Mergers & Acquisitions

in 68 jurisdictions worldwide

2012

Contributing editor: Casey Cogut

Published by
Getting the Deal Through
in association with:

Aabø-Evensen & Co Advokatfirma
ÆLEX
Arfidea Kadri Sahetapy-Engel Tisnadisastra (AKSET)
ASAR – Al Ruwayeh & Partners
Baião, Castro & Associados | BCS Advogados
Bersay & Associés
Biedecki
bizconsult law LLC
Bonn & Schmitt
Bowman Gilfillan
Boyanov & Co
Carey y Cía
Casahierro Abogados
Colibri Law Firm
Corpus Legal Practitioners
Debarliev, Dameski & Kelesoska Attorneys at Law
Divjak, Topić & Bahtijarević Law Firm
ELIG Attorneys-at-Law
Estudio Trevisán Abogados
Ferrere Abogados
Freshfields Bruckhaus Deringer LLP
Gilbert + Tobin
Gleiss Lutz
Grata law firm
Harneys Aristodemou Loizides Yiolitis LLC
Headrick Rizik Alvarez & Fernández
Hoet Peláez Castillo & Duque
Homburger
Hoxha, Memi & Hoxha
Iason Skouzos & Partners
JA Treviño Abogados
Jade & Fountain PRC Lawyers
Kettani Law Firm
Khaitan & Co
Kim & Chang
Kimathi & Partners, Corporate Attorneys
Law Office of Mohanned bin Saud Al-Rasheed in association with Baker Botts LLP
LAWIN
LAWIN Lideika, Petrauskas, Valiūnas ir partneriai
Lloreda Camacho & Co
Madrona Hong Mazzuco Brandão Advogados
Mares, Danilescu & Asociatii
MJM Limited
Nagashima Ohno & Tsunematsu
NautaDutilh
Nielsen Nørager Law Firm LLP
Odvetniki Šelih & partnerji, op, doo
Pérez-Llorca
RIAA LAW
Salomon Partners
Schönherr
Setterwalls Advokatbyrå
Simont Braun
Simpson Thacher & Bartlett LLP
Slaughter and May
Stankovic & Partners
Stikeman Elliott LLP
Thanathip & Partners Legal Counsellors Limited
Ughi e Nunziante – Studio Legale
Walker Kontos Advocates
Walkers
Weil, Gotshal & Manges
Wong Beh & Toh
WongPartnership LLP
Young Conaway Stargatt & Taylor, LLP

Mergers & Acquisitions 2012

Contributing editor
Casey Cogut
Simpson Thacher & Bartlett LLP

Business development managers
Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers
Ellie Notley
Alice Hazard

Marketing assistants
William Bentley
Zosia Demkowicz

Admin assistant
Megan Friedman

Marketing manager (subscriptions)
Rachel Nurse
Subscriptions@GettingTheDealThrough.com

Assistant editor
Adam Myers

Editorial assistant
Lydia Gerges

Senior production editor
Jonathan Cowie

Chief subeditor
Jonathan Allen

Subeditors
Martin Forrest
Caroline Rawson

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Mergers & Acquisitions 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2012
No photocopying: copyright licences do not apply.
ISSN 1471-1230

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of May 2012, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law Business Research

Global Overview Casey Cogut and Sean Rodgers *Simpson Thacher & Bartlett LLP* 4

European Overview Stephen Hewes and Richard Thexton *Freshfields Bruckhaus Deringer LLP* 6

Albania Shpati Hoxha *Hoxha, Memi & Hoxha* 8

Argentina Pablo Trevisán, Laura Bierzychudek and Walter Beveraggi *Estudio Trevisán Abogados* 15

Australia Neil Pathak, David Clee and Alex Kauye *Gilbert + Tobin* 21

Austria Christian Herbst *Schönherr* 28

Belgium Sandrine Hirsch and Vanessa Marquette *Simont Braun* 35

Bermuda Peter Martin and Andrew Martin *MJM Limited* 42

Bolivia Carlos Pinto-Meyer and Cristian Bustos *Ferrere Abogados* 48

Brazil Maria PQ Brandão Teixeira *Madrona Hong Mazzuco Brandão Advogados* 52

Bulgaria Yordan Naydenov, Angel Angelov and Nevena Kostadinova *Boyanov & Co* 58

Canada Richard E Clark and Curtis A Cusinato *Stikeman Elliott LLP* 66

Merger Control in Canada Susan M Hutton *Stikeman Elliott LLP* 71

Cayman Islands Rob Jackson and Ramesh Maharaj *Walkers* 74

Chile Pablo Iacobelli and Cristián Eyzaguirre *Carey y Cía* 79

China Lawrence Guo and Henry Xiao *Jade & Fountain PRC Lawyers* 84

Colombia Enrique Álvarez, Santiago Gutiérrez and Tomás Calderón *Lloreda Camacho & Co* 90

Croatia Damir Topić and Mate Lovrić *Divjak, Topić & Bahtijarević Law Firm* 97

Cyprus Nancy Erotocritou *Harneys Aristodemou Loizides Yiolitis LLC* 101

Czech Republic Rudolf Rentsch and Petra Trojanová *Rentsch Legal*
Please visit www.GettingTheDealThrough.com

