

# Market Intelligence

**M&A**  
2021

Global interview panel led by Simpson Thacher & Bartlett LLP

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**Published by**

Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

Cover photo: [shutterstock.com/g/leungchopan](https://www.shutterstock.com/g/leungchopan)

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ISBN: 978-1-83862-738-6

Printed and distributed by Encompass Print Solutions

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# Czech Republic

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## 1 | What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?

There has certainly been a positive mood and upswing in deals in 2021, after the delays and suspension of many transactions earlier in 2020 due to the covid-19 lockdowns that put the M&A sector on ice for some time. Overall, in 2020, the Czech M&A market recorded its steepest decline in three years, as a result of the effect of the government-imposed covid-19 measures on business. CzechInvest notes that despite the covid-19 crisis, final prices of transactions were not affected, as there is still pent-up demand and strong competition amongst buyers, with transactions being delayed rather than merely abandoned. Towards the end of 2020 there was an upswing in deals partially caused by delayed transaction closings from earlier in the year, but from the start of 2021 onwards there has definitely been a more buoyant and positive outlook with respect to transactions as both domestic and international investors looked forward to getting on with a return to restored business operations. Growth has been evident in many sectors; however, the clear exception is the travel industry and hospitality sector that were both severely hit by covid-19 restrictions.

According to Czechinvest, the government investment development agency, there were 159 M&A deals announced in the third quarter of 2020, 285 M&A deals in the fourth quarter of 2020 and 100 M&A deals announced in the first quarter of 2021. In each period, the highest degree of activity was in the real estate and construction sectors.

## 2 | Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

The main activity during the period of covid-19 restrictions has been in IT/technology and real estate. Czech tech entrepreneurs and systems developers have shown great innovation and gained a leading reputation, which are highly sought after by investors. Business information systems in the areas of ecommerce, logistics, data centres, cloud systems, cybersecurity, payments systems, learning and games are all areas that have seen strong activity with sustained potential for growth, due to the fact that it is widely acknowledged that the covid-19 era has accelerated the pace of digitalisation and tech applications.

The chaos and disruption caused to business operations by covid-19 restrictions increased the focus of investors to truly consider the economic resilience of potential targets and zero in on potential vulnerable areas such as supply chain disruption.



It's hard to speak of a 'typical' deal size, because although there are many small to midsize transactions ranging from €10 million to €100 million, there are also quite a number of larger transactions, in the €200 million plus size. As the era of privatisation deals has long finished, the scale of those industry wide very large deals is generally no longer seen.

### 3 | What were the recent keynote deals? What made them so significant?

As noted previously, real estate and IT have been two very strong sectors in recent times in the Czech Republic.

Our law firm advised the Arete Invest Group in one of the largest Czech-Slovak real estate transactions in 2020, the sale of a portfolio of 11 logistics and industrial parks in the Czech Republic and Slovakia to the Australian Cromwell fund. This complex deal, with total leasable area of over 125,000 square metres and 140,000 square metres of development land, was located over multiple sites in regions with further development options, thus offering a better yield. The deal was able to be

signed even during the covid crisis and required unique structuring with different regulatory requirements in the two jurisdictions.

In another key real estate transaction, we advised J&T Banka on its acquisition of the Rustonka Development II, which owns the landmark Rustonka office building in Prague, to which the bank moved its headquarters and approximately 750 employees in September 2020.

In the area of IT and technology, we continued to advise Solitea, a leading Czech IT company that develops accounting, economic and enterprise information systems, in a number of key technology deals including the acquisition of Mainstream Technologies s.r.o. and its parent company Powerstream a.s., one of the most important partners of Microsoft. Additional Solitea acquisitions included the purchase of Czech-Slovak group D3Soft, a developer of CRM and energy solutions and the acquisition of the IT services division of AspectWorks, focused on cloud platforms and a leading Czech implementer of the world's most successful CRM platform from Salesforce in the USA.

