the bidder (or its statutory body, if it is a legal person) to make a bid.
- Offer document. Its main terms are set out in sections 10 and 11 of the Takeover Bids Act. The offer document must contain, for example:
 - the business names and registered office of the bidder, target and concert parties;
 - essential terms of the purchase or exchange contract;
 - the length of the exchange period;
 - information on resources; and
 - the method of financing the consideration.
- Written statement on the bid issued by the target's board of directors and supervisory board, containing their opinion on the bid, including on:
 - whether the bid is in the interest of:
 - the target;
 - its recipients;
 - the target's employees or creditors.
 - the form and amount of consideration offered.

The bidder should make this document public together with the offer document. If it does not, the target should make it public.

- Form for acceptance of the offer (issued by the bidder).

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

The bidder and target's board of directors must, without undue delay, inform the following about the publication of the announcement of the decision to make a bid and the offer document:

- The trade unions, employees' councils or other employee representatives.
- If no representatives exist, the employees directly.

The target's board of directors must provide employees with copies of documentation that have been provided to the board in connection with the bid. They must also inform the employees of their right to express their opinion on the bid. There is no specific statutory time limit for the expression of the employee's opinion, but the board of directors must specify the time limit in such a way that it is possible to publish the employees' statement simultaneously with the written statement on the bid issued by the target's board of directors and statutory board. The target's employees must also be informed of and provided with the statement of the target's statutory bodies concerning the bid (*see Question 14*).

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

A requirement to make a mandatory offer arises when:

- A person acting either by itself or with a concerted party acquires a controlling stake of at least 30% of the voting rights in a listed target (see *Question 12, Notification and publication of the bid*).
- A bidder acquires at least a 90% share of voting rights in a listed target as a result of an unlimited and unconditioned takeover offer under the Takeover Bids Act.
- A company decides at its general meeting to:
 - revoke the listing of company shares on a regulated market, change a class of shares or restrict the transferability of shares (*section 186a, Commercial Code*);
 - change shareholders' rights to their detriment as a result of a transformation (*section 145 and following, Transformation Act*) (see *Question 2*).

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

There is generally no restriction on the type of consideration that can be offered in a voluntary offer. The consideration can therefore include:

- Cash.
- Loan notes.
- Shares.
- Warrants.
- Convertible or exchangeable bonds.

The bidder can also offer a choice of cash and shares as consideration.

For a mandatory offer, the consideration must be in cash, or in cash accompanied by a cash alternative, and must follow certain rules provided by the Takeover Bids Act (see *Question 18*).

18. Are there any regulations that provide for a minimum level of consideration? If so, please give details.

The minimum level of consideration depends on whether the takeover is a voluntary or mandatory takeover:

- **Voluntary takeover.** There are no legal requirements for a minimum level of consideration. The offer price is within the bidder's discretion (*section 20, Takeover Bids Act*).
- **Mandatory takeover bids.** For mandatory bids which result from the acquisition of a certain level of shares, the offer price must be a minimum of the highest price paid by the bidder or any concerted party for the target shares during the 12 months before the obligation to bid arose (premium price). If the premium

price cannot be assessed, then the offer price must be the minimum of the weighted average of prices achieved in transactions with the target shares on the regulated market during the six-month period before the bidding obligation arose (average price) (*section 43, Takeover Bids Act*). The CNB can modify the consideration where an expert opinion requested by the CNB finds it to be disproportionate.

Different rules are set out under the Commercial Code for other mandatory offers (resulting from, for example, changes of rights attached to the shares or the de-listing of shares from a regulated market (see *Question 16*)). In that case:

- where the shares are not listed on a regulated market, the consideration must be proportionate to the value of the shares, and the bidder must evidence that it is proportionate through an expert opinion;
- where the shares are listed on a regulated market, the proportionality of the consideration must be evidenced in relation to each share and the offer disclosed to the CNB. An expert opinion is not necessary unless the bidder fails to properly substantiate the level of consideration.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders? If so, please give details.

There are no restrictions on the consideration that a foreign bidder can offer to shareholders.

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders? If so, please give details.

Shares of minority shareholders can be purchased on a:

- **Compulsory basis.** Where, as a result of an unlimited and unconditional takeover bid, the bidder has acquired at least a 90% share in the target's voting rights and registered capital, it must submit a post-bid offer to all remaining target shareholders under the following conditions:
 - the offer must be made within 30 days from the last day of the acceptance period (effectiveness) of an initial takeover bid;
 - the consideration offered must, at a minimum, be the level of consideration offered in the initial takeover offer (see *Question 19*);
 - the offer period of the post-bid offer must be a minimum of 90 days.
- **Voluntary basis (squeeze-out).** A shareholder holding a minimum 90% share in the registered capital and voting rights in the company (dominant shareholder) can require the company's board of directors to call an emergency general meeting that will decide whether to pass all other participating shares to the dominant shareholder (*section 183i, Commercial Code*). The following principles apply to the squeeze-out:
 - the acquisition of shares does not have to be the result of a prior takeover bid;

- the squeeze-out can be carried out at any time after the acquisition of shares.