Denmark Thomas Weisbjerg, Jakob Mosegaard Larsen and Martin Rudbæk Nielsen *Nielsen Nørager Law Firm LLP* 106

Dominican Republic Roberto Rizik Cabral, Sarah De León and Claudia Taveras *Headrick Rizik Alvarez & Fernández* 112

England & Wales Michael Corbett *Slaughter and May* 117

France Sandrine de Sousa and Yves Ardaillou *Bersay & Associés* 127

Georgia Revaz Javelidze and Eka Siradze *Colibri Law Firm* 133

Germany Gerhard Wegen and Christian Cascante *Gleiss Lutz* 138

Ghana Kimathi Kuenyehia, Sr, Atsu Agbemabiase and Kafui Baeta *Kimathi & Partners, Corporate Attorneys* 146

Greece Theodoros Skouzos and Georgia Tsoulou *Iason Skouzos & Partners* 152

Hungary David Dederick, László Nagy and Eszter Katona *Weil, Gotshal & Manges* 158

India Rabindra Jhunjhunwala and Bharat Anand *Khaitan & Co* 164

Indonesia Johannes C Sahetapy-Engel and Kartika Putri Wohon *Arfidea Kadri Sahetapy-Engel Tisnadisastra (AKSET)* 171

Italy Fiorella Federica Alvino *Ughi e Nunziante – Studio Legale* 178

Japan Ryuji Sakai, Kayo Takigawa and Yushi Hegawa *Nagashima Ohno & Tsunematsu* 183

Kazakhstan Artem Timoshenko and Aliya Zhumabek *Colibri Law Firm* 189

Kenya Michael Kontos, Jitin Mediratta and David Wayumba *Walker Kontos Advocates* 194

CONTENTS

Korea Sang Hyuk Park and Gene (Gene-Oh) Kim *Kim & Chang* **199**

Kuwait Ibrahim Sattout and John Cunha *ASAR – Al Ruwayeh & Partners* **204**

Kyrgyzstan Zhanyl Abdrakhmanova and Kerim Begaliev *Colibri Law Firm* **209**

Latvia Raimonds Slaidins and Krista Zarina *LAWIN* **214**

Lithuania Robertas Čiočys *LAWIN Lideika, Petrauskas, Valiūnas ir partneriai* **219**

Luxembourg Alex Schmitt, Chantal Keereman and Philipp Mössner *Bonn & Schmitt* **227**

Macedonia Emilija Kelesoska Sholjakovska and Elena Miceva *Debarliev, Dameski & Kelesoska Attorneys at Law* **232**

Malaysia Wong Tat Chung *Wong Beh & Toh* **238**

Mexico Daniel I Puente Medina and Mauricio Garza Bulnes *JA Treviño Abogados* **244**

Morocco Nadia Kettani *Kettani Law Firm* **249**

Netherlands Willem Calkoen and Martin Grablowitz *NautaDutilh* **255**

Nigeria Theophilus Emuwa, Chinyerugo Ugoji and Ayoyinka Ayeni *ǼLEX* **261**

Norway Ole K Aabø-Evensen *Aabø-Evensen & Co Advokatfirma* **267**

Pakistan Bilal Shaukat, Mayhar Kazi and Mahum S Shere *RIAA LAW* **277**

Peru Percy Castle and Carlos Carrasco *Casahierro Abogados* **283**

Poland Ludomir Biedecki and Radosław Biedecki *Biedecki* **289**

Portugal Victor de Castro Nunes, Maria José Andrade Campos and Cláudia de Meneses *Baião, Castro & Associados | BCS Advogados* **296**

Romania Simona Mares and Lucian Danilescu *Mares, Danilescu & Asociatii* **303**

Russia Anton Klyachin and Igor Kuznets *Salomon Partners* **309**

Saudi Arabia Babul Parikh and O Ali Anekwe *Law Office of Mohanned bin Saud Al-Rasheed in association with Baker Botts LLP* **314**

Serbia Nenad Stankovic, Dusan Vukadin and Sara Pendjer *Stankovic & Partners* **321**

Singapore Ng Wai King and Chan Sing Yee *WongPartnership LLP* **328**

Slovenia Nataša Pipan Nahtigal and Jera Majzelj *Odvetniki Šelih & partnerji, op, doo* **336**

South Africa Ezra Davids and David Yuill *Bowman Gilfillan* **343**

Spain Vicente Conde *Pérez-Llorca* **349**

Sweden Anders Söderlind, Anders Holmgren and Ola Grahn *Setterwalls Advokatbyrå* **356**

Switzerland Claude Lambert, Dieter Gericke, Dieter Grünblatt and Gerald Brei *Homburger* **362**

Tajikistan Denis Bagrov and Shirinbek Milikbekov *Colibri Law Firm* **370**

Thailand Thanathip Pichedvanichok and Issariya Vimonrat *Thanathip & Partners Legal Counsellors Limited* **374**

Turkey Salih Tunç Lokmanhekim and Saniye Simge Eren *ELIG Attorneys-at-Law* **379**