In the area of webhosting and domain registration, we advised WY Group on the acquisition of HOSTING90 systems s.r.o. and Hosting zdarma s.r.o. as well as WebGlobe (Ignum) in the acquisition of savana.cz and the hosting division of Axfone. We also advised Sandberg Capital in the acquisition of a 40 per cent stake in DAKTELA, which provides comprehensive solutions for communication centres and customer contact. In the area of cybersecurity, we advised US software company Jamf on its acquisition of Wandera, a software developer that provides protection against security threats on mobile devices to businesses all around the globe.

**4 | In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?**

Generally speaking, M&A deals in the Czech Republic tend to be primarily cash transactions; shareholders in a target tend to prefer cash. We have not very often seen examples of shareholders being willing to accept shares by a foreign acquirer, this would be a rare exception rather than a regular practice.

**5 | How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?**

On 1 January 2021 the first major comprehensive amendment to the Act on Business Corporations (part of the recodification of Czech private law in 2014)

“M&A deals in the Czech Republic tend to be primarily cash transactions; shareholders in a target tend to prefer cash.”



took effect. The amendment covers a variety of issues, often with the purpose of ironing out any interpretative uncertainty, based on the Supreme Court's case law.

A brief selection of the most interesting amendments:

- For monistic structure (one tier) joint stock companies, the institute of the statutory director is cancelled and only the management board, which will be the company's executive body will remain. This change brings the monistic joint stock company in the Czech Republic more into alignment with the monistic structure in other European jurisdictions.
- Rights to appoint an executive or member of a supervisory board or management board in either a limited liability company or joint stock company may be attached to shares in either limited liability or joint stock companies. This may be of particular interest in joint ventures.
- The transfer of a portion of the assets of a business corporation that would mean a 'change in the actual subject of business engagement' must be approved by the general meeting. The actual benchmark for this will be dependent on the individual company and thus requires careful review in any transaction.

On 1 May 2021, the new Foreign Direct Investment Act took effect in the Czech Republic, based on the EU regulation No. 2019/452 that came into force in October 2020, setting out minimum standards for foreign direct investment (FDI) screening across the EU. The Czech act introduces a level of vigorous screening for non-EU investments in the Czech Republic, overseen by the Ministry of Industry and Trade. The scope of investments or activities triggering review under FDI rules is considerably broad and foreign investors will need to stay vigilant to maintain compliance as even activities such as nominating new company directors may trigger FDI rules. The FDI rules require very particular assessment by all non-EU investors because in fact there is no simple financial threshold or any sector of the economy that can be 100 per cent ruled out from the application of the rules.

The FDI rules apply not just to the standard 'third country' non-EU countries but will apply also to include Switzerland and members of the European Economic Area, such as Lichtenstein, Norway and post-Brexit United Kingdom. FDI clearance now needs to be considered, where applicable, as an additional condition for effectiveness of a transaction. Accordingly, transaction negotiations will need to reflect the timeline obligations for FDI clearance, in a parallel fashion to the manner in which competition office clearance is already factored into timelines.



6 | Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

Foreign investors and buyers have been a key and regular feature on the Czech commercial landscape for the past 30 years, since the Velvet Revolution in 1989 and accession to EU membership in 2004. The Czech Republic attracted a huge inpouring of foreign investment, according to the Czech National Bank a total of more than €115 billion inflow of foreign direct investment has occurred since 1993, making it the most successful CEE country in terms of FDI per capita. High profile multinationals such as Volkswagen, Siemens, Amazon, ABB, IBM, DHL, Danone, Proctor & Gamble, Nestle, Astra Zeneca and many others have significant subsidiaries in the Czech Republic. For many years the Czech Republic has enjoyed very strong and stable economic conditions, with the lowest unemployment rate in Europe and strong growth, moderate interest rates and a stable currency, together with political stability and a strong legal framework all of which continues to attract foreign investors.

In recent years, Czech companies are now venturing abroad with their own strategic foreign acquisitions and investments. And domestically, on the M&A scene,

we also see more domestic buyers than in earlier years. There is currently a generational handover occurring on the commercial landscape in the Czech Republic as family firms are handed over after 25–30 years of development or if there are no successors – then the family firms are being sold, this tier of investment is predominantly medium sized enterprises.

