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National Report for the Czech Republic

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PUBLIC CAPITAL AND PRIVATE CAPITAL IN THE INTERNAL MARKET. SECURING A LEVEL PLAYING FIELD FOR PUBLIC AND PRIVATE ENTERPRISES

I Constitutional law or other fundamental/framework laws

1. *Please state whether the Constitution of your Member State contains rules that require certain goods or services to be provided by the government.*

The Constitution of the Czech Republic does not contain any rules requiring any specific goods or services to be provided directly by the government or by any public body or state agency. However, the Declaration of Human Rights, which is part of the Constitution, states that the state is obliged to ensure the provision of certain basic services such as health care (Art. 31) and education at primary and secondary schools (Art. 33) for everyone. However, the Constitution does not prescribe whether these services should be provided directly by the government or by the private sector. There are both private and public providers of these services in the Czech Republic.

2. *Are there special laws that lay down similar requirements?*

According to Czech law, generally all business activities can be conducted by private entities. Nevertheless, there are a limited number of very specific activities that can only be conducted by a company established or owned by the state, e.g. the organizing of the gas and electricity market is reserved only for a company in which the State holds at least 67% of the shares (Act No. 458/2000 Coll., the Energy Act).

3. *Does the Constitution of your Member State contain guarantees that certain activities are reserved for the private sector?*

Generally, the Czech Constitution does not contain any rules reserving certain activities for the public or for the private sector.

The significant difference between private entities' and public bodies' possibilities to act is derived from the key principle of Czech law that a state power can be executed only based on the law and within the law, while private entities are entitled to conduct any activity which is not prohibited by law (Art. 2 of the Constitution and Art. 2 of the Declaration of Human Rights).

4. *Are there any rules that prohibit nationalizing undertakings or certain sectors of the economy?*

Although Czech law supports the absolute nature of proprietary rights, it allows the expropriation of ownership rights in exceptional cases if the conditions laid down by the law are fulfilled. There are no special rules prohibiting nationalization in any specific area of undertakings or in any sector of the economy. On a Constitutional level, general rules stipulating conditions and procedural rules for expropriation are contained in Art. 11 of the Declaration of Human Rights: "The expropriation or forced restriction of proprietary rights is only possible in the public interest, based on the law and for adequate compensation." The Czech Constitutional Court has specified the meaning of "public interest" as a generally beneficial interest (Decision No. 23, Book 5, Coll., issued on 28 March 1996).

These principles are further specified in the legislation of lower legal force, especially in acts - Act No. 40/1964 Coll., the Civil Code (the "**Civil Code**"), states that the expropriation or forced restriction of proprietary rights is only possible if the purpose of the expropriation cannot be achieved otherwise. The comprehensive regulation of expropriation is provided by Act No. 184/2006 Coll., on Expropriation, which regulates in detail the whole process of expropriation or restriction of proprietary rights. Public interest in the achievement of the purpose of the expropriation must be proved in the expropriation procedure and must outweigh the interest in preserving the existing ownership rights of the expropriated person. Expropriation can only be carried out to the extent which is necessary for the achievement of its purpose. Compensation for expropriation must be worth the real value of the property or restriction of proprietary rights.

5. *Are there rules that subject nationalizing to procedures or specific rules?*

Please see answer no. 4 above.

6. *Are there, in the absence of such rules, other procedures or mechanisms that have to be followed for the nationalization of undertakings?*

Please see answer no. 4 above.

7. *Are there rules for the acquisition or sale of shares of enterprises by the government?*

The general rules for the acquisition or sale of any property by the government are contained in Act No. 219/2000 Coll., on Property of the Czech Republic and Its Acting in Legal Relationships (the "**State Property Act**"). The state can only acquire property for the purpose of performing its functions, for public beneficial activities or for its entrepreneurial activity, unless acquired free of charge.

Only ministries may acquire shares in joint-stock companies and only subject to the consent of the government. Neither ministries nor any other state organisational unit

may acquire a shareholding interest in a company (corporation) with a legal form other than that of a joint-stock company.

State property can only be transferred to another person in the case of the non-necessity of such a property for the state, with the exception of an ordinary sale as part of the state's entrepreneurial activity. In order for the state to acquire or sell property the purchase agreement must be made in writing.