United Arab Emirates Patrick Ko and Omar Momany *Freshfields Bruckhaus Deringer LLP* **387**

United States Casey Cogut and Sean Rodgers *Simpson Thacher & Bartlett LLP* **393**

United States, Delaware Rolin P Bissell and Elena C Norman *Young Conaway Stargatt & Taylor, LLP* **398**

Uzbekistan Babur Karimov and Nodir Yuldashev *Grata law firm* **403**

Venezuela Jorge Acedo *Hoet Peláez Castillo & Duque* **409**

Vietnam Tuan Nguyen, Phong Le, Hanh Bich, Huyen Nguyen, Hai Ha and Thuy Huynh *bizconsult law LLC* **413**

Zambia Sharon Sakuwaha, Lupiya Simusokwe and Robin Msoni *Corpus Legal Practitioners* **420**

Appendix: International Merger Control David E Vann Jr and Ellen L Frye *Simpson Thacher & Bartlett LLP* **425**

Czech Republic

Rudolf Rentsch and Petra Trojanová

Rentsch Legal

1 Types of transaction

How may businesses combine?

Generally, there are four models of business combinations in the Czech Republic:
- transformation;
- acquisition of shares;
- joint venture; and
- silent partnership.

Transformation

Transformation of a company requires the following legal steps:
- merger of companies in the form of
  - absorption; or
  - combination;
- demerger of the company in the form of
  - split up;
  - spin off (a split up or spin off may be implemented upon the simultaneous formation of new entities or in the form of absorption by an existing entity);
- transfer of all company assets to a shareholder;
- change of legal form of the company; and
- cross-border translocation of the company's registered seat.

Change of legal form and cross-border translocation of registered seat do not represent a real combination of businesses. These are internal changes within the same entity. Therefore, we will only discuss merger, demerger and transfer of assets.

Merger

When two or more companies merge, whether in the form of absorption or combination, the company (or companies) is dissolved and all its assets and liabilities are transferred to a successor entity.

Absorption is where a company merges into an existing entity. Combination is where two or more companies merge into a newly founded entity.

Demerger

A split-up is where a company is dissolved and all its assets and liabilities are transferred to existing entities or newly founded entities (successors), or both.

A spin-off is where all company assets and liabilities are transferred to existing entities or successors, or both. The company to be partially divided via spin-off continues to exist.

Transfer of assets

When a company's assets and liabilities are transferred to one shareholder (successor) the company is dissolved.

Generally, all company assets and liabilities (for instance, termination of existing contractual relationships, sale of assets) must be settled before the company is dissolved. In case of a transformation, no settlement is required if all company assets and liabilities are transferred to a successor.

Acquisition of shares

Upon an acquisition of shares, a natural person or legal entity becomes a shareholder of a corporation (target). The existence of the acquirer and the target continues; only the structure of the shareholders in the target has changed.

Acquisition of shares often occurs in limited liability companies (s.r.o.) and joint-stock companies (a.s.), which are the most common types of companies in the Czech Republic.

Joint venture

Two or more natural persons, legal entities, or both, may create a joint venture in order to achieve a common goal.

Under the Czech Civil Code, a joint venture is not a legal entity. Therefore, the members of the joint venture have to enter into contractual relationships with third parties (subcontractors) on their own. In order to overcome the missing legal capacity of the joint venture, the entrepreneurs may found a special purpose vehicle (SPV) in the form of a corporation (eg, a limited liability company or joint-stock company) and become its shareholders.

Silent partnership

This legal relationship is based on a written contract between a company and a 'silent shareholder'. Under this contract, the silent shareholder puts certain assets into the company, such as money or real estate, and participates in the company's profits or losses.

A silent partnership is simply a legal relationship between two persons; it is not subject to any registration duty (unlike the shareholders of a limited liability company). The silent shareholder is liable for the company's obligations only if the silent shareholder is included in the name of the company.

The tax duties of a silent shareholder arising out of participation in the company's profits and losses remain unaffected by the silent partnership.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Mergers, demergers and the like are generally regulated by Act No. 125/2008 Coll, on the Transformation of Corporations and Cooperatives (the Transformation Act). The acquisition of shares is regulated by Act No. 513/1991 Coll. of the Commercial Code, while joint ventures are primarily regulated by Act No. 40/1964 Coll. of the Civil Code.

In special cases, other regulations are to be observed.

Protection of competition against restrictions

If businesses that are to be combined reach a certain limit of aggre-

gate turnover, the following shall also apply:
- the Act on the Protection of Competition (Act No. 143/2001 Coll.), with regard to combinations with possible impact only to the Czech market; or
- European Regulation (EC) No. 139/2004, on the Control of Concentrations between Undertakings (the EC Merger Regulation), with regard to combinations with possible impact on the common EU market.

Stock exchange

If stocks of a Czech joint-stock company are listed on a regulated stock market, the following shall also apply:
- the Act on Take-over Bids (Act No. 104/2008 Coll.), with regard to take-over bids towards other shareholders of the company being acquired; and
- the Act on Business Activities on the Capital Market (Act No. 256/2004 Coll.), with regard to notifications to the Czech National Bank if someone acquires a certain amount of shares in a listed joint-stock company.