The Czech government provided strong support to business during the peak of the covid-19 pandemic, with specific loans and subsidy packages to prevent layoffs and banks also provided a moratorium on loan payments. The sectors most affected by covid-19 in the Czech Republic have naturally been travel and hotels and restaurants. The second period of lockdown measures and state of emergency for the Czech Republic were lifted in April 2021 and since that time people have been generally back at work and industry is operational, apart from hotels and travel that still see a slow recovery as tourism levels into the Czech Republic are still fairly low this summer, thus the hospitality sector is largely dependent on domestic demand at the moment.

A strong trend in the last couple of years, despite the covid-19 period, has been a rising trend in the share of investments with high value added, for example investments focused on technology and R&D in strategic sectors. CzechInvest notes that in 2018, only 20 per cent of investment projects it arranged fulfilled the high value-added criteria, in 2020 this jumped to two-thirds of investment projects.

## **7 | Are shareholder activists part of the corporate scene? How have they influenced M&A?**

Czech corporate law grants shareholders an inalienable right to attend and be heard at the general meeting, the supreme governing body of the company. The Czech Republic implemented the EU Amended Shareholders' Rights Directive last year, by amending the Capital Market Undertakings Act, applicable to listed companies, which provides greater involvement of shareholders in the remuneration of senior management and also requires significant transactions to be the subject of approval by the general meeting and also published on the company's website.

Nevertheless, to date, shareholder activism, particularly in terms of progressive social issues, such as environmental and climate change issues or more general human rights and ethical issues, but also in terms of proactively steering a company's commercial decisions on specific business matters or corporate governance issues, is not currently a common feature of the corporate scene in the Czech Republic. The key reason for this, in contrast to jurisdictions where there are powerful examples of shareholder activism, such as the US, UK, France or Germany, is the respectively low number of publicly listed companies available as potential targets.

“Shareholder activism is not currently a common feature of the corporate scene in the Czech Republic.”

However, given that institutional shareholder activism is spreading through Europe with institutional investors on the lookout for potential European targets, it is certainly foreseeable shareholders with both appetite and experience in shareholder activism may become more prevalent in the Czech market through strategic acquisitions in the future as more Czech companies are listed on the stock exchange.

## 8 | Take us through the typical stages of a transaction in your jurisdiction.

The structure, time flow and legal requirements of a transaction will, as in any jurisdiction, depend on the particular nature of the transaction. If an acquisition, it may be in the form of share deal (most common) or asset deal. And if in the form of a merger, then there is less flexibility due to mandatory legal requirements with specific statutory time periods.

With a few exceptions, the typical acquisition deal in the Czech Republic, will, in comparison to other larger jurisdictions in the EU be of a small to medium (eg, €5 million to €90–100 million) rather than large scale. Financial advisors are frequently engaged by a seller and will seek to generate initial interest in a potential target by



the release of a 'teaser', followed by a detailed information memorandum, inviting interested investors to submit an indicative bid. A seller's due diligence report may also be advised by the financial advisor, to further serious purchaser interest and aid the flow of the transaction. A strategic industry investor or a private institutional investor with a particular target in mind may also do their own market research and make their own overtures to the owners of a company identified as being of particular interest.

It is important to note that generally speaking there are no restrictions on foreign investors making acquisitions in the Czech Republic, whether they are corporate entities or individuals, purchasers – whether domestic or foreign, are on an equal legal and regulatory footing. Only in a few specific sectors such as banking, telecommunications or insurance, will a foreign purchaser be obliged to obtain certain notifications or consents.

An exact sequence of events and stipulation of documents will depend on the form of assets, target or deal structure, but the common chronological features in most acquisition deals between initial expression of interest and closing will be signing of a letter of intent/terms sheet and a non-disclosure agreement, undertaking of legal,



financial, tax or technical due diligence, review of due diligence findings, identification of red flag issues and seeking of possible solutions, Q&A with management, drafting and negotiation of transaction documentation, merger control notification if certain thresholds are met and the merger or acquisition has not been subject to notification under the EC Merger Regulation. Due diligence is standardly organised via electronic online data rooms on one of the typical transaction document management platform providers. On site visits for due diligence will primarily be in respect of technical due diligence such as an environmental audit.