The Czech Republic may only establish or become a shareholder in joint-stock companies and only with the consent of the government. The relevant ministry performs the role of founder of the company and the shareholder's rights are exercised by an employee of the relevant ministry who is authorised in writing by the government.

Privatization of state-owned enterprises is regulated by Act No. 92/1991 Coll., the Privatization Act. According to this act, the government decides which state-owned enterprises (or state participations in companies) are eligible for privatization. Privatization is effected by the approval of a privatization project. The privatization project is usually prepared by the state-owned enterprise that is going to be privatized. If only participation in a company is going to be privatized, the privatization project is prepared by the relevant ministry entrusted with the exercise of the state's shareholding rights in such company. The privatization project is presented to the Ministry of Finance and then approved by the government based on the proposal of the Ministry of Finance. Under certain circumstances, only the consent of the Ministry of Finance is sufficient.

8. *Are these rules different depending on whether the acquisition leads to control or not? And do different rules apply to a sale leading to a loss of control?*

There are no rules regulating these situations specifically.

9. *Are contracts concluded by state-owned enterprises subject to normal civil law?*

Czech law does not differentiate between the acts of enterprises owned by the state and those owned by private persons; they are both subject to the same rules of the Civil Code and of Act No. 513/1991 Coll., the Commercial Code (the "**Commercial Code**") when entering into contracts. According to the Civil Code and the State Property Act, the state is considered a legal person when it enters into in legal relationships.

However, contracts concluded by the state or other public bodies with their suppliers are subject to special rules included in Act No. 137/2006 Coll., the Public Procurement Act. As a general rule, the awarding of public contracts is to be based on

the principles of transparency, non-discrimination and equal treatment and if certain conditions are met, they must follow the procedures stipulated in this Act.

10. *Is there a rule or practice that one ministry is responsible for enterprises that are controlled by the government or are there different ministries responsible according to their sectoral responsibilities?*

There is a practice that each ministry is responsible for all its activities, including the enterprises within its competences. The competences of each ministry are specified in Act No. 2/1969 Coll., on Establishment of Ministries and Other Central Administrative Bodies of the Czech Republic.

11. *Are there rules that restrict the possibilities for other governmental bodies, states, provinces, municipalities etc. to participate in the capital of private enterprises?*

As regards the state, its organisational units and other government bodies, please see answer no. 7 above. As regards municipalities and regions, they are only entitled to establish and participate in corporate enterprises for the purpose of performing their functions within the sphere of the independent authority (in Czech "*samostatná působnost*") delegated to them by law. Generally, the property of municipalities and the regions has to be used purposefully, economically and in accordance with the interests and tasks connected to the authority delegated to them by law.

12. *Is there any indication that the exceptions provided for under the mandatory requirements have been perceived as insufficient to protect public interests?*

There is no such indication.

13. *Has there been any discussion about the need to have recourse to Art. 295 EC for the protection of national public interests?*

No, there has been no public discussion regarding this issue. However, there was a public political debate regarding the protection of national public interests lead by president Vaclav Klaus in connection with the ratification of the Lisbon Treaty, particularly in respect of potential restitution claims.

II Company law

1. *What was the reaction to the ECJ judgments in the Golden Share cases in your Member State? Have there been measures taken to amend legislation?*

The ECJ judgments clearly indicated that the existence of "golden shares", i.e. shares with special rights for the holder, constitutes a breach of the principle of free movement of capital and, consequently, of the principle of freedom of establishment contained in EC Treaty. The legal basis for the existence of golden shares in the

Czech Republic was the Privatization Act, No. 92/1991 Coll., allowing the issuing of shares with special privileges for the state. After the process of privatization commenced in 1991, the state obtained golden shares in many privatized companies in various areas of business. According to the ECJ judgments, golden shares are only justifiable if their existence is based on general or strategic interests and if the measures prescribed are based on precise criteria that are known in advance, are open to review by a court and which cannot be achieved by less restrictive measures. As the existence of golden shares in the Czech Republic was not in compliance with the principles stipulated by the ECJ judgments, the Czech government decided to proceed with the cancellation of certain golden shares in 2002. The process of cancelling the golden shares was completed in 2005 by an amendment to the Privatization Act, which excluded the possibility of issuing shares with special privileges. The current legislation does not allow the issuing of any forms of shares other than as stipulated in the Commercial Code, which does not distinguish between forms of shares based on the types of shareholders.