Bankruptcy

Combining bankrupt businesses is possible in principle. In such a case, insolvency (Act No.182/2006 Coll., on Bankruptcy and Modes of its Solution) is to be observed.

Employment

If there are employers affected by the contemplated combination of businesses, the strict regulation of the Labour Code (Act No. 262/2006 Coll.) shall apply.

Regulated entities

Other special laws shall apply when combining banks, insurance or reinsurance companies, security brokers, investment companies or funds.

3 Governing law

What law typically governs the transaction agreements?

Corporations founded in compliance with Czech law are usually governed by Czech law. If there is an international element, such as a merger of a Czech company with a foreign company or a foreign shareholder of a Czech company, foreign laws may apply if the participants choose it for the deal.

However, the compulsory provisions of Czech corporate law, namely the Commercial Code or Transformation Act, are always to be followed. These include, for example, the formal requirements with regard to share purchase agreements (SPAs).

A joint venture has no legal capacity under Czech law; it is merely a legal relationship between its members. Therefore, they can choose the governing law in compliance with Regulation (EC) No. 593/2008, on the Law Applicable to Contractual Obligations (Rome I) if there is an international element (such as different domiciles of members of the joint venture).

If there are several international parties in an agreement, it is also possible to agree on any rules of international arbitration in case of dispute arising from such an agreement, and a neutral governing law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Commercial register filings

Transformation of a company is always subject to registration in the Czech commercial register. At the moment of issuing the final legally effective registration decision, the transformation is legally effective.

If a company is dissolved due to a transformation, there is no fee with regard to the erasure of this company from the commercial register. A newly founded company must always be registered; otherwise it does not exist according to the law. Registration of a new limited liability company is subject to a court fee of 6,000 Czech koruna (approximately €240) and registration of a new joint-stock company is subject to a court fee of 12,000 koruna.

Every change in registration of a registered entity (for example, change of shareholders of a limited liability company on the basis of an SPA or change to the amount of registered capital) is subject to a court fee of 2,000 koruna. The fee duty may be paid via (i) stamps stuck on the application form or (ii) bank transfer to the account of the respective court in the case of an electronic application.

Furthermore, many legal steps required for registration in the commercial register must be executed in the form of a notarial deed (articles of association of a limited liability company or joint-stock company), and the signatures of authorised representatives on SPAs and the like must be officially verified by a notary, municipal authority or post office. These formalities are subject to other fees; for example, the notary fee for execution of the articles of association of a limited liability company or joint-stock company depends on the amount of the company's registered capital. For the minimum statutory amount of registered capital (200,000 Czech koruna for a limited liability company and 2 million koruna for a joint-stock company), the notary fee would be 3,200 and 7,400 koruna respectively, plus VAT of 20 per cent.

The notary/administrative fee for verification of one signature is approximately €1.50 (VAT included).

Stock exchange filings

Any person must notify the issuer and the Czech National Bank if their share in the voting rights of a listed joint-stock company equates to or exceeds the following thresholds: 3 per cent (if the issuer's registered capital is more than 100 million koruna), 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 40 per cent, 50 per cent or 75 per cent, or if any person reduces their share to below such limits. This notification is not a subject to any administrative fee.

The respective share is to be calculated on an aggregated basis, that is, all shares of persons acting in concert in the voting rights of the same entity are to be summed up.

If a person fails to report the acquisition of shares over the limit, the person would be prohibited from exercising voting rights ascribed to the share that the person possesses.

Antitrust authorities filings

Pursuant to the regulation on protection of competition against restrictions, the businesses intending to combine must inform the European Commission in the prescribed form in advance if the contemplated combination may influence the common EU market, and must inform the Czech Antitrust Authority if the contemplated combination may influence only the Czech market. For the Czech Antitrust Authority, the administrative fee for the notification is 100,000 koruna.

If a combination triggers the thresholds according to EU merger control law and the Commission needs therefore to be notified of the combination, there is no obligation to inform the Czech antitrust authority.

The obligation to file the application for a contemplated combination to the respective antitrust authority depends on the aggregated turnover of the businesses intending to combine.

Regulated entities

If someone intends to acquire a certain share (threshold) in the voting rights of a Czech bank, insurance or reinsurance company, security broker, investment company or fund, the prior consent of the Czech National Bank is required. Voting rights acquired without this con-

tent cannot be exercised. The application for the consent of the Czech National Bank is subject to an administrative fee of 20,000 koruna.

If the share in the voting rights of the regulated entities is reduced to below the thresholds prescribed by law, the Czech National Bank must be notified of this fact.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Various kinds of information are to be disclosed depending on the type of transaction (for instance, transformation or acquisition of shares) and the character of the target (whether, for example, it is a listed or unlisted company).

Commercial register

The commercial register is a general source of public information about corporations registered in the Czech Republic. The commercial register keeps the Collection of Deeds, where documents have been published electronically since 2007.

With regard to the transformation of a company, the transformation project is to be filed in the Collection of Deeds of the commercial register. Alternatively, this project may be disclosed on the company's website. The transformation project contains the necessary information for company shareholders and/or creditors. As the commercial register is open to the public, a significant part of the documentation prepared in connection with the transaction, such as the merger agreement, financial statements, the merger report and the special audit report, will be available for inspection upon filing.