The squeezed-out shareholders are entitled to an adequate consideration (see *Question 18*).

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

Neither the bidder nor its concerted parties can:

- Acquire the target's shares within a six-month period of the original offer for a price higher than the bid price (*section 30, Takeover Bids Act*). The Takeover Bids Act sets out certain exceptions to this rule (for example, if the trade has been concluded on a regulated market and its essential terms have been agreed by the parties through the automated trading system). In addition, the bidder, its concerted parties, or target shareholders can ask the CNB for an exception. The CNB will grant an exception when the basic principles set out in section 3 of the Takeover Bids Act are met. If the bidder or its concerted parties acquire shares in breach of the rule or of the conditions set out by the CNB for its exception the bidder must provide payment to persons who accepted the bid in the original offer to even up the difference in price.
- Make a new bid for the target with a one-year period from the announcement of the results of the original bid (*section 29(1), Takeover Bids Act*). The CNB can make exceptions from this rule on the bidder's request if the bid does not conflict with the interests of the target or its shareholders. This rule also applies in certain other circumstances (for example, when the bidder publicly announces that it will not make a public offer).

22. What action is required to de-list a company?

If a company wishes to de-list its shares from trading on a regulated market it must:

- Notify the intention to de-list to the CNB and the operator of the regulated market.
- Obtain the approval of the general meeting. The general meeting can take place after the expiry of a 30-day period after notification of the general meeting to the shareholders in the manner set out in the articles of association and the Commercial Code. The general meeting requires the participation of shareholders who possess more than 30% of the company's registered capital (unless the articles require a higher percentage). The resolution must be:
 - approved by at least 75% of the votes of the shareholders present at the general meeting that are attached to the shares that are to be de-listed, and more than 50% of the votes of the other shareholders present (if any);
 - recorded in an official form of a notarial deed, when passed.

- Notify the CNB and the operator of the regulated market about the general meeting's approval and publish it in a manner that allows remote access to the decision.
- Make a public offer for purchase of the de-listed shares from shareholders who did not vote for the decision at the general meeting. The following conditions apply to the public offer:
 - it must be published in the manner required for calling a general meeting;
 - consideration for the shares must be adequate to their value (see *Question 18*);
 - the public offer must remain open for four weeks after it is published;
 - where the company fails to make a public offer, the aggrieved shareholders have a right to claim the conclusion of a contract with the court.
- Send an application for de-listing of the shares to the operator of the regulated market without undue delay together with the following:
 - the general meeting's decision;
 - evidence proving that the company has notified the CNB about the general meeting's decision; and
 - evidence proving that all requirements related to the de-listing of shares were fulfilled.

The operator must de-list the shares from trading on the regulated market without undue delay after it receives and reviews the application for de-listing.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

The target's statutory bodies have a general duty of neutrality under the Takeover Bids Act. After the target's board of directors or supervisory board have reason to believe that a takeover bid may be imminent (*sections 3(d) and 15, Takeover Bids Act*):

- They must take no action which could effectively result in the recipients' inability to decide freely about the offer with sufficient knowledge of the matters involved.
- Until the announcement of the bid's results, they must refrain from any action which could jeopardise the bid unless that action is:
 - approved by the general meeting within the period for acceptance of the bid;
 - a duty imposed by law; or
 - executed within the target's normal operations.

Members of the target's board of directors or supervisory board can take all necessary steps to find a third party to make a counter offer or make their own counter offer. In addition, subject to its general duty of neutrality, the board can set out its objections in its statement on the bid (see *Question 14*).

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in your jurisdiction? Can payment of transfer duties be avoided?

Tax implications

A seller (natural or legal person) that is a tax non-resident must pay income tax on a capital gain from the sale of shares of a joint stock company domiciled in the Czech Republic (*section 22(1)(h), Act 586/1992 Coll. (Income Tax Act)*). However, there may be an applicable double tax treaty that provides otherwise.

A seller that is a natural person does not have to pay income tax if he possessed the shares in the joint stock company prior to their sale for a period longer than:

- Five years.
- Six months, provided that the seller's participation did not exceed 5% of the company's voting rights or registered capital during the period of 24 months before the sale of the shares.