2. *Have there been any specific characteristics of the company laws of your Member State that were deemed to be imperiled by the EC company law directives?*

We are not aware of any such characteristics. EC company law has instead been considered a tool for the improvement and development of Czech company law.

3. *Do the national company rules provide guarantees that secure a level playing field when the government pursues its objectives by way of undertakings which it controls wholly or partially?*

Czech company law does not distinguish between undertakings controlled by the state and other undertakings. They are all treated in the same way.

4. *Are there rules that allow or oblige the government to make use of a special form of company if it wants to pursue public interests?*

As already mentioned in answer no. 7 in Part I above, for entrepreneurial purposes the Czech Republic may only establish or acquire interest in a joint-stock company. For other purposes the Czech Republic may establish legal persons of various forms such as public beneficial associations, foundations or endowment funds or become a member of these persons. The approval of the government is needed in these cases. The government also decides which Ministry is entitled to execute the function of founder.

5. *Are there rules blocking unfriendly take-overs?*

Until 1996 there was no explicit regulation of take-overs in Czech Republic. The amendments to the Commercial Code made between 1996 and 2008 significantly

changed the regulation of take-overs and the rules gradually became very strict, in particular the requirement of the Czech Securities Commission's prior approval for launching take-over bids of listed securities was introduced.

As a result of the obligation of the Czech Republic to transpose Directive 2004/25/EC, a new Take-over Bids Act was enacted and became effective on 1 April 2008. The new act fully complies with the Directive and does not stipulate significant requirements in excess of the Directive. As expressed by the legislators in the report explaining the new Act, the intention was to make the regulation of take-overs more liberal and not to impose unnecessary burdens on the market. In fact, the new Act removes certain regulatory burdens included in the previous regulation of take-overs in the Commercial Code, such as obligations to make take-over bids when reaching 2/3 and 3/4 thresholds of the registered capital or voting rights in the company.

6. *To what extent are the 2005 OECD Guidelines on Corporate Governance of State-owned Enterprises taken into account?*

OECD Guidelines are generally considered by the Czech administration as a source for legislation. However, we are not able to obtain any information as to whether and how the 2005 OECD Guidelines on Corporate Governance of State-owned Enterprises were taken into account in the Czech Republic.

7. *Are there any special features in your Member State's legislation that may be relevant for our topic?*

We are not aware of any such special features.

III Competition law

1. *Has there been a debate about whether the provision of certain goods or services should be undertaken by the government or by the private sector? Please specify whether and to what extent such a debate has taken place on a general level or on a specific level, i.e in the context of sector specific regulation?*

Under Czech law there is currently no general definition of what constitutes public interest and which activities are within the domain of the public sector and which are not. However, a new act which will implement Directive 2006/123/EC on services in the internal market (Services Directive) into Czech law and which will enter into force on 28 December 2009 includes a definition of services of general economic interest. They are defined as "any service which is provided in a universal and permanent way and the provider of which is recognized by law to have special rights and obligations; examples of such services are the provision of postal services, supply of electricity or gas, operation of airports or harbours, public transport, water supply services, waste water services and treatment of communal waste". In addition, Act

No. 319/2006 Coll., as amended, implementing Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings includes a definition of public undertaking.

Moreover, certain sector specific legislation lays down that the provision of specific goods or services is to be partly or fully undertaken by a single entity and, in certain cases, state controlled companies were granted this exclusivity. An example of this might be Česká pošta, s.p. (Czech Post), the incumbent state controlled universal postal service provider which was repeatedly granted an exclusive licence for reserved services, currently defined as universal services for the domestic delivery of correspondence weighing less than 50 grams and costing less than CZK 18. The objective of the exclusive licence, granted in 2008 until full liberalization in 2013, is to compensate Czech Post for ensuring the general accessibility of universal postal services of adequate quality for the entire Czech Republic. The scope and legitimacy of Czech Post's monopoly over reserved services is subject to relatively intensive political debate. For this reason, the scope of reserved services has gradually been decreased. For example, prior to the current regime, reserved services used to be defined as universal services for domestic delivery of correspondence weighing less than 100 grams and costing less than CZK 19.