If the shareholder structure of a limited liability company (s.r.o. or spol. s.r.o.) changes due to a share acquisition, this must be recorded in the commercial register and the respective SPA is to be filed in the Collection of Deeds. For a joint-stock company, the shareholder structure is not registered in the commercial register unless there is only one sole shareholder in the company.

In compliance with the Commercial Code and the company's articles of association, shareholders are to be informed in advance of the date and the place of a shareholder meeting that shall decide about transformation. The invitation may be placed on the company's website or in the public journal or newspapers, pursuant to the company's statutes.

Public offer and listings

Companies listed on the stock exchange must disclose information regulated according to the specific stock exchange market. For example, there is a duty to inform about a transfer of significant share in the company.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

For listed companies, if anybody, such as a party to a business combination, acquires shares of a listed joint-stock company up to or over certain limits (see question 4 above), it must notify the Czech National Bank or any other authority governing the stock market, as well as the issuer of the shares of this acquisition. Once the limit is reached or exceeded, there is a mandatory notification duty regardless of the reason for the acquisition (business combination).

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Duties of directors and managers

Under Czech law, members of a statutory body that are registered in the commercial register are entitled to act in the name of the limited liability company (the executive) or joint-stock company (the board of directors). They shall exercise their range of powers with due managerial care and are not allowed to disclose confidential information and facts to third parties if such disclosure may be detrimental to the company. If they fail to fulfill the duty to exercise their powers with due managerial care, they may become personally liable to the company and its shareholders. Furthermore, a member of the board of directors can be considered criminally liable.

Members of the statutory body who caused damage to the company by breaching legal duties while exercising their powers shall be liable for such damage. They must follow the principles and instructions approved by the general meeting, provided that they are legal.

In the course of transformation of a company, members of the statutory body of the companies involved have several information duties towards company shareholders and creditors and other subjects. They must, in particular:

- draw up a transformation project that outlines the main aspects of the intended transaction and that must contain specific terms set by law;
- file the transformation project in the Collection of Deeds of the commercial register;
- notify the company's creditors of their statutory rights triggered due to the contemplated transformation;
- deliver the transformation project to every particular shareholder of a limited liability company; and
- make the transformation project available for shareholders of a joint-stock company at the company's registered seat.

The shareholders' meeting of a limited liability company or joint-stock company must approve the intended transformation. The shareholders shall be informed by the company's statutory body about the details of the shareholders' meeting (see question 5), including its agenda.

Pursuant to the articles of association of a limited liability company or a joint-stock company, transfer of shares of the company may be subject to the consent of the shareholders' meeting. In this case, the rules for arranging the shareholders' meeting (notification of shareholders in advance, etc) shall also apply.

Under the Labour Code, the corporations involved in a merger must inform the employees in writing before the merger becomes effective.

Duties of controlling shareholders

If someone acquires at least 30 per cent of shares of a listed joint-stock company, a compulsory takeover bid must be offered to the other shareholders of the target company within 30 days of the acquisition of the defined share.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Approval rights

In the case of a limited liability company or joint-stock company, transformation of the company is generally subject to a previous decision of the shareholders' meeting of companies involved. In a merger, whether effected by absorption or by combination – and

for demergers – the Transformation Act requires a resolution of the shareholders' meeting approving the merger with a supermajority vote, namely at least three quarters of the votes represented at the shareholders' meeting, unless the articles of association require an even higher majority. The decision of the shareholders present at the shareholders' meeting approving the intended transformation must be adopted in the form of a notarial deed.

In case of transfer of shares of a limited liability company or a joint-stock company, the company's articles of association may subject this transfer to the previous consent of the shareholders' meeting (see question 7).

Appraisal rights

In the course of transformation, every shareholder of a limited liability company involved in the transformation may demand that an expert review the transformation project.

For a joint-stock company, an expert must always review the transformation project in principle, not only upon request of a shareholder.

If the exchange rate for shares held by individual shareholders of particular companies involved in a transformation as set in the transformation project is deemed to be inadequate, the shareholders shall receive adequate compensation.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

For unsolicited transactions consisting in a takeover of a joint-stock company, the general rules of the Czech Commercial Code may apply. If a company is listed, the Takeover Bids Act shall be observed. Only in case of listed companies shall the bidder make a public announcement of a contemplated takeover. The public announcement is the moment when the company's board of directors learns about the contemplated takeover, if the bidder does not approach them directly.

There is no mandatory public announcement with regard to unlisted companies. In this case, the information potential of the company management is limited because the bidder may approach particular shareholders in private.

As soon as the company learns of a contemplated hostile transaction, the management may take some pre-emptive measures. In any case, every member of the board of directors must always carry out a due diligence with regard to the company's interest. They may obstruct the transaction only if the company's shareholders' meeting agrees to do so.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

In general, there are no statutory or judicially determined limits as to whether break-up fees or reverse break-up fees are permissible in principle, and if they are permissible, in which amount. A break-up fee that correlates to the costs incurred by the other party in connection with the intended transaction of the company would be acceptable. Pursuant to the Czech Commercial Code, however, the court can reduce a disproportionately high contractual penalty, taking into account the value and significance of the secured obligation, and can do so in an amount corresponding to the damage which arose prior to the judicial decision and which was caused by a breach of the contractual obligation to which the contractual penalty applies.

