Contribution of the Czech National Bank to the survey

'**Evaluation of procedural and jurisdictional aspects of EU Merger Control**'

5. Based on your experience, do you consider that, beyond the types of cases listed in question 2, there are any other categories of cases that are generally not likely to raise competition concerns but do not currently benefit from the simplified procedure?

YES, with regard to the BRRD[1] and in particular recital 61 along with the Article (38), Article (40) and Article (42) thereof, as well as to the SRMR[2], there is a category of cases that currently do not benefit from the simplified procedure and which are not likely to raise competition concerns namely use of:

a) the **bridge institution tool** ("bridge bank") established pursuant to the Article (40) and following of the BRRD, as an institution established by a national regulator or central bank to operate temporally a failed bank (a part of) which is about to be 'awarded' to the bridge bank upon a resolution authority decision until a buyer can be found for its operations; and designed to aid in the resolution of complex, large failing bank(s).

   The bridge bank is wholly or partially owned by (may be more than one) public authority and controlled by the resolution authority and established for receiving and holding some or all of the instruments of ownership (shares) issued by an institution under resolution or some or all of the assets, rights and liabilities of one or more institutions under resolution with a view to maintaining access to critical functions and selling the institution or the entity in question.

   The bridge bank constitutes an (i) alternative to a [missing and sought after] market acquirer willing and capable to acquire (a part of) the failing bank business, namely to preserve critical function(s), or as (ii) an substitute to be used in cases where the acquirer for the failing bank was not found yet, primarily to temporally maintain the critical function(s) of the failed bank;

b) the **asset separation tool** established pursuant to the Article (42) and following of the BRRD, as an instrument to 'cleanse' failing bank's balance sheet of underperforming or impaired assets and insulate them in a separate entity.'[3]

   An asset separation tool therefore separates viable and profitable elements of (to be) failing bank from distressed and nonperforming assets which it collects, allowing the viable entity to continue as a running business.

To sum up, both types of institutions have limited purpose, they are controlled by the public authorities and exist only on a temporary basis (usually less than 2 years), to compensate for a market failure.

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[1] *Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firm.*

[2] *Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.*

[3] Note, the asset separation vehicle is not a bank, but may arguably acquire assets which place it into a competitive position on the relevant market.

The usage of the bridge bank and/or the asset separation tool in resolution might result in significant benefits to the public interest of ensuring the stability of the financial system or economy of one or more Member States or of the Union and such benefits should outweigh any potential anti-competitive outcomes.

In spite of that such cases could - based on our consultations - be currently considered as possible mergers subject to competition review, provided the state controls also any other financial institution(s) (though this is without any prejudice to an assessment that would need to be made in each case of an actual merger of this kind).

For the sake of clarity, we suggest to seek amendment of the Article 3(5)(b) or a new Article 3(5)(d) of Council Regulation No 139/2004 (Merger Regulation) in respect to the resolution pursuant to the BRRD, namely the use of the bridge institution tool (Article 40 of BBRD) and the asset separation tool (Article 42 of BRRD), e.g. by adding the text in bold as follows:

[A concentration shall not be deemed to arise where]:“

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, **resolution**, cessation of payments, compositions or analogous proceedings.”.

(We understand the bridge bank or asset separation tool to be office-holders as they act on basis and under control of a public mandate).

8. On the basis of your experience on the functioning of the Merger Regulation, particularly after the changes introduced with the 2013 Simplification Package, and your knowledge of the enforcement practice of the Commission in recent years, do you consider that there is currently scope for further simplification of EU merger control without impairing the Merger Regulation's objective of preventing harmful effects on competition through concentrations?

YES.

8.1 Exempting one or several categories of the cases listed in question 2 above (and/or any other categories of cases) from the obligation of prior notification to the Commission and from the standstill obligation; in those cases, the Commission would not adopt a decision under the Merger Regulation;

YES, in relation to the bridge bank and the asset separation tool, as argued in the answer to question No. 5.

8.2 Introducing lighter information requirements for certain categories of cases listed in question 2 above (and /or any other categories of cases), notably by replacing the notification form by an initial short information notice; on the basis of this information, the Commission would decide whether or not to examine the case (if the Commission does not to examine the case, no notification would need to be filed and the Commission would not adopt a decision);

YES, in relation to the bridge bank and the asset separation tool, see the answer to question No. 5.

While a full exemption as indicated in question No. 8.1 is preferable and justified, we are also open to discussion on possible use of the lighter information requirement in option – question No. 8.2. However, such option would require, in case of a resolution procedure, a very speedy and strictly confidential assessment of the notification by the Commission, possibly within hours.

8.3 Introducing a self-assessment system for certain categories of cases listed in question 2 above (and/or any other categories of cases); under such system, merging parties would decide whether or not to proceed to notify a transaction, but the Commission would have the possibility to start an investigation on its own initiative or further to a complaint in those cases where it considers it appropriate in so far as they may potentially raise competition concerns;

NO. The Commission may, regardless of the outcome of self-evaluation, come to a different conclusion and intervene ex-post; such situation would however entail a legal and reputational risks to the resolution and to financial stability.

8.4 Other

YES, there is a need for further simplification of mergers in respect to the resolution pursuant to the BRRD, as such a merger might result in significant benefits to the public interest (ensuring the stability of the financial system) and such benefits should outweigh the potential anti-competitive outcomes - please see e.g. decision by Lord Mandelson, the Secretary of State for Business, in particular point 12, not to refer to the Competition Commission the merger between Lloyds TSB Group plc and HBOS plc under Section 45 of the Enterprise Act 2002 dated 31 October 2008, available at http://data.parliament.uk/DepositedPapers/Files/DEP2008-2685/DEP2008-2685.pdf.

Moreover, the Article 21(4) of Merger Regulation states that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation and compatible with the general principles and other provisions of Community law and namely prudential rules shall be regarded as legitimate interests.

It is not clear whether the concept of prudential rules also comprises of (i) macro-prudential rules and/or (ii) the financial stability and/or (iii) resolution pursuant to the BRRD, especially as BRRD and financial stability tools are often presented as different from the tools of prudential supervision.

We support a wider reading of prudential rules, that would comprise also (i) macro-prudential rules, (ii) the financial stability and (iii) resolution rules. Such wider reading would match perfectly with the supervisory and resolution authorities´ mission under other EU acts and would form a logical interpretation of the principle in the Article 21(4).

Also further options to improve and streamline the process of mergers in the context of the resolution on financial market should be analysed.