However, the tax will apply in any event if the seller purchased the shares for a consideration which was satisfied from the seller's business assets, or the shares formed part of the seller's business assets after their purchase.

A seller that is an EU-tax resident company does not have to pay the tax if it sells its shares in subsidiaries and certain conditions set out in the Income Tax Act are fulfilled (that is, holding of at least 10% shareholding interest for at least 12 months).

Administrative payments

There are various payments of an administrative nature associated with the transfer of shares on the regulated markets, such as the Prague Stock Exchange (*Burza cenných papírů Praha, a.s.*) and the RM-System.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable (for example, do the approvals delay the bid process, at what point in the timetable are they sought and so on)?

Other regulatory approvals may be required, depending on the public offer, and this can affect the timetable (*see below*).

Effect on the public offer timetable

If the approval of an administrative body is required, the public offer document cannot be published without previously obtaining that approval, unless it is provided that a mere application is sufficient (*section 13(2), Takeover Bids Act*). As the Takeover Bids Act has been in effect for only a short time it is uncertain how this rule will be interpreted, or in what circumstances an application will be sufficient (except in relation to applications to the Competition Office (*see below, Regulatory approvals*)).

THE REGULATORY AUTHORITIES

Czech National Bank (CNB)

Head. Zdeněk Tůma (Governor) until 30 June 2010

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Main area of responsibility. The CNB is the central bank of the Czech Republic and the supervisor of the Czech financial market.

Contact for queries. See contact details above.

Obtaining information. See contact details above.

The Office for the Protection of Competition (Office)

Head. Ing. Petr Rafaj (Chairman)

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+420 542 167 233 (Secretariat of the Chairman)

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F +420 542 167 112

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Main area of responsibility. The Office is a central administrative body with the purpose of maintaining and protecting competition.

Contact for queries. See contact details above.

Obtaining information. See contact details above.

Regulatory approvals

Possible regulatory approvals which may be required include:

- **The CNB's approval for shares of financial entities.** Generally there are no disclosure requirements, restrictions or timetables concerning building a stake in a company (*see Question 8*). However, some restrictions may apply to building a stake in a bank, insurance company or financial institutions, where the approval of the CNB is needed to pass certain thresholds.
- **Approval of the Competition Office.** It is necessary to notify a concentration to the Competition Office for its approval if that concentration meets the relevant turnover thresholds (*section 13, Act on Protection of Competition*). A concentration is a situation where there are one or more persons who are not entrepreneurs (that is, a person who independently carries out systematic activity in its own name and at its own liability for the purpose of making profit), but

who already control at least one undertaking, or where one or more entrepreneurs acquire the possibility to control an undertaking directly or indirectly, in particular by (*section 12(3), Act on Protection of Competition*):

- acquiring equity shares, business or membership interests; or
- a contract or any other means that allows them to control another undertaking.

However, the Competition Office will terminate proceedings if the transaction falls within the exclusive jurisdiction of the EU.

Applying for Competition Office approval is interpreted as one of the cases in which mere application is sufficient to publish a public offer document (*see above, Effect on the public offer timetable*). However, the granting of an approval is usually a condition precedent for the acquisition of shares.

Concentration approval proceedings are started on the basis of a notification. The Competition Office must inform the parties in writing whether the concentration is subject to a Competition Office approval within a period of 30 days of the start of proceedings. If the concentration requires approval, the Competition Office must issue a decision within five months of the start of proceedings. If it fails to do so, the concentration is deemed to be approved.

26. Are there restrictions on foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

There are generally no specific restrictions on investment in Czech companies by foreign investors. Foreign persons (natural or legal) can usually engage in business activities in the Czech Republic under the same conditions and to the same extent as Czech persons, unless the law provides otherwise. However, the government can impose restrictions during a state of emergency in the foreign exchange economy (*section 32, Act no. 219/1995 Coll.*).

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

There are generally no restrictions on repatriation of profits or exchange control rules for foreign companies. However, the government can forbid cross-border transfers and impose other restrictions during a state of emergency in the foreign exchange economy (*see Question 26*).

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

Restrictions and disclosure requirements

During the offer period the bidder or its concerted parties cannot engage in activities aimed at:

- Contractual acquisition of shares in the target under different conditions than those set out in the bid unless specific conditions set out in section 17(1) of the Takeover Bids Act are fulfilled, for example, when during the offer period the bidder or its concerted parties receive the target's shares through preferential rights, options or contract rights, if those rights were acquired in good faith before the bidder decided to make a bid.
- Disposal of shares in the target unless specific conditions set out in section 17(2) of the Takeover Bids Act are fulfilled, for example, when during the offer period the bidder or its concerted parties dispose of the target's share because they are a securities dealer or bank and that disposal is made within the ordinary business activity of providing investment services for the management of investment instruments.