Furthermore, there are general statutory limits with regard to transactions between a limited liability company or a joint-stock company and persons who are related to the company (members of its statutory body, shareholders of this company or persons related to them). These restrictions shall apply in general, ie, also in case of break-up and/or reverse break-up fees with regard to business combinations.

According to these statutory limits and restrictions:

- a company may only conclude a credit or loan contract with a member of its statutory body, supervisory board, proxy or another person authorised to conclude such an agreement in the name of the company, or with persons close to them, or transfer the company's property to them for free only with the prior consent of the shareholders' meeting and only under terms customary in business transactions;
- if a company or a person controlled by the company acquires property for a consideration from its founder, shareholder or a person involved in concerted conduct with them or a member of its statutory body, supervisory board, proxy or another person authorised to act in the name of the company, or with persons close to them, or from persons controlled by the company or persons belonging to the same group, or if a company transfers its property to any such person for a counter performance in an amount equal to at least one-tenth of the company's subscribed registered capital at the day of acquisition, the value of such property must be determined on the basis of a court-appointed expert's opinion; if this acquisition occurs within three years of incorporation of the company, it must be approved by the shareholders' meeting.

These restrictions may influence business combinations of companies belonging to the same group in particular.

Further, a limited liability company or a joint-stock company may protect deals from third-party bidders through (i) acquisition of their own shares or (ii) granting so-called 'financial assistance' in order to acquire shares in this company. These instruments are allowed, however, to a very limited extent and under strict conditions set by law.

Financial assistance

Unless the articles of association provide for other conditions, limited liability companies may provide financial assistance under the following terms:

(i) the financial assistance is provided on an arm's length basis;
(ii) the provision of financial assistance will not cause the immediate insolvency of the company;
(iii) the company's accounting records show no unpaid balance sheet loss;
(iv) the executive director prepares a report with content required by the law;
(v) the provision of financial assistance is approved by the general meeting.

For a joint-stock company, the financial assistance may be provided under more specific rules, where the provision of financial assistance must be allowed under the company's articles of association or the board of directors examines the financial eligibility of the person to whom financial assistance is provided and the provision of financial assistance does not cause the immediate insolvency of the company. Furthermore, loans granted in breach of the prohibition are invalid and have to be repaid on grounds of unjust enrichment.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Basically, there is no government influence except in antitrust and regulated sectors such as banking and insurance. Accordingly, the proposed acquisition of a certain bundle of shares in regulated subjects is to be announced to a regulating authority and/or approved by it. If the shares are acquired without previous announcement

or approval, the acquirer cannot exercise voting rights under these shares.

With regard to national security, the government may access and use the property of individuals and companies. There are no special provisions on restrictions of business combinations in emergency situations. If national security is jeopardised, the parliament may adopt laws that restrain business combination, for example in a simpler way.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Conditional offers are specifically regulated only with regard to the takeover bid of listed joint-stock companies. In this case, the takeover bid may be only subject to a condition if accomplishing this condition does not depend only on a consideration of the bidder or person cooperating with the bidder. The condition may consist in a minimal acceptance level by shareholders, regulatory approvals, or both.

In cases not regulated by the Takeover Bids Act, such as cash acquisitions backed up by a financing bank, only general rules for conditioned legal acts set by the Civil Code are to be observed. Therefore, conditions precedent or subsequent may be used in the course of a business combination process. In these cases the frequency and character of the conditions depends on the process of negotiation between the parties and the financing bank.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Generally, in private transactions, financing conditions and representations as to financing may be included in the transaction document. If there is a financing bank on the side of a buyer involved in a transaction (which is the most typical case), then the bank usually has wide disclosure and guarantee rights and the parties to the transaction have corresponding duties. Therefore, the bank usually requires continuous reports of findings and issues arising in the course of due diligence.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Pursuant to the Czech Commercial Code, anybody who holds at least 90 per cent of shares in a Czech joint-stock company may exercise the squeeze-out right in accordance with the law (see question 9). The company's shareholders' meeting must decide on the squeeze-out of the minority shareholder, whereas nine-tenths of the votes of all shareholders are required to adopt the decision of the shareholders' meeting on squeeze-out. The decision must always be adopted in the form of a notarial deed.

The company's statutory body (board of directors) must arrange the shareholders' meeting deciding on the squeeze-out within 15 days after the request of the majority shareholder. After the decision of the shareholders' meeting on the squeeze-out of minority shareholders is adopted, it must be registered in the commercial register. One month after the decision has been made public in the commercial register, ownership of the shares of minority shareholders is transferred to the majority shareholder.

A majority shareholder of a joint-stock company who holds at least 90 per cent of shares may require the company's statutory body to arrange a shareholders' meeting that will decide on transfer of other company shares to this majority shareholder. The majority shareholder shall determinate an adequate price for the shares to be transferred. Each shareholder may appeal to the court in order to review the adequacy of the offered price.