České dráhy, a.s. (Czech Railways) could also be viewed as having a *de facto* monopoly over the provision of rail passenger transport, in particular in certain Czech regions. In this regard, according to public information, several Czech regions currently intend to enter into 10-year exclusive agreements with Czech Railways for the provision of regional passenger transport services in the relevant regions and for certain high-speed national connections, with an option to extend the exclusivity by another 5 years. There is a bill being prepared by the Ministry of Transport which aims at implementing Regulation (EC) No 1370/2007. Reflecting Regulation (EC) No 1370/2007, the bill regards, among other things, the provision of inland rail passenger services and bus passenger services and inland boat passenger services as services required in the general economic interest. Similarly, SŽDC, the owner, administrator and operator of railway tracks in the Czech Republic, could be viewed as having a *de facto* monopoly in the area of operation of railway tracks and relating infrastructure.

2. *Please identify such laws and/or policy documents.*

See above.

3. *For the new member states, it would be interesting to describe how the reform process of the economy whereby large sectors of the economy were privatized has taken place.*

Privatization played a significant role in the transformation process of the Czech economy over the decade following 1989. It consisted of three main programs: (i) large-scale (mass) privatization, which aimed at selling off large and medium-size state enterprises, particularly in the production sector; (ii) small-scale privatization which was to privatize smaller businesses such as shops, restaurants and smaller industrial companies; and (iii) restitution which aimed at returning assets nationalized by the communist regime after 1948 to former owners or their heirs. The large-scale privatization was the most significant privatization program. Several methods were used within the large-scale privatization, including public tenders and auctions, mass distribution of shares to citizens through vouchers for a low nominal price, direct sales to selected bidders, or transfers to municipalities for free. Privatization was centralized, controlled by the Czech government and regulated by privatization laws. Approximately 1800 companies were privatized through vouchers within a short period of time which temporarily led to widely dispersed ownership and well publicized conflicts between ownership and control.

4. *Has there been any discussion of the question whether certain services should be guaranteed by identifying them as services of general economic interest? What are the questions that were discussed?*

As indicated above, Czech Post, which has the legal form of "state enterprise", as well as Czech Railways, which has the legal form of a joint stock company, could serve as examples of undertakings that have a monopoly in certain areas of their activity that are required in the general economic interest.

5. *Has the implementation of the Services Directive 2006/123 led to a debate about services of general economic interest?*

As indicated above, Directive 2006/123/EC on services in the internal market (Services Directive) was implemented into Czech law by Act No. 222/2009 Coll., Act on the Free Movement of Services which will enter into force on 28 December 2009. It includes an open-ended definition of services of general economic interest, supplemented by examples of such services. The preparation of the Act did not seem to lead to extensive public discussion about which services should and which should not be regarded as services of general economic interest. The reason seems to be that the general definition of what constitutes general economic interest and the specific examples given by the Act roughly correspond to Article 17 of Directive 2006/123/EC.

6. *Has the introduction of Article 16 EC with the Treaty of Amsterdam given rise to a debate about the function of services of general economic interest and/or services of general interest?*

No.

7. *Has the equivalent of Article 81 (3) EC in your national competition law been interpreted so as to allow exceptions for the protection of public interest? And has this led to a situation whereby public enterprises have been favoured over private enterprises?*¹

The Czech Competition Act incorporates Article 86(2) EC Treaty into the national antitrust law by stipulating that "undertakings ... entrusted with the operation of services of general economic interest shall be subject to the rules contained in the Act insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".² This exception also applies to Section 3(4) of the Czech Competition Act as the equivalent of Article 81(3) EC Treaty, although there does not seem to be a precedent whereby a public undertaking was favoured over a private undertaking based on the application of this exception.

8. *Do the merger control rules in your member state provide for special authorization of mergers when public interests are deemed to be at stake?*

No.

9. *Have such powers been used?*

Not applicable.

10. *Have these decisions been appealed to courts? What was the outcome of these appeals?*

Not applicable.