The CNB can authorise further exemptions from these restrictions on the application of the bidder or its concerted parties.

In addition, any person that has dealt in the target's shares must report this dealing to the CNB within five working days.

Sanctions

Where the bidder or its concerted parties have acquired the target's securities:

- In breach of the restrictions (*see above, Restrictions and disclosure requirements*) they cannot exercise the rights connected to the shares acquired for three years after the acquisition (*section 18(1), Takeover Bids Act*).
- At conditions more favourable to the seller than those contained in the takeover bid, the takeover bid and contracts that have already been concluded under the offer are modified accordingly (*section 18(2), Takeover Bids Act*).

In relations to dealings by the bidder and concerted parties after the offer period ends, see *Question 21*.

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

No major changes are expected to the Takeover Bids Act, as it has been in force for fewer than two years. However, minor changes may be introduced.

A major amendment is currently being considered to the Transformations Act. However, this is at present unlikely to affect public takeovers.

A bill proposing cancellation of certificated bearer shares was presented before the House of Deputies in November 2009. The aim of the proposed bill is to clarify the ownership structure of joint stock companies, which should lead to the transparency of the business and political environment and prevent corruption in areas such as public procurement. If it is adopted, bearer shares will no longer exist, and any shareholder of a joint stock company will be identified in the Commercial Register, if it has a 100% share (or at least in a list of shareholders managed by the company).

However, the wording of this bill has been criticised by the government and legal experts and a bill on the same issue has been proposed by a different group of members of the House. The second bill has attracted less criticism, but the concurrent discussion of both bills in the House has added to the overall confusion. It is unlikely, therefore, that either bill will be adopted in their present wordings, but they have drawn attention to the problem of the exploitation of anonymous shareholder structures in joint stock companies.

Finally, within the framework of the ambitious re-codification project of the entire civil and commercial law in the Czech Republic, a new bill on business companies and co-operatives has been presented for public discussion. The bill is intended to become the main source of regulation in the field of company law and may replace the Commercial Code in that area. In relation to takeovers, the draft provides a general framework for regulation of public bids for acquisition

of shares made to shareholders which are not aimed at acquiring control over a company. Takeover bids that aimed at acquisition of control of a listed company, both voluntary and mandatory, will continue to be regulated by the Takeover Bids Act. However, it is unclear when and how these changes will be adopted.

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Our Clients' Success Speaks For Itself



BBH, advokátní kancelář, v.o.s. (formerly named Brzobohatý Brož & Honsa, v.o.s.) is a full-service independent Czech law firm based in Prague with an international cross-border focus. Established in January 2000, BBH subsequently acquired the Prague office of an international law firm previously operating in the CEE region, thereby greatly expanding BBH's presence throughout Central and Eastern Europe.

In June 2006 BBH opened an office in Moscow under the name BBH Legal LLC (the first branch office of a Czech law firm in Russia), and on 1 January 2007, BBH opened a new office in Bratislava now officially named BBH advokátska kancelária, s.r.o. (formerly named BBH Slovensko, s.r.o.)

The opening of the Moscow office was the logical conclusion of BBH's numerous instructions and engagements by Russian clients, and significant Czech and international concerns conducting business in Russia in the years preceding 2006. The establishment of the Slovak branch office, on the other hand, resulted from the deepening of a ten year partnership with local lawyers. Both offices have been profitable from their opening and have been involved in numerous high profile transactions and instructions. The Prague office of BBH is cur-

rently the largest office of the firm and it is also the office with the longest history, with a professional team dating back to 1990. BBH Prague is consistently rated among the leading law firms operating on the Czech market.

BBH has 65 highly skilled lawyers (including 8 partners) and a number of specialised support staff so that in total BBH is comprised of nearly 100 employees working in the Czech Republic, Russia and Slovakia.

Over the past few years, BBH has participated in a number of high profile and top-rated transactions, involving both Czech and foreign jurisdictions:

- Largest Ever Czech M & A Deal which involved 17 jurisdictions ("Emerging Markets Deal of the Year", according to Thomson – Acquisitions Monthly)
- 2009 CEE Real Estate Deal of the Year
- First Rated Securitization in CEE
- Largest Foreign Investment in the Republic of Serbia
- Largest Bond Issue Placed on the PSE in 2007
- Largest Share Buy Back Transaction in Czech history
- Largest Energy Industry Arbitration in CEE

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