In the case of listed companies, the Czech National Bank must approve the squeeze-out.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Generally, the same rules apply for domestic and cross-border business combinations. There are some specific rules with regard to cross-border transactions. The main issue in this respect is usually the question of governing law.

Transformation

Transformations of companies are regulated by the Act on the Transformation of Corporations and Cooperatives and the respective EU regulations (only with respect to EU-settled corporations). Cross-border transformation with regard to a foreign entity settled outside the EU area would be only possible on the basis of an international treaty. Such an international treaty has not been concluded yet.

Laws of particular EU member states regulating cross-border transformations are strongly influenced by EU regulations. Therefore, the course of a transaction and all necessary steps in connection therewith are similar in member states (transformation project, appraisal report of an independent expert, approval of the transformation by shareholders' meetings of companies involved, registration in respective national registers of member states, share exchange).

Acquisition of share

Pursuant to the Commercial Code, a foreign person may participate in the forming (founding) of a Czech legal entity or become a partner or member in an already existing Czech legal entity, that is, the person may acquire shares in a Czech limited liability company or a joint-stock company. The parties to the respective SPA may even choose a foreign governing law. However, the formal and procedural rules of the Czech Commercial Code must always be followed, in particular, verified signatures on the SPA or registration of new shareholder in the commercial register.

Chaining prohibition

Chaining prohibition means a special restriction of business combinations pursuant to Czech law. A single-member limited liability company cannot form or be a single-member of another single-member company. One individual may be a member of not more than three limited liability companies. In addition, investments of foreign persons from certain countries may be protected under international treaties.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The Commercial Code, the Act on the Transformation of Corporations and Cooperatives and the Takeover Bids Act set a number of waiting and notification periods in order to protect shareholders and creditors of businesses being combined. In particular:

- the company involved in the transformation must file the transformation project in the Collection of Deeds of the commercial register and notify the creditors of the intended transformation at least one month before the company shareholders' meeting decides on the transformation;
- the statutory body of the company shall invite shareholders to the shareholders' meeting, which shall decide on the transformation at least 15 days in advance for a limited liability company and 30 days in advance for a joint-stock company;
- employees must be notified of the intended transformation at

Update and trends

On 1 January 2014, a completely new system of private law will probably be implemented in the Czech Republic. A number of new laws will come into effect. The most important of these are the Civil Code, the Act on Business Corporations and the Act on International Private Law.

The Act on Business Corporations introduces new structures of a limited liability company and a joint-stock company. The liability of persons acting in the name of a company (members of its statutory body) will be extended. Although these changes will affect the internal organisation of corporations in the Czech Republic in particular, they will implicitly influence business combinations at the same time.

Since credit crisis originated in the banking sector, the EU reacted by implementing new rules with regard to banks and other entities operating on the financial and capital markets. These restrictions may, however, implicitly affect combinations of other business, because banks will be reluctant to finance business transactions.

In the new legal regulation effective from 2014, there is a new way to manage individual property or investments: the trust. The basic principle is that the trustee has legal title to the trust property, but the beneficiaries have equitable title to the trust property (separation of control and ownership). The trustee owes a fiduciary duty to the beneficiaries.

least 30 days prior to the effectiveness of the transformation if the employees are to be transferred to a new employer as a result.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Additional regulations and statutes apply to financial market subjects in particular, namely banks, insurance and reinsurance companies, security brokers, investment companies and funds. If someone intends to acquire a share in any of these regulated entities that equals or exceeds 10, 20, 30 or 50 per cent, the prior consent of the Czech National Bank is required. In case of decrease of shares under these limits, the Czech National Bank must be notified in advance.

18 Tax issues

What are the basic tax issues involved in business combinations?

The main sources of the Czech tax law are the following acts:
- Income Taxes Act;
- VAT Act;
- Tax Procedure Code;
- Real Estate Tax Act; and
- Transfer Taxes Act.

The Czech Republic is also a party to over 70 income tax treaties. The most relevant taxes for corporations are:
- corporate tax, with a tax rate of 19 per cent;
- value added tax (VAT), with a basic tax rate of 20 per cent;
- income tax if the company pays a dividend to the shareholders, with a tax rate of 15 per cent; and
- wage tax with respect to remuneration paid to employees.

Transformation

Tax laws, in particular Act No. 280/2009 Coll., Tax Administration Act and Act No. 586/1992 Coll., recognise a tax succession, provided that a legal entity was dissolved and there is a legal successor. The transformation project must contain the ‘decisive day’. Before the decisive day, the company being dissolved due to transformation shall close its accounts. As on the decisive day, the acting of this company, even if not dissolved yet, ie, before the registration of the transformation in the commercial register, is attributed to its successor with regard to accountancy and therefore also tax consequences. After the transformation is registered in the commercial register, the company’s legal successor dissolved due to the transformation shall file a statement of taxable income (if any) for this company.

According to Act No. 357/1992 Coll., on Heritage and Donation Tax and on Tax on the Transfer of Real Estate, assets transferred due to the transformation are exempted from the donation tax and tax on the transfer of real estate.