11. *Does your Member State have national rules on the granting of state aid? Are there any procedural rules on the granting of state aid?*

Czech law used to contain rules prohibiting incompatible state aid although this does not apply to measures adopted or taking effect after 1 May 2004 (date of Czech accession to the EU). Currently, state aid measures are subject to Article 87(1) EC Treaty and, apart from some consultation and information powers of the Czech Competition Office as well as the Czech Ministry of Agriculture in relation to

¹ In Case C-203/96, Dusseldorp, [1998] ECR I-4075 and Case C-209/98, Entreprenorforeningens Affald v. Copenhagen, [2000] ECR I-3743, the questions were raised under Art. 90(2) but one could easily imagine a similar discussion under Art. 81(3) if the government had invited enterprises to conclude agreements with similar purposes.

² Section 1(3) of the Czech Competition Act

measures under Article 87(1) EC Treaty, there are no special procedural rules on the granting of state aid. There is currently a public debate about whether special legislation covering national state aid measures falling outside Article 87 EC Treaty should be introduced.

12. *Has the application of the guidelines for state aid to the financial sector mentioned above been successful in addressing the distortions of competition resulting from the massive aid operations and the accompanying measures?*

It seems that the Communication of 13 August 2008 from the Commission on the Application of State Aid Rules to Measures Taken in Relation to Financial Institutions has not been applied to the Czech financial sector yet. This could be the result of the fact that according to public sources, the Czech financial system has escaped the worst effects of the global financial crises so far. Nevertheless, the Czech banking sector experienced a major crisis in the 1990s and sixteen banks active in the Czech banking sector received state guarantees and other forms of state aid at the time. These state aid measures were notified to the EU Commission under the so-called interim mechanism procedure provided for in Annex IV.3 of the Act of Accession. The aid measures have been subjected to detailed scrutiny by the European Commission as to whether these measures are "applicable after accession" within the meaning of Section 3 of Annex IV of the Accession Treaty and therefore subject to the Commission's review for substantive conformity with the EU State aid rules.

13. *Discuss the main Commission decisions concerning your member state so far. As these decisions all contain a revision clause that the effects of the aid have to be assessed after six months it is appropriate to describe/analyse the follow up measures. Such analysis should be focused on the main theme of this questionnaire, as set out above.*

The decisions taken by the Commission in relation to the measures adopted by the Czech state during the Czech banking crisis of the 1990s were retroactive. Thus, those decisions which are publicly available do not seem to contain revision clauses.

IV Miscellaneous

1. *If you are of the opinion that financial regulation and supervision has an effect on the cleavage between public and private capital in your Member State please provide your views.*

Czech financial regulation is generally based on EU Directives and does not expressly prefer either public or private ownership of financial institutions. All financial institutions with a licence granted by, or registered with, the Czech National Bank are owned by private capital. There are limited exceptions only in the form of certain financial institutions established by the state in order to support small enterprises and

the exports of Czech businesses, such as the Czech Export Bank, Export Guarantee and Insurance Corporation and Czech-Moravian Guarantee and Development Bank.

As a result of fast growing indebtedness, the Czech Ministry of Finance has decided to change the current manner of financing government debt by enabling everyone to purchase government bonds directly. This will probably negatively affect private financial institutions as small individual investors will invest in state bonds with higher interest instead of depositing their money with private financial institutions.

2. *Is there a risk that the measures taken to address the financial crisis including the nationalization of some banks, will lead to less stringent financial supervision?*

Although the financial sector of the Czech Republic has not been fundamentally affected by the recent financial crisis, the Czech Republic has taken certain anti-crisis measures addressing the financial sector. In particular, the amendment to Act No. 21/1992 Coll., on Banks, as amended, provides for a simplified procedure for nationalizing banks which are in trouble by transferring all the assets of such banks to special joint-stock companies (called "special purpose banks") owned by the state. However, so far there has been no need to use this new institute.

Also, the Czech National Bank as the sole financial supervisor was granted new competences. Most importantly, it can institute fundamental measures against banks, such as prohibiting certain activities or trades, if the stability of the banking or financial sector is jeopardized.

Even though the new competences of the state have not been used so far, they represent significant empowerment of its position in the financial market.

3. *Are there any other areas of the law that are designed to secure a level playing field between public and private capital?*

Other than those mentioned in this analysis we are not aware of any law of a general nature that is designed to secure a level playing field between public and private capital.