In terms of transaction documentation for a typical acquisition, it is common to have a framework share purchase agreement containing all commercial terms, along with a short form transfer deed for the purpose of registering the change of ownership in the Commercial Register in the event of a purchase of ownership of a limited liability company. In the event that a foreign purchaser is involved, the framework share purchase agreement may sometimes be governed by a foreign law – often English law as the lingua franca of international commercial deals, or the law of the jurisdiction of the foreign investor. The framework agreement might also be executed only in the English language if a foreign purchaser is involved. In the case of the target being a Czech limited liability company, the only document submitted to the publicly accessible Commercial Register will be the short form transfer deed, containing only the formalities necessary for transfer of an ownership interest, essentially identification of parties, price and specification of transfer interest. As such short form transfer deed must be submitted to the Commercial Register in the Czech language, it will usually be executed in a bilingual Czech/English version where foreign investors are involved. The parties may also decide to execute all of the transaction documents in a bi-lingual version. Of primary importance in any bi-lingual documentation is the specification of a decisive language version, usually Czech, in the event of any later disputes.

Additionally, transaction documents for an acquisition will typically include an escrow account agreement, a handover protocol for shares in the event the deal involves shares in a target joint stock company and a closing certificate.

## 9 | Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

The effects of the covid pandemic since last year on M&A transactions had impact on deals in several ways, some of which will likely continue to have effect. There are a variety of new due diligence issues such as disruption to supply chains, risk valuation and allocation times, negotiations and management interviews via video conferencing due to uncertainty as to current possible travel arrangements and a longer time frame for financing and deal closure. As an overriding commercial

aspect, we note that the acceleration of digitalisation during the pandemic has caused companies in all sectors of industry to adopt technology solutions faster than might have been previously forecast.

As discussed earlier in this article, on 1 May 2021, the new Foreign Direct Investment Act took effect in the Czech Republic. As yet it is still very new and untested, but lawyers and their clients will need to pay due attention from the point of view of M&A practice implications, to assess whether an investment under consideration requires prior consultation with the respective responsible authority of the Czech Republic, or whether other aspects of a client's existing business operations in the Czech Republic may be subject to review.

**10 | What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?**

Investors around the world are facing the same issues, how to strategically move forward as the world recovers from the interruptions to deal making and caution during the worst of the covid-19 slowdown. In the Czech Republic, we've seen a strong and determined bounce back in M&A activity and a strong appetite from foreign investors to identify deal opportunities. The pandemic accelerated digitalisation in all sectors of the economy and the excellence of the Czech tech sector as well as the motivation of companies not to fall behind in adopting digital solutions makes it likely that the tech sector will continue to be a key driver of M&A activity.

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# The Inside Track

## What factors make mergers and acquisitions practice in your jurisdiction unique?

Although the Czech Republic is no longer an 'emerging economy', there are very strong drawcards for investors such as the combination of a highly skilled workforce, relatively low wages and a very long tradition of Czech innovation. Together with a mix of entrepreneurial start up culture, sales of formerly privatised business and family business, the nature of clients and deals is constantly varied and exciting.

## What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

- Language and local business cultural fluency, together with a perspective and experience to equally understand the mentality and objectives of, for example, a start-up entrepreneur or family business vs. an institutional investor.
- Hands on experience in ground-breaking transactions that have applied new legislation.
- The ability of a law firm to provide integrated tax and legal advice; the right M&A legal counsel proactively understand the client's business goals and are not simply 'contract drafters'. Complex transactions require due diligence specialists in particular fields of law and industry, along with approvals from antitrust and other regulatory agencies.

## What is the most interesting or unusual matter you have recently worked on, and why?

The covid-19 pandemic caused a number of previously completely standard transactions to become non-standard – either due to the need to negotiate via video conferencing, or due to the need to change already commercially agreed term sheets for reasons of new necessity.

One particular case recently was quite unusual, providing assistance to a client post transaction, where the client, as buyer, sought to enforce certain rights against the seller and a dispute arose as to whether or not the buyer had a pre-emptive right. The matter has not yet been finally resolved, but it's always quite stimulating to revisit 'fresh' contractual documentation in a deal dispute.

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**Sector focus**

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**2022 outlook**