Sale of shares and assets

In case of sale of shares, the income of the seller is subject to income tax. A tax exemption could apply under certain circumstances if the seller was a natural person. For legal entities, a tax exemption is generally not possible. Only certain transactions between persons belonging to the same group may be subject to the tax exemption.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Pursuant to the Labour Code, employers must inform their employees about certain circumstances set by law, such as the legal status of the employer and changes to it.

Rudolf Rentsch rudolf.rentsch@rentsch.cz
Petra Trojanová petra.trojanova@rentsch.cz

Lazarská 8
12000 Prague
Czech Republic

Tel: +420 222 233 323
www.rentsch.cz

Transformation

In case of a cross-border transformation, the Act on the Transformation of Corporations and Cooperatives grants other information rights to the employees of Czech entities involved in the transformation.

Owing to a transformation, the employment relationships of employees may be transferred to the legal successor of the entity being dissolved. In this case, the affected employees are entitled to terminate their employment upon a termination notice with effect on the date of the proposed transaction at the latest, regardless of whether the general statutory termination period of two months expires or not.

Acquisition of shares

The legal status of the company remains unchanged following an acquisition of shares; only the shareholder structure changes. Employees shall be informed about the internal structure of their employer. There are no special benefits in this respect. The union contract, if concluded between the employer and the respective trade unions, might stipulate otherwise.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The Act on the Transformation of Corporations and Cooperatives explicitly allows combination of bankrupt businesses. In such a case, special regulation of the Insolvency Act is to be observed. All legal acts in the name of the bankrupt company shall be performed by an appointed administrative trustee instead of the company's statutory body.

During the insolvency proceedings, the creditors of the bankrupt company have a strong position. They form a special creditor body according to the Insolvency Act, which influences the decisions of the insolvency trustee in the course of the insolvency proceedings with regard to the company's assets and/or its further business activity.

Prior to filing for insolvency there are no special restrictions for the acquisition of shares or assets from a seller that may become insolvent. However, if insolvency proceedings over the assets of the seller are commenced after the acquisition is completed, there is a risk that the insolvency trustee may challenge the transaction arguing that it was to the disadvantage of the insolvency creditors of the seller. This can also occur if the purchase price paid by the purchaser was adequate and represented the fair value for the target. The consequence of a successful challenge may be that the purchaser would have to return anything acquired from the seller. These assets would then become a part of the insolvency mass. There is a risk that the insolvency mass might be lower than the purchase price and there might be other creditors of the insolvent debtor (seller). Therefore, the claim of the purchaser to get the purchase price repaid (due to the unsuccessful transaction) would fail. In this case, the purchaser would only receive an aliquot portion of the insolvency mass.

Acquisition during the insolvency proceedings is possible under Czech law. The insolvency trustee is granted the authority to sell the assets of the insolvent entity. The insolvency trustee is prepared to provide only limited transaction guarantees, which also influences the determination of the purchase price.

21 Anti-corruption and sanctions

What are the anti-corruption and economic sanctions considerations in connection with business combinations?

In case of business combinations, there are no specific regulations with regard to corrupt practices pursuant to Czech law. Corruption is a criminal offence for any natural person involved. Pursuant to the Czech law of criminal liability of legal entities, a company that profits from corruption can be subject to criminal forfeiture so that it loses anything gained as a result of the corruption.

Anti-corruption

The general anti-corruption regulations of the Penal Code (Act No. 40/2009 Coll.) shall also apply to business combination. Under the Penal Code, a person is guilty of bribery if, in connection with his or her business or that of a third party, he or she:

- takes a bribe himself or through an intermediary for himself or a third party or lets another person promise a bribe (taking a bribe); or
- provides, offers or promises a bribe to a third party or for a third party (bribery).

Sanctions

The state authorities may impose sanctions in case of a breach of regulatory laws, in particular:

- antitrust laws and regulations with regard to a control of combinations;
- reporting duties with regard to acquisition of shares in regulated or listed entities.

GETTING THE DEAL THROUGH®

Annual volumes published on:

- Air Transport
- Anti-Corruption Regulation
- Arbitration
- Banking Regulation
- Cartel Regulation
- Climate Regulation
- Construction
- Copyright
- Corporate Governance
- Corporate Immigration
- Dispute Resolution
- Dominance
- e-Commerce
- Electricity Regulation
- Enforcement of Foreign Judgments
- Environment
- Foreign Investment Review
- Franchise
- Gas Regulation
- Insurance & Reinsurance
- Intellectual Property & Antitrust
- Labour & Employment
- Licensing
- Life Sciences
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil Regulation
- Patents
- Pharmaceutical Antitrust
- Private Antitrust Litigation
- Private Equity
- Product Liability
- Product Recall
- Project Finance
- Public Procurement
- Real Estate
- Restructuring & Insolvency
- Right of Publicity
- Securities Finance
- Shipbuilding
- Shipping
- Tax on Inbound Investment
- Telecoms and Media
- Trademarks
- Vertical Agreements

For more information or to purchase books, please visit:
www.GettingTheDealThrough.com

Strategic research partners of the ABA International section

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

The Official Research Partner of the International Bar Association

 ISSN 1